The employment relationship
I. Background

157. The employment relationship is a concept that is familiar in countries around the world, irrespective of the differences in national legal systems. It refers to the relationship between an employee (or worker) and an employer, for whom the employee/worker performs work under specified conditions and in exchange for remuneration. The employment relationship gives rise to reciprocal rights and obligations between the employer and the employee under national legislation. Access to employment-related rights and benefits is secured through the vehicle of the employment relationship. When the employment relationship is not the vehicle for these protections, many are inevitably provided by governments on an emergency basis at a considerable cost to the Government and to the taxpayer, while other benefits, such as social security, go unmet entirely.

158. Rapid changes in the labour market, particularly due to factors such as globalization, digitalization and other technological innovations, are affecting the way we work. As a result, new and emerging forms of work are being created which do not necessarily fit within the traditional notion of the employment relationship. These new forms of work have increased flexibility, but this same flexibility has led to a growing number of workers whose employment status is unclear and who, as a consequence, may be deemed to fall outside the scope of the employment relationship, and remain unprotected by those labour and employment laws which condition coverage on that very same relationship.

159. This chapter examines the history, content and application of the Employment Relationship Recommendation, 2006 (No. 198), in light of the changing landscape of the world of work. It examines the guidance set out in the Recommendation for determining when and in which circumstances an employment relationship and its attendant rights and obligations should be deemed to exist. It considers the relevance and impact of the Recommendation on employment promotion and job creation, particularly in relation to specific categories of workers who may be concentrated in jobs where there is uncertainty regarding the employment relationship.

160. The employment relationship has served as a basis for a series of discussions in the ILO that have examined a range of working relationships, including those of self-employed workers, migrant workers, homeworkers, private employment agency (temporary) workers, workers in cooperatives, workers in the informal economy, the fishing sector and domestic workers.208

161. In 1997 and 1998, the ILC examined an item on contract labour.209 The ILC discussion examined the situation of persons excluded from the employment relationship, including those in “triangular” relationships, as well as workers who perform work or provide services to other persons within the legal framework of a civil or commercial contract, but who are in fact dependent on or integrated into the firm for which they perform work or provide services. The objective of the ILC discussion was to protect certain categories of unprotected workers through the adoption of a Convention and Recommendation on the subject. The proposal ultimately failed, primarily because the proposed instruments did not clarify the scope of the employment relationship, and did not define who should be deemed to be covered by the employment relationship. Moreover, differences arose in concepts and terminology between countries and languages. Nevertheless, delegates from all regions referred to the employment relationship in its various forms and with different meanings, as a concept familiar to everyone. In addition, some of the tripartite constituents considered that the proposed Convention created a third category of workers who fell between the employed and the self-employed, which risked undermining workers’ rights.

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209 The issue of contract labour had been raised in a number of sectoral discussions, starting in 1950.
2. The employment relationship

Figure 2.1

The multiple functions of the employment relationship

Social protection  
Employment and income security  
Safe and healthy workplaces  
Enhancing productivity  
Equal access of access  
Fair treatment  
Stable economy  
Voice


162. In 1998, following the second discussion, the ILC adopted a resolution inviting the Governing Body to place the issue of the employment relationship on the agenda of a future session of the Conference. It also requested the Office to hold meetings of experts to examine: which workers in the situations that were being identified were in need of protection; and appropriate ways to protect these workers and how to define them, taking into consideration differences in national legal systems and language differences existing between countries.210

163. A Tripartite Meeting of Experts on Workers in Situations Needing Protection, in May 2000, concluded that changes in the world of work had resulted in situations where the legal scope of the employment relationship – which determines whether or not workers are entitled to the protections afforded by labour legislation – no longer accorded with the realities of employment relationships. This had resulted in a tendency whereby workers who should be protected by labour and employment law were not receiving that protection in fact or in law. The scope of regulation of employment relations no longer accorded with reality, which varied between countries and within countries, from sector to sector. The Meeting noted that, while some countries had adapted the scope of the employment relationship to take account of these changes, this had not occurred in other countries, leaving workers unprotected. The Meeting therefore concluded that countries should adopt or continue a national policy which would review at appropriate intervals and which would clarify or adapt the scope of the regulation of the employment relationship to align it with current realities for workers. It also agreed on

210 There was a misunderstanding between “contract labour” in English and subcontracting in Spanish and French. ILO: Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour, ILC, 86th Session, Geneva, 1998.
elements that the national policy could include.\textsuperscript{211} At the suggestion of the Meeting, the Office undertook a series of national studies to determine the extent to which dependent workers who should be afforded adequate protection under labour and employment legislation had ceased to be covered.\textsuperscript{212}

164. In 2003, the ILC held a general discussion on the scope of the employment relationship and its impact on workers’ rights. In its conclusions, the ILC indicated that there are rights and entitlements under labour legislation and collective agreements that are specific to or linked to workers who work within the framework of an employment relationship. It noted that changes in the structure of the labour market, the organization of work and the deficient application of the law are leading to a growing phenomenon of workers who are in fact employees but who find themselves without the protection of an employment relationship. There was a shared concern among the tripartite constituents that it is necessary to ensure that labour laws are applied to those in an employment relationship and that the wide variety of working arrangements are placed within an appropriate legal framework. Recalling that the protection of workers is at the heart of the ILO’s mandate and that, within the framework of the Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity, the ILC recommended that the ILO envisage the development of a Recommendation to combat disguised employment relationships, which would provide for mechanisms to ensure that those in an employment relationship enjoy the rights to which they are entitled.\textsuperscript{213}

165. Subsequently, in 2006, following extensive discussions, the ILC adopted Recommendation No. 198. This is the first occasion on which a General Survey has examined this important instrument.

\textsuperscript{212} ibid. For an enumeration of the studies carried out, see ILO: The employment relationship, Report V(1), 2006, op. cit., footnote 8.
II. Rationale

166. The employment relationship is a universally recognized legal concept which provides a framework for the functioning of the labour market in many countries, and is taken into account explicitly or implicitly in a number of ILO standards. Certain ILO Conventions and Recommendations cover all workers without distinction, such as the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), while others refer specifically to the coverage of independent workers214 or self-employed persons.215 Others, such as the Termination of Employment Convention, 1982 (No. 158), and the Domestic Workers Convention, 2011 (No. 189), specify that they apply only to employed persons or to persons in an employment relationship, respectively.

167. In response to the challenges faced by enterprises’ and workers’ needs to work under flexible work arrangements, the concept of the employment relationship has evolved over time and become more diversified, covering situations that differ from traditional full-time employment. These types of working arrangements also lie within the framework of the employment relationship, and differ from civil or commercial contractual relationships under which the services of self-employed workers may be procured.216

168. However, the various discussions held over the years have acknowledged that an increasing number of workers, although they are in an employment relationship, do not enjoy the rights and protections to which they are entitled. This is the result of the profound changes occurring in the world of work in response to various factors, including globalization, technological change, transformations in the organization of work, reorganization, the increased participation of women in the labour market, migration flows and the shift to services.

169. This lack of protection has an adverse impact on workers and their families, affecting not only their incomes, but also their access to avenues of redress and to social protection. Lack of protection can also be counterproductive for enterprises, by diminishing productivity and distorting competition between enterprises at the national, sectoral and international levels, often to the detriment of those enterprises that do comply with labour law, leading to social dumping.217 Moreover, as the workers concerned often do not have access to vocational education, this may result in lower competitiveness and a higher risk of occupational accidents, depending on the nature of the work. The lack of protection can have a ripple effect, extending to society at large. Low wages paid to unprotected workers may spill over to workers covered by the law, and negatively affect wages protected by collective agreements. Moreover, the lack of access to social protection of unprotected workers can have a significant financial impact in terms of unpaid social security contributions and taxes.

170. The ILO Global Commission on the Future of Work recalled that the employment relationship is the centrepiece of labour protection, but recognized the need to review and, where necessary, clarify and allocate responsibilities and adapt the legal scope of the employment relationship to ensure effective protection for workers who should be entitled to protection.218 In turn, the Centenary Declaration reaffirms the continued relevance of the employment relationship as a means of providing certainty and legal protection to workers.

171. The establishment of a comprehensive and clear legal framework governing the employment relationship is crucial to promote full, productive and freely chosen employment, while providing for both security and flexibility in the labour market. The employment relationship brings with it many benefits, including access to social security, income security and the right to a safe and healthy workplace. Moreover, those in an employment relationship...
normally have access to vocational training and skills development, which enhances their productivity and provides opportunities for advancement. It is often more difficult to access protection for fundamental labour rights, such as the right to freedom of association and collective bargaining, and protection against discrimination, child labour and forced labour when the labour occurs outside of an employment relationship. Workers in an employment relationship are able to access dispute resolution procedures and mechanisms to seek redress for violations of their rights.\textsuperscript{219}

172. National policies for the review of the legislation, examined below, should be taken into consideration within the framework of a coordinated national employment policy that aims to promote economic growth, job creation and decent work. Indeed, the employment status of workers has consequences for tax collection, as well as on social security rights and other entitlements that have an incidence on national programmes and budgets. Lack of clarity concerning employment status, or its concealment, may result in workers falling into informality, as seen in chapter III.

173. The objective of the Recommendation is threefold:

- the formulation and application of a national policy to review, clarify and adapt the scope of relevant laws and regulations, and to guarantee effective protection for workers in an employment relationship;
- the establishment of criteria for the determination of the existence of an employment relationship (conditions and indicators); and
- the establishment of an appropriate mechanism for monitoring developments in the labour market and the organization of work.

III. National policy of protection for workers in an employment relationship

1. Formulation and application of a national policy

Paragraph 1 of Recommendation No. 198 provides that:
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.

174. The Recommendation calls for member States, as a first step, to develop and adopt a national policy aimed at clarifying the scope of the employment relationship. The objective of the national policy is to “guarantee effective protection for workers who perform work in the context of an employment relationship” (Paragraph 1 of the Recommendation), including those “workers especially affected by the uncertainty as to the existence of an employment relationship” (Paragraph 5). While it does not specify the elements of the policy, the Recommendation encourages States to periodically review their national legislation to permit the clarification or adaptation of the scope of the regulation of the employment relationship in the national legislation to ensure that it continues to be aligned with the realities of a changing world of work.

175. The periodicity of the review should be determined at the national level. The review should be undertaken in consultation with the social partners, as part of an ongoing and dynamic process that encompasses clarifying, supplementing and stating as precisely as possible the scope of regulation of the employment relationship in the law addressing and clarifying objectively ambiguous situations; and combating disguised employment relationships; and addressing triangular working arrangements. The legislation should allow workers to know who their employer is, what their rights are and who bears the responsibility for guaranteeing those rights. New and emerging forms of work and changes in the organization of work that give rise to uncertainty regarding the existence of an employment relationship should be addressed in the context of the periodic policy review process envisaged in Paragraph 1 of the Recommendation.

176. In their reports, several countries indicate that they do not have a specific national policy for the review of the relevant laws and regulations to determine the scope of the employment relationship, but provide no further information. Other countries indicate that their existing policies and mechanisms for the review of the legislation also apply to the review of the legal scope of the employment relationship.

177. A number of countries indicate that, while they do not have a specific review process, they carry out revisions when needed, on an ad hoc basis.

221 For example, Argentina, Cabo Verde, Cameroon, Chile, Colombia, Cook Islands, Croatia, Cuba, Dominican Republic, El Salvador, Honduras, Indonesia, Jamaica, Senegal, Slovakia, Spain, Sweden, Sudan, Thailand and Togo.
222 For example, Austria and Bulgaria (on the basis of the Law on normative acts, following an impact assessment by the Council of Ministers of new laws within five years of their entry into force).
223 For example, Canada, Costa Rica, Egypt, Estonia, Israel, Paraguay, Qatar, Suriname and the United States.
Canada – In early 2019, the Minister of Employment, Workforce Development and Labour appointed an independent Expert Panel on Modern Federal Labour Standards. The Panel will examine, consult on and provide the Minister with evidence-informed advice on five complex issues related to the changing nature of work that warrant further study: (i) the federal minimum wage; (ii) the right to disconnect from work-related e-communications outside work hours; (iii) labour protections for non-standard workers; (iv) benefits: access and portability; and (v) collective voice for non-unionized workers.

178. Other countries have established mechanisms for the periodic review of legislation and regulations, including labour law.

Austria – Section 11 of the “Regulation of the Federal Chancellor on the principles of the effects-based impact assessment in the case of regulatory and other initiatives” (WFA-GV" BGBI.II No. 489/2019 as amended), establishes that regulatory initiatives must be evaluated internally no later than five years after they come into force or take effect in order to identify any potential for improvement and recommendations for implementation.

Belgium – The legislation on the scope and nature of the employment relationship (sections 328–343 of the Act of 27 December 2006) provides that the Act must be assessed by the National Labour Council and the Higher Council of the Self-employed and Small and Medium-sized Enterprises two years after its entry into force to assess its effectiveness and determine whether initiatives are needed to enhance its impact.

Republic of Korea – In accordance with the Framework Act on Government Work Assessment, the Employment and Labour Policy Assessment Committee, a body composed of internal and external members, regularly reviews the results of major employment and labour policies and activities related to the enactment and revision of laws and regulations. It posts the assessment results on the Ministry’s website and submits them to the National Assembly.

179. In many countries, the competent authority responsible for conducting the review is the legislative body, which reviews national legislation on an ongoing basis to align it with labour market developments. In other countries, this function is undertaken by the Ministry of Labour. In some countries, ad hoc consultative bodies are established to carry out such reviews as necessary.

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224 For example, Austria, Republic of Korea, New Zealand and Sweden.
225 For example, Afghanistan (Labour Law, section 88), Belgium (Act on the nature of the employment relationship, sections 328–343); Switzerland (an extra-parliamentary commission, the Federal Labour Commission, on which the cantons, science, employers’ associations, workers’ associations and women’s organizations are represented. As a body appointed by the Confederation, it performs public functions on behalf of the Federal Council and the administration. It gives its opinion to the federal authorities on legislative or implementation issues related to the Labour Act).
226 For example, Armenia, Bahrain, Belarus, Colombia, Finland and Mexico.
227 For example, Ecuador, Guatemala, Montenegro, New Zealand, Nigeria, Philippines, Saudi Arabia and Seychelles.
228 For example, Canada and Namibia (a tripartite task force has been established to spearhead the amendment of the Labour Act).
United Kingdom – In 2016, the Prime Minister commissioned an independent review of modern working practices. In February 2018, the Government responded to the review, accepting the vast majority of its recommendations, and engaged in consultations on their implementation. The consultations covered employment status, agency workers and increased transparency and enforcement. Following those consultations, in December 2018, the Government published the Good Work Plan, setting out its vision for the future of the labour market, accompanied by an ambitious plan for the implementation of the recommendations arising from the review.

180. In some countries, existing tripartite advisory bodies have been mandated to examine legislation and propose new regulations relevant to the employment relationship. Other governments refer in their reports to tripartite political discussions addressing the issue of the employment relationship, as the country’s labour market is highly dependent on collective bargaining and social dialogue.

181. A number of governments indicate that their legislation and its implementation is reviewed regularly and evaluated by labour inspectorates, which make suggestions and proposals for improvement.

182. The role of the judicial authorities and case law in the review of legislation and the clarification of the employment status of workers is also highlighted by certain governments and trade unions.

Paragraphs 2 and 3 of Recommendation No. 198 provide that:

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.

183. Certain adjustments to the scope of the legislation may be necessary, for example when the lines between different employment relationships have become blurred, or when some forms of work or some categories of workers who were traditionally excluded from the employment relationship are now included (such as domestic workers, homeworkers or teleworkers), or to encompass new situations or work arrangements that were not envisaged when the law was adopted, such as digital labour platforms. The law may also be adapted to provide legal certainty and predictability in cases of conflicting judicial decisions on certain aspects of the employment relationship.

231 For example, Cyprus (Labour Advisory Board), Japan (Labour Policy Council), Malta (Employment Relations Board), Myanmar (Labour Law Reform–Technical Working Group (LLR–TWG), a tripartite body), Oman (Social Dialogue Committee), Pakistan (Tripartite Consultation Committees), Palau (Palau Labour Advisory Group), Poland (Labour Law Team in the Social Dialogue Council) and Sri Lanka (National Labour Advisory Council).
232 For example, Norway and Sweden.
233 For example, Guatemala, Latvia and Lithuania.
234 For example, Germany and the United States.
235 For example in Argentina the CGT RA indicated that the judicial authority implements legislation correctly and recognizes economic dependency and thus the employment relationship in the case of false dependency.
2. The employment relationship

184. In their reports, several countries indicate that they have recently adapted or clarified their legislation on the scope of the employment relationship as a result of a review.236

**Brazil** – The Temporary Work Act was amended by Act No. 13,429 of 31 March 2017 to clarify the scope of temporary contractual arrangements and the procedures for the operation and registration of temporary employment agencies. The amended Act is intended, inter alia, to provide the parties with the necessary legal certainty respecting their relationship.

185. Other governments indicate that the current law is sufficiently flexible to encompass new and emerging forms of work.237

**Norway** – A committee issued an official Norwegian report (NOU) in 2017 on the “sharing economy”. The Committee discussed whether there were aspects of the sharing economy that indicate a need to amend the term “employee” in the Working Environment Act, either because there is a gap in protection that the Working Environment Act does not address, or because the sharing economy creates more instances where parties disagree on status. The majority considered that the current Working Environment Act is sufficiently flexible to deal with possible conflicts that may arise in the sharing economy in relation to this question, and therefore concluded that there was no need to propose changes to the definition of employee contained in the Act.

186. Some governments indicate that the situation with respect to new or emerging forms of work has or is currently being examined. A number of governments identify part-time, temporary work,238 platform work239 and dependent self-employment240 as posing challenges in terms of ensuring labour protection for workers or determining responsibilities. Some found it difficult to compile data on enterprises that have recourse to subcontracting or to the platform economy. Some governments indicate that they are in the process of modifying their labour legislation in response to current labour market needs.241

2. Form of the national policy

187. The Recommendation leaves it up to each State to choose the appropriate means of monitoring changes in the national labour market, identifying situations in which workers are left unprotected and devising the most appropriate means of addressing such situations. National policies on the employment relationship may be implemented through legislation, collective bargaining agreements, judicial decisions, codes of practice, or a combination of these.

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236 For example, Bangladesh (Bangladesh Labour Act, 2006, as amended in 2018), Belgium (Decision No. 1970, of 2016, on the evaluation of the nature of work relation with a view to address disguised employment relationships), Brazil, Canada, Finland (working time arrangements), France (Labour Code, section L-7341-1 on platform work), Japan (Work Style Reform Law of 2018 to address pay inequalities among regular and non-regular part-time and fixed-term workers), Philippines (Order No. 174 of 2017 of the Department of Labor and Employment on subcontracting) and Qatar.

237 For example, Norway and Switzerland.

238 For example, Norway and Switzerland.

239 For example, Cambodia, Germany, Latvia, Mauritius, Norway and Peru.

240 For example, Belgium.

241 For example, Belarus (draft Labour Code to include chapters on new issues, such as telework), Benin, Chile (the law is currently being revised), Philippines, Poland, Jamaica, New Zealand (Employment Relations (Triangular Employment) Amendment Bill introduced into Parliament in 2018) and Saudi Arabia (Telework).
3. Content of the national policy

Paragraph 4 of the Recommendation provides that:

The 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.

(a) Provision of guidance

188. The first and most important element of the national policy is that it should provide guidance to the parties concerned, particularly to employers and workers, on how to determine the existence of an employment relationship and how to distinguish between employed and self-employed workers. Paragraph 4(g) of the Recommendation refers to the need to ensure that all those responsible for dealing with the resolution of disputes and the enforcement of national employment laws and standards, including 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.

189. Legislation has been adopted in a significant number of countries that provides guidance on how to determine the existence of an employment relationship. The criteria used to distinguish between employment and self-employment are sometimes set out exclusively in law, in a combination of law and jurisprudence or exclusively by jurisprudence.

246 For example, Afghanistan, Algeria, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Benin, Bosnia and Herzegovina (Republika Srpska), Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Croatia, Cyprus, Côte d’Ivoire, Egypt, Finland, Gabon, Georgia, Indonesia, Japan, Latvia, Lithuania, Montenegro, Morocco, Myanmar, Nepal, New Zealand, Nigeria, Sudan (by definitions of parties), Suriname, Togo and United Kingdom.

247 For example, China and Republic of Korea.

248 For example, Israel (where the labour courts have established tests to examine if an employment relationship exists; the most important test is the so-called “mixed test”, of which dominant component is the “integration in the organization test”). Several other examples are mentioned throughout the chapter.
The BAK from Austria, the Danish Trade Union Confederation (FH) and the Federation of Korean Trade Unions (FKTU) indicate that clear methods and guidance to determine the existence of an employment relationship are necessary in particular due to the upheaval in the world of work and the emergence of new forms of employment (not least as a result of increasing digitalization). The guidance provided by case law is neither sufficient nor univocal.

Almost all reporting countries, whether or not they have a national policy, have established a system that provides guidance on effectively establishing the existence of an employment relationship and making a distinction between employed and self-employed workers. This guidance may take different forms. In some countries, a mechanism or institution (such as an ombudsman, the ministry of labour, and conciliation and arbitration services) has been established that provides information and confidential advice on employment status, and carries out awareness-raising activities, particularly relating to fair labour practices, workers’ rights, taxation and other issues. Information may also be provided through codes of practice, manuals, brochures, websites and social networks.245

**Australia** – The Fair Work Ombudsman246 provides guidance in person and through its website regarding the existence of an employment relationship and on the distinction between employees and independent contractors (self-employed workers).

### (b) Combating disguised and ambiguous employment relationships

The national policy should also address situations in which the employment relationship is disguised and the worker is left unprotected.247 This may involve concealing the identity of the worker or according him or her a status other than that of employee, with the intention of releasing the real employer from any involvement in the employment relationship, and above all from any responsibility towards the workers.

Disguised employment relationships may occur in the context of civil or commercial contracts, as well as in the framework of cooperatives or training arrangements. While the worker may appear to be independent, in reality the employer directs and monitors the work activity in a way that is incompatible with the status of self-employment. Internships may also if misused, constitute disguised employment relationships.248 The nature of the employment relationship may also be misrepresented to exclude dependent workers from rights and benefits they would otherwise enjoy. One form of employment relationship can also be used in place of another that would be more appropriate to the circumstances to avoid the protections provided for in the law. An example is the use of fixed-term contracts or contracts for a specific task, but which are repeatedly renewed with or without a break. As a consequence, the worker may be excluded from benefits provided to employees with


246 See: Fair Work Ombudsman.


open-ended contracts by labour legislation or collective bargaining.\textsuperscript{249} Disguised employment relationships may also arise in multiple party arrangements (i.e. in subcontracting) if an intermediary is used to conceal the true identity of the employer.\textsuperscript{250}

The German Confederation of Trade Unions (DGB) refers in this respect to the misuse of self-employment as a form of reduction of costs by employers. It highlights that according to estimates of the Labour Market Research Institute (IAB, 2017), there are between 235,000 and 436,000 people who are pseudo self-employed in their main occupation. On top of that is the damage to society as a whole when increasing numbers of self-employed people are not paying any social insurance contributions. This has an impact nowadays in the classification of platform workers.

According to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), The National Labor Relations Board recently ruled that misclassification of employees as independent contractors is not by itself an unfair labor practice, leaving such misclassified employees without any means of gaining a determination of their status absent other unlawful conduct by the employer.


193. The employment relationship may also be objectively ambiguous, for example, when the main factors that characterize the employment relationship are not readily apparent. The relationship may be ambiguous where there are complex forms of relationships between workers and the persons to whom they provide their labour, or where the relationship between the parties changes over time. In such situations, even though there may not be any deliberate attempt to disguise the employment relationship, there may be genuine doubt concerning its existence.\textsuperscript{251}

Removal of incentives to disguise or conceal the employment relationship

194. Paragraph 17 of the Recommendation calls on Members to develop effective measures aimed at removing any incentives that may exist to disguise an employment relationship.

195. The lack of a clear legislative and policy framework can facilitate concealment and give rise to difficulties for the effective implementation of the legislation. Many countries report that the presumption of the existence of an employment relationship, unless proven otherwise, and the use of factual criteria to determine the true nature of the relationship are adequate tools for deterring the practice of disguised employment. Labour inspection is also crucial, both in monitoring compliance and providing guidance.

\textsuperscript{249} The Committee has referred, for example, to the replacement of the employment contract with other types of contract in order to evade the protection provided under the Termination of Employment Convention, 1982 (No. 158). See in this respect, ILO: *Protection against unjustified dismissal*, General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982, Report III (Part 4B), ILC, 82nd Session, Geneva, 1995, para. 56.


2. The employment relationship

The NSZZ Solidarnosc from Poland argues that the law facilitates the substitution of employment contracts with civil law contracts, with particular emphasis on decisions and views of the Supreme Court. This court ruled in favour of civil law contracts even in situations in which the existence of an employment relationship might seem obvious (e.g. with respect to security guards that worked in a specific time frame and in a specific workplace, and thus remained under the supervision of the employer and performed their work using specific materials, e.g. uniforms, provided by the employer).

196. In many cases, national legislation prohibits exerting pressure on workers to become independent contractors. It may also be prohibited to dismiss workers and then rehire them as independent contractors to perform the same work. Labour legislation frequently provides that fraudulent contracts shall be deemed null and void. It is also common for legislation to provide that employers are automatically liable in such cases to pay the full contributions due on the gross sums paid to self-employed persons. In most cases, the employer must also pay the worker’s part of the contribution.

Chile – The Labour Code, section 507, prohibits “recourse to any subterfuge, concealment, disguise or alteration of identity or ownership if it results in the avoidance of compliance with labour and social security obligations established by law or agreement.... Any alteration undertaken in bad faith through the establishment of different corporate names, the creation of legal identities, the division of the company or other means which result for the worker in a reduction or loss of individual or collective labour rights and, especially in relation to the former, bonuses or indemnities for years of service, and in relation to the latter, the right to organize and collective bargaining, shall be considered subterfuge.”

197. In some countries, disguised employment relationships are conflated with informal employment, particularly in the case of undeclared work, without placing it in the context of a specific type of contractual arrangement. It is often argued in this regard that high taxation and social security costs may push employers and employees to use self-employment arrangements and intermediary structures to conceal employment relationships. For this reason, some governments report that they are currently carrying out studies and research to ascertain whether this is the case and to identify remedial measures. Some governments indicate that they are already taking measures, particularly to address undeclared work. Criminal proceedings are also being initiated on the basis of infringement reports by labour inspectors or other authorities.

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252 For example, Australia (Fair Work Act, sections 357–359) and Canada (Labour Code, section 167.1, which is not yet in force).
253 For example, Argentina (Act No. 20744 on labour contracts, section 14) and Gabon (Labour Code, sections 3–5, which establish a general prohibition).
254 For example, Algeria, Armenia, Belgium (Programme Act (I) of 2006, section 340), Colombia (Substantive Labour Code, section 198) and Malta (Employment Status National Standard Order (SL 452.108)).
255 For example, Afghanistan, Azerbaijan, Bangladesh and Turkey.
256 For example, Croatia (Labour Act 2014, section 229(1) and (3)), Cyprus (Law No. 59(I) of 2010 on Social Insurance) and Estonia.
257 For example, Ireland and Sweden.
258 For example, Switzerland and United Kingdom. See also chs III and VI.
198. In many countries, the competency to requalify the employment relationship lies with the labour inspectorate, the ministry of labour, the ombudsman or similar institutions and the judicial authorities, which periodically examine the true nature of the contract and monitor that there are no fraudulent situations. Coordination among the various national institutions responsible for labour and for tax collection may also be considered useful in determining the existence of disguised employment relationships. This issue is examined in detail in chapter VII.

199. The reports do not provide substantive information on the sectors in which disguised employment is prevalent, despite certain references to the subcontracting of temporary and fixed-term workers, contracts in show business and in the platform economy, and the use of civil or commercial contracts instead of true employment relationships.

200. The establishment of a clear framework for subcontracting is another means of addressing disguised employment. In addition, preventive measures, including awareness-raising campaigns, can also be useful in reducing the incidence of disguised employment. Institutions that provide guidance also often provide information on how to prevent disguised employment relationships.

(c) Ensuring standards applicable to all forms of contractual arrangements, including those involving multiple parties

201. Recommendation No. 198 indicates that the national policy should ensure standards applicable to all forms of contractual arrangements, including multiple party arrangements, with a view to ensuring that employed workers receive the protection to which they are entitled. Paragraph 4(c) specifies that these standards should apply to contractual arrangements with multiple parties, or so-called “triangular” employment relationships, in which employees of private employment agencies (the provider) are assigned to perform work for a third party (the user). Triangular relationships take different forms, and are often encountered by workers in the traditional assembly lines, construction, garment and other sectors as well as the more recent digital economy.

202. Paragraph 4(d) of the Recommendation seeks to ensure that these standards facilitate the identification of the parties to the relationship, the worker’s rights and the allocation of responsibilities between the parties. The allocation of responsibilities varies between countries. In some countries, the provider and the user are responsible for specific areas, while in others both the user and the provider are jointly liable.

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259 For example, Algeria, Cabo Verde, Costa Rica (Manual of legal procedures for labour inspection, in accordance with Orders Nos DMT-017-2013 and DMT-014-2014), Hungary (Act No. LXXV of 1996, section 1(5)), Italy, Republic of Korea, Nicaragua, Oman and Poland.

260 For example, Spain.

261 For example, Belarus.

262 For example, Brazil (Outsourcing Act No. 13,467 of 2017) and Germany (Labour Leasing Act (AÜG) of 2017).

263 Some provisions in other ILO instruments are also intended to discourage disguised employment relationships. For example, Paragraph 8(1)(b) of the Promotion of Cooperatives Recommendation, 2002 (No. 193), calls on governments to “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”. Similarly, Article 2(3) of the Termination of Employment Convention, 1982 (No. 158), provides that: “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.”


2. The employment relationship

(d) **Access to procedures and mechanisms for determining the existence of an employment relationship**

203. Where disputes arise regarding the existence and terms of an employment relationship, Paragraph 4(e) of the Recommendation calls for the parties concerned to have effective access to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms. 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, including labour inspectorates, human rights bodies, social security tribunals, tax authority, etc., to which workers and employers have effective access in accordance with national law and practice. Such procedures must be accessible, fair and inexpensive (Paragraph 14).

204. Paragraph 15 of the Recommendation calls on countries to take measures to ensure compliance with laws and regulations concerning the employment relationship through labour inspection services and in collaboration with the social security administration and tax authorities. Enforcement programmes and processes should be monitored regularly to ensure their effectiveness.

**New Zealand** – The Employment Relations Authority (ERA), an independent body set up under the Employment Relations Act 2000, resolves disputes relating to the employment relationship by examining the facts and making a decision based on the merits of each case. The ERA has exclusive jurisdiction to make determinations about employment relationship problems generally, including whether a person is an employee. Decisions made by the ERA are legally binding.

(e) **The gender dimension of the employment relationship**

205. The Recommendation calls on Members to take particular account in the national policy to ensure effective protection to workers who may be especially affected by the uncertainty with respect to the employment relationship, including women (Paragraph 5). Paragraph 6(a) adds that women may also be concentrated in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity with regard to the existence of an employment relationship. For example, the situation of domestic workers, which are mainly women and who often have difficulties to demonstrate that they are working within an employment relationship.

206. The Committee considers that it is therefore crucial, when developing and implementing the national policy envisaged under the Recommendation, to bear in mind the gender dimension of issues surrounding the employment relationship. Moreover, member States should develop comprehensive and effective policies on gender equality and ensure enforcement of the relevant laws and agreements at the national level with a view to anchoring gender equality in all policy and legal frameworks, including those relevant to employment (Paragraph 6(b)). With respect to effective enforcement, the Recommendation calls for national labour administrations and related services to pay special attention to occupations and sectors with a high proportion of women workers (Paragraph 16).

207. The Committee further recalls the importance of taking into account the situation of other specific groups, including the most disadvantaged workers, young persons, older workers, workers in the informal economy, migrant workers and persons with disabilities. It is also essential to consider the impact of multiple discrimination, as people who are subject to multiple forms of discrimination are more likely to be working under precarious conditions in which disguised employment relationships are prevalent, or where the employment relationship is uncertain.

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267 See also ch. VII on national practice.
268 Specific examples are referred to in ch. VI.
269 See in this regard ch. VI.
(f) Measures to address the transnational movement of workers\(^{270}\)

208. As indicated in the Preamble to the Recommendation, the transnational dimension of the employment relationship also needs to be addressed, particularly with respect to the determination of who is a worker, the rights to which workers are entitled and the allocation of responsibility. This is particularly important in a globalized economy in order to ensure fair competition and effective protection of workers’ rights, irrespective of whether the employment relationship crosses borders. Mobility should not be a motive for leaving workers unprotected. Accordingly, Paragraph 7 indicates that member States should take steps, after consulting the most representative organizations of employers and workers, to ensure that the national policy provides effective protection to and prevents abuses of migrant workers in their territories who may be uncertain as to their employment status and are often afraid to or discouraged from take action in this respect.\(^{271}\) These measures may also be taken in collaboration with other countries, including through bilateral agreements to prevent abuse and fraudulent practices.\(^{272}\)

209. The Recommendation highlights the importance of cooperation between States to address the issue. Paragraph 22 invites member States to establish specific national mechanisms to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. To this end, it encourages countries to develop systematic contact and exchange of information (see also section VI of this chapter).

210. In many countries, the general legal regime respecting the employment relationship applicable to workers is also applicable to migrant workers legally established in the country.\(^{273}\) In some other countries, there is specific labour regulation covering migrant workers legally in the country,\(^{274}\) or such legislation is being drawn up, for example with respect to remittances.\(^{275}\) Some governments provide information on bilateral agreements to ensure the protection of workers recruited to work abroad.\(^{276}\) Certain bilateral agreements exclusively cover the determination of the social security regime applicable to migrant workers.\(^{277}\) In some cases, bilateral agreements or memorandums of understanding also contain specific provisions on hiring and working conditions.\(^{278}\)


\(^{271}\) The Government of Switzerland refers in this respect to the Tripartite Commission on measures related to the free movement of persons.

\(^{272}\) See also Paragraph 43 of Recommendation No. 169, examined in ch. I, concerning the prevention of abuse or exploitation of migrant workers.

\(^{273}\) For example, Algeria, Canada (the Immigration and Refugee Protection Act, section 209(3) guarantees temporary foreign workers (TFW) effective protections), Ecuador (instructions on controlling the exercise of the labour rights of foreign migrant workers) and Republic of Korea (Act on Private International Law, section 28, the employment contract).

\(^{274}\) For example, Afghanistan, Guatemala and Sweden.

\(^{275}\) For example, Bangladesh (the Bangladesh Labour Act, 2006, section 174, sets out rules to give effect to arrangements with other countries for the transfer of money paid as compensation).

\(^{276}\) For example, Afghanistan (agreement with the United Arab Emirates), Burkina Faso (with Côte d’Ivoire and Gabon), Cambodia (with Thailand and Republic of Korea), Colombia (with Costa Rica and Panama), Egypt (with Jordan and Sudan), Georgia (the circular migration project, “Piloting Temporary Labour Migration of Georgian Workers to Poland and Estonia”), Kiribati (with Australia and New Zealand) and Oman (memorandums of understanding with labour-sending countries). The United States indicates that it has signed a number of MOUs with several countries (Mexico, Ecuador, the Philippines, Dominican Republic).

\(^{277}\) For example, Bulgaria (with United Kingdom), Cameroon (with France), Montenegro (with, among others, Austria, Hungary, Luxembourg, Serbia and Slovenia) and Uruguay.

\(^{278}\) For example, in the Philippines, workers, and especially domestic workers, are protected by additional provisions and the enhancement of the existing provisions in bilateral labour agreements, including protocols (guidelines) and the standard employment contract.
The Mexico–Canada Seasonal Agricultural Worker Program (SAWP) provides for safe, legal and orderly labour mobility and promotes the sending of Mexican agricultural day labourers to different provinces in Canada under conditions that guarantee respect for their labour rights, thereby eliminating intermediaries and preventing abusive and fraudulent practices.

The CTA Autónoma from Argentina indicates that a mechanism to determine the existence of the employment relationship across borders does not exist.

The BAK from Austria considers that there are small steps taken towards cooperation among national authorities. It further indicates that the proposal by the European Commission to set up a European labour authority to implement EU regulations on worker mobility in a fair, straightforward and effective manner is therefore expressly welcomed in order to improve the working conditions of migrant workers.

The FKTU from the Republic of Korea refers to the multiple reasons why a migrant worker may become an unregistered (irregular situation) migrant in the Republic of Korea and the difficulties they face to change employers.

The NZCTU from New Zealand refers to cases of migrant workers exploitation where the workers are not provided with a formal written contract, or where the contract submitted to authorities is replaced with a new contract at lower terms and conditions. This situation exists in some sectors such as horticulture and construction.

211. Some governments refer in their reports to systematic exchanges of information with other countries. Many have also adopted legal provisions regulating the situation of national workers hired to work abroad.

212. At the European level, reporting countries provide information on the manner in which they have applied European Union Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The Directive aims to promote the transnational provision of services in a climate of fair competition, while guaranteeing respect for workers’ rights. It is based on the premise that there is an employment relationship between the undertaking posting the workers and the workers themselves. It is supplemented by Directive 2014/67/EU on the enforcement of Directive 96/71/EC and amending Regulation (EC) No 1024/2012 on administrative cooperation through the Internal Market Information System (the “IMI Regulation”).


275 For example, Bulgaria (with the Netherlands).
276 For example, Burkina Faso (Labour Code, sections 56 ff.), Cambodia (inter-ministerial Prakas No. 5188 of 2017 on procedures and formalities for the issuance, confiscation and denial of the travel document for Cambodian workers overseas), Ecuador, Mexico (Federal Labour Act, section 25) and Nigeria (the Labour Act, section 37, refers to agreements with other countries in cases where Nigerian nationals are employed abroad).
281 For example, Belgium (posted workers are regulated by the Act of 5 March 2002), Bulgaria, Croatia, Finland (Act on Posting Workers, No. 447/2016), Malta (Posting of Workers in Malta Regulations, 2016 (S.L. 452.82)), Norway (posted workers), Spain (Act No. 45/1999), Switzerland (Act respecting posted workers, RS 823.20) and United Kingdom (Northern Ireland) (Posting of Workers (Enforcement) Regulations (NI) 2016).
including in situations of subcontracting. It lays a mandatory core set of terms and conditions of employment applicable according to the host Member State regulations regarding: pay, work and rest periods, paid annual leave, health and safety at work, posting of workers by temporary employment agencies, and equal treatment between men and women. The Directive introduces a mandatory equal treatment clause for posted temporary agency workers, in the sense that the conditions to be applied to cross border agencies hiring out workers must be those that are applied to national agencies hiring out workers. The same applies in the case of successive postings of the worker (if the worker is posted to other Member-State and, during that period, is posted to another Member-State). The user undertaking shall inform the temporary employment agency which hired out the worker in due time before commencement of the work.

214. Similarly, the Common Market of the Southern Cone (MERCOSUR) has provisions on the placement of workers in other member countries in the region, on equality and non-discrimination, as well as on protection against the illegal employment of migrant workers. The exchange of information concerning the free movement of skilled workers is also envisaged in bilateral and other regional agreements.

215. Taking into account the new and emerging forms of the organization of work that involve multiple processes with different actors across borders, including digital platform workers, and the important development of global supply chains, the Committee considers that Paragraphs 7 and 22 of the Recommendation are of great relevance in light of these transformations.

(g) Non-interference with true civil and commercial relationships

216. The manner in which people provide their labour differs from one situation to another. Some may perform work under the authority of an employer and for remuneration. Others may provide their labour or services independently and for an agreed fee, within the framework of a civil or commercial relationship.

217. The Recommendation does not limit in any manner the right of employers to establish civil or commercial contractual relationships, as indicated in Paragraph 8, which indicates that the national policy for protection of workers in an employment relationship should not interfere with true civil or commercial relationships. At the same time, it calls for workers in an employment relationship to have the protection to which they are entitled.

218. The use of civil and commercial contracts has become increasingly widespread in the context of new and emerging forms of work. Indeed, the employment relationship appears to have shrunk to leave space for a proliferation of cases in which entrepreneurs provide the same work or services that were previously carried out in the framework of the employment relationship, but are now under commercial or civil contracts. In many cases, this gives rise to situations of what has been called “dependent self-employment”, in which lines and responsibilities are sometimes blurred. Platform work is the object of intense debate throughout the world in this respect.

219. In this context, a distinction is often drawn between legitimate commercial or civil relationships and disguised employment relationships. While the employment relationship provides protections that compensate for inequalities in bargaining power between employers and workers, in true civil or commercial relationships the parties are deemed to have equal bargaining power. Clarification of the concept and scope of the employment relationship is therefore helpful in combating concealment and addressing any grey zones. On the one hand, employment relationships should not interfere with bona fide civil or commercial relationships. At the same time, national policy should prohibit the use of false civil or commercial contractual relationships to disguise any underlying relationships that in practice have the characteristics of an employment relationship.

282 For example, Suriname (for Caribbean Community (CARICOM) nationals).


220. The great majority of governments report that the system used to determine the existence of an employment relationship and its elements contributes to its differentiation from other civil or commercial contracts, which are generally regulated by other laws or regimes. Ultimately, the nature of contracts is determined, not on the basis of how they are labelled by the parties, but in accordance with the principle of the primacy of the facts. The establishment of this distinction is one of the main tasks of labour inspectors and judges.

Poland – The Labour Code, section 22(12), provides that employment contracts cannot be replaced by a civil law contract when the conditions for the performance of the work specified in section 22(1) (which describes the elements of the employment relationship) remain intact.

(h) Social dialogue and collective bargaining to find solutions concerning the scope of the employment relationship

221. Social dialogue is crucial in reaching consensus at the national level on the scope of the employment relationship. The Committee notes in this regard that the promotion of social dialogue requires the creation and strengthening of mechanisms for dialogue and exchange among constituents and the forging of alliances and partnerships to address effectively the complex issues surrounding the employment relationship.

222. The Recommendation calls on Members to promote collective bargaining and social dialogue as a means of finding solutions to questions related to the scope of the employment relationship at the national level (Paragraph 18). In addition, to facilitate the determination of the existence of an employment relationship, consultations should be held to determine whether workers with certain characteristics are to be considered employed or self-employed (Paragraph 11(c)), as well as in relation to the transnational movement of workers (Paragraph 7(a)). The social partners should be represented on an equal footing in any national mechanism for the monitoring of developments in the labour market and the organization of work, and consulted in this respect (Paragraph 20).

223. The Committee notes some reports refer to existing consultation bodies tasked with all consultations related to workplace relations that may include also the scope of the employment relationship. In other cases, governments indicate in general terms that collective agreements set out rights and obligations that impact directly on the employment relationship. The Committee observes, however, that from the information contained in the reports, it is not possible to determine to what extent such mechanisms have effectively been used to determine the scope of the employment relationship.

Latvia – All issues related to employment relationships are discussed among social partners within the framework of the National Tripartite Cooperation Council (NTCC) and the Sub-Council of the Tripartite Cooperation in Labour Affairs (STCLA).

Suriname – collective bargaining and social dialogue are used as a means of finding solutions to questions related to the scope of the employment relationship at national level, particularly when considering the adoption of legislation on the employment relationship.

287 For example, Australia (the National Workplace Relations Consultative Council (NWRCC)); Belarus, (National Council for Labour and Social Affairs); Bulgaria, Cambodia, Guinea Bissau, Hungary, Islamic Republic of Iran, Malta, Namibia and Portugal.
288 For example, Bangladesh and Turkmenistan.
IV. Determining the existence of an employment relationship

224. The Recommendation sets out a number of elements to be used in determining whether the parties concerned are in an employment relationship or another form of contractual arrangement.

225. Labour law in many countries contains provisions on the scope of the employment relationship. However, this issue is not always addressed adequately. Some national laws facilitate the recognition of the existence of an employment relationship and prescribe administrative and judicial mechanisms for monitoring compliance and enforcement. Others define the employment contract as the framework for the employment relationship, and provide definitions of employee and employer. The level of detail varies from one country to another. The most detailed national laws tend to establish a set of variables (conditions and indicators) to guide the determination of what constitutes an employment relationship, while in other cases the definitions are less detailed and leave the task of determining the existence of an employment contract to case law.

226. Amid this variety, the different laws may be seen to share common elements, in that the employment relationship is constituted by a legally recognized connection between the person who performs the work and the person for whose benefit the work is performed, in return for remuneration, under certain conditions established by national law and practice. In many jurisdictions, in particular under the civil law system, subordination is the key element. Three common elements in this respect are: work performed for another person; in exchange for remuneration; and within a relation of subordination.289

Côte d’Ivoire – The 2015 Labour Code defines the employment relationship as one in which there is a relationship of subordination, remuneration and the provision of services.290

227. As noted below, a wider set of conditions, in addition to subordination, tend to be established in common law countries to determine the existence of the employment relationship. In some countries, these are the same elements that define a labour contract.291

228. Paragraph 10 of the Recommendation calls on Members to promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship. In principle, employment relationships fall within the scope of labour law, while other arrangements are regulated by commercial or contract law. This difference is crucial in determining, among other aspects, whether the worker will fall or not under the remit of the labour law. However, changes in the world of work are rendering the legal manifestations of the employment relationship tenuous and opaque, thus complicating the legal classification of work and the application of employment protection legislation.292

229. The ILC intentionally developed a flexible instrument that could accommodate different national circumstances and changes in the world of work. For this reason, the Recommendation provides guidance on the substance of the employment relationship, but does not attempt to define it.

289 See in this regard J. Betray v. Staatssecretaris van Justitie: Reference for a preliminary ruling, Raad van State, Netherlands (Concept of worker – Community national employed under a social employment programme), Case 344/87.
290 Similar definitions are provided in Cambodia (Labour Law Act 1997, section 3).
291 For example, Gabon (Labour Code, section 18).
1. The employment relationship: A determination based on the facts

Paragraph 9 of Recommendation No. 198 provides that:
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.

230. The true nature of any employment relationship should be established through an examination of the relevant facts. In the event of any discrepancy between the established facts and formal documents, the facts must prevail. In accordance with the principle set out in the Recommendation, known as the *primacy of facts*, the realities of the relationship are dispositive and trump other elements, such as the intentions of the parties or the manner in which they describe the relationship. The principle of the *primacy of facts* is helpful, particularly in situations where the employment relationship is deliberately disguised. However, as indicated in Paragraph 9 of the Recommendation, the determination should be guided “primarily” by the facts relating to the performance of work and the remuneration of the worker. This does not prevent other elements from being taken into consideration. The provision of work and the fact that the work is performed in exchange for remuneration are sufficient in many countries to establish an employment relationship.

231. In many countries, this principle is set out either statutorily or through case law. It can be found in both civil law and common law systems, at the constitutional level, as a general principle of contract law, or as established by courts.

*Argentina* – The National Labour Court of Appeal considered that: “In labour matters, the principle of the primacy of facts prevails. The nature of the relationship must be determined by the examination of the characteristics that shape it and define it on the basis of the reality of facts, and not the documentation (in this case, a service lease contract), which could have constituted one more imposition by the giver of work.” 7th Chamber, 18 November 2002, *Zelasco, José F. v. Instituto Obra Social del Ejército*.

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267 For example, *Colombia* (Constitution, article 53).
268 European Union Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union endorses this principle in preambular paragraph (8).
Brazili – The Fourth Regional Labour Court recognized the existence of an employment relationship between the employee and the employer on the grounds that the worker had been required to create a legal entity to be paid. During the proceedings, it was also shown that all of the other elements required for the recognition of an employment relationship were present. Case No. 0021209-20.2014.5.04.0221.299

Germany – Section 611a of the Civil Code provides that:

“The employment contract obliges the employee in the service of another person to perform work in personally, heteronomously and in accordance with instructions. The right to issue instructions may relate to the content, performance, time and place of work. Anyone who is not essentially free to organise his activity and determine his working hours is bound by instructions. The degree of personal dependence also depends on the nature of the activity in question. An overall assessment of all circumstances must be made in order to determine whether an employment contract exists. If the actual performance of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant.”

United Kingdom – The Employment Appeals Tribunal has found that “... the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represents what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.”. Autoclenz Ltd v. Belcher & Ors, Belcher [2011] UKSC 41, at paragraph 35.

2. Elements that facilitate the determination of the existence of an employment relationship

(a) Use of a broad range of means

232. In many jurisdictions, a general rule of contract law is that the burden of proof rests on the complainant. However, it is often difficult for the worker to meet this burden, as the employer normally controls the information concerning the relationship. For this reason, the Recommendation encourages States to allow a broad range of means for determining the existence of an employment relationship (Paragraph 11(a)), which also serves to deter the use of disguised employment relationships. The Committee notes that many countries require the employer to inform employees of the conditions applicable to the employment contract or to provide a written contract, a letter of engagement or other documents setting out the particulars of the employment contract or relationship, thereby providing the worker with a means of proving the existence of the employment relationship.

299 Similar examples can be found in ILO: “The employment relationship: An annotated guide to ILO Recommendation No. 198”, 2007, op. cit., p. 32.


2. The employment relationship

United Arab Emirates – Federal Law No. 8 of 1980 regulating labour relations requires employers to issue a written contract of employment in two copies, one of which is to be given to the worker. If there is no written contract, the two parties may establish the working relationship by any means of legal proof.302

(b) Legal presumption of the existence of an employment relationship

233. Paragraph 11(b) of the Recommendation calls on member States to consider providing for a legal presumption of the existence of an employment relationship where one or more of the indicators established by law (referred to in Paragraph 13 of the Recommendation) are present. The Committee notes that the establishment of a legal presumption is a step forward in the process of easing the burden of proof, even if these are two different concepts. The burden of proof is then shifted from the worker to the employer.303 The Committee considers this legal presumption as crucial to counterbalance the unequal bargaining power of the parties and as a consequence of the principle in dubio pro operario which is fundamental in labour law.304 This issue has also been the object of abundant jurisprudence.305

234. The presumption may be broad, in that working relationships are presumed to be employment relationships.306 However, the law may specify that the presumption is triggered only once one or more indicators are present.307 The presumption is generally rebuttable by the employer.

302 Similarly, for example, Algeria (Act No. 90-11 of 1990 on employment relations), Cabo Verde (Labour Code, section 33), Gabon (Labour Code, section 20), Mexico (Federal Labour Act, section 21) and Togo (Labour Code, sections 37 and 10: “Proof of the contract or employment relationship may be provided by any means”).


304 The Committee notes in this respect that some latest judicial decisions do not take into account this principle, although it is normally firmly rooted in national jurisprudence. Judgment of the High Court of Justice of Madrid Section 04 of the Social Court of 19 September 2019 No. 715/2019 (rec. 195/2019) dismissing the appeal filed against the Judgment of the Court 39 of Madrid of 3 September 2018 declaring a true autonomous Glovo Rider (TRADE). According to the decision, the worker must prove the reality between the parties. If he does not do so, then the judges base its decision on what was “agreed” by the parties without taking into consideration the primacy of facts.

305 See for example Deborah Lawrie-Blum v. Land Baden-Württemberg: Reference for a preliminary ruling: Bundesverwaltungsgericht, Germany (Worker - trainee teacher), Case 66/85. See also United States: Supreme Court of California, Dynamex Operations West, Inc. v. Superior Court of Los Angeles County (2018) 4 Cal. 5th 903.

306 For example, Argentina (Act on labour contracts No. 20.744, section 23), Cabo Verde (Labour Code, section 33), Colombia (Labour Code, section 24), Costa Rica (Labour Code, section 18(2)), Dominican Republic (Labour Code, section 15), El Salvador (Labour Code, section 20), Estonia (Employment Contracts Act, section 2), Honduras (Labour Code, section 30), Panama (Labour Code, section 66), Peru (Act No. 29497, section 23(23)(1)), Spain (Workers’ Statute, section 8) and Bolivarian Republic of Venezuela (LOTTT, section 53).

307 For example, Chile (Labour Code, sections 7 and 8), Malta (Employment Status National Standard Order (SL 452.108) section 3), Namibia (Labour Amendment Act, 2012, section 128A), Panama (Labour Code, section 66) and Togo (Labour Code, section 37).

Article 11 Where Member States allow for the use of on-demand or similar employment contracts, they shall take one or more of the following measures to prevent abusive practices:

(b) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period;

Article 15 Legal presumptions and early settlement mechanism

1. Member States shall ensure that, where a worker has not received in due time all or part of the documents referred to in Article 5(1) or Article 6, one or both of the following shall apply:

(a) the worker shall benefit from favourable presumptions defined by the Member State, which employers shall have the possibility to rebut;

(b) the worker shall have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.

2. Member States may provide that the application of the presumptions and mechanism referred to in paragraph 1 is subject to the notification of the employer and the failure of the employer to provide the missing information in a timely manner.

In **Belgium**, sections 337(1) and (2) of the Programme Act (I) of 2006 create the presumption of employment in certain at-risk economic sectors. In the absence of proof to the contrary, the employment relationship is presumed to be performed under the terms of an employment contract if over half of the listed criteria are met. The following six economic sectors are covered by the presumption:

- construction;
- surveillance;
- transport;
- cleaning;
- agriculture;
- horticulture.

**Colombia** – The Constitutional Court had held that the presumption that every personal employment relationship is governed by a civil or commercial contract implies a transfer of the burden of proof to the employer. The employer, in order to rebut the presumption, must prove that a civil or commercial contract for the provision of services is not governed by labour standards exists in practice, and the mere production of the contract is not sufficient evidence in itself.308

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Cuba – The Labour Code, section 23, provides that: “When the employment contract is not formalized in writing, the employment relationship is presumed by the fact that the worker performs work with the knowledge of and without opposition from the employer.”

235. Some trade unions indicated that the legal presumption does not exist in the legislation of their country. Others referred to the need that the legal presumption concerning the existence of an employment relationship be recognized at national level.

The ITUC, the BAK from Austria and the NZCTU from New Zealand support the adoption of a broad presumption of the existence of an employment relationship. Furthermore, they consider it crucial to establish precise and specific factors including with respect to the performance of the work and the remuneration of the worker that will help determine the existence of the employment relationship.

Business New Zealand does not support the adoption of a presumption of the existence of an employment relationship.

(c) Designated groups or categories of workers deemed to be employed or self-employed

236. In some cases, the law goes a step further and directly determines that certain workers in ambiguous situations are in an employment relationship. Conversely, legislation may specify that certain contractual arrangements are not considered to be employment relationships (Paragraph 11(c)). For example, the legislation may give the Minister general discretion to make such a determination, or may refer specifically to a particular group. In such cases, the presumption is not normally rebuttable. This concerns for example door to door sellers, sportspersons, models, etc.

309 For example, the NSZZ “Solidarność” from Poland.

310 The TUC from the United Kingdom considers that measures should be taken to crack down on bogus self-employment, by creating a statutory presumption that all individuals will qualify for employment rights unless the employer can demonstrate they are genuinely self-employed. This presumption has been adopted by the Supreme Court of California in the Dynamex case and has given place to the adoption of new legislation in California.


313 For example, Australia (Victoria) (the Workplace Injury Rehabilitation and Compensation (WIRC) Act 2013, Schedule 1, Part 1, provides that, for the purposes of the WIRC Act, certain persons are deemed to be in an employer/employee relationship. Such arrangements include employer/student arrangements, persons attending training programmes, secretaries of a cooperative housing society, door to door sellers, timber contractors, drivers carrying passengers for reward, owner drivers carrying goods for reward, contractors that meet certain criteria, share farmers, religious bodies and organizations, certain persons employed in the public sector, municipal councillors, sporting contestents, riders and drivers in certain races and outworkers); and France (the Labour Code establishes this presumption with respect to models (section L7112-1), professional journalists (section L7121-3), entertainers (section L7313-1), travellers, representatives or market stall holders (section L7211-2), janitors, employees, housekeepers or cleaners of residential buildings. French law also establishes the presumption of a non-employment relationship in the case of natural persons registered in the various professional registers, such as the register of trade and companies, trades, road passenger transport companies, etc.). Similar provisions exist in Mexico (Federal Labour Act, section 285) and Spain (Royal Decree No. 1006/1985 regulating the special employment relationship of professional sportspersons).
(d) Conditions and indicators

237. While the Recommendation does not define the employment relationship, Paragraph 12 encourages Members to clearly define the conditions (factors) applied to determine the existence of an employment relationship, listing two such examples: subordination and dependence.

238. The employment relationship has traditionally been described as a dependent relationship defined by these two elements. In some countries, the legislation refers to “legal subordination” and “economic dependency”. Additional factors are also used in many countries for the determination of an employment relationship. Some of the more common factors used include: the level of subordination to the employer, whether work is for the benefit of another and whether it is under instruction.

(i) Subordination

239. In many countries, the dependent relationship is demonstrated by a situation of subordination in which the employee is required to follow the instructions of the employer. This presupposes that the employee may freely leave the employer when he or she so chooses or freely chooses to follow the instructions (otherwise the situation could be one of forced labour). In many cases, subordination and dependency are synonymous, and are characterized by three elements – directional power, power of control and disciplinary power – exercised by the employer over the employee.

![Figure 2.2](source: G. Casale: The employment relationship: A comparative overview, 2011, op. cit.)
(ii) Economic dependency

240. National labour legislation also frequently refers to economic dependency, which is present where: the remuneration received by the worker from the employer constitutes his or her only or main source of income; the remuneration is paid by a person or enterprise in exchange for the worker’s activity; and the worker is not autonomous and is economically linked to the sphere of activity in which the employer operates.

United States – In Dynamex Operations West, Inc. v. Superior Court, the Supreme Court of California (US) considered that “here the hiring entity is a delivery company and the question whether the work performed by the delivery drivers within the certified class is outside the usual course of its business is clearly amenable to determination on a class basis. As a general matter, Dynamex obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages …”.

241. In many cases, this factor is used as a supplementary means of proof when doubts subsist as to the employment relationship. This element has gained importance in some countries that have adopted legal categories (such as dependent self-employed workers), in which economic dependency is a dispositive factor.

Panama – The Labour Code, section 65, provides that: “Economic dependence exists in any of the following cases: (1) when the amounts received by the natural person rendering the service or performing the work constitute the workers’ sole or principal source of income; (2) when the amounts referred to in the previous subsection come directly or indirectly from a person or company, or as a consequence of its activity; (3) when the natural person who provides the service or performs the work does not enjoy economic autonomy, and is economically linked to the activity undertaken by the person or company that can be considered as an employer. In case of doubt about the existence of an employment relationship, the proof of economic dependence determines that the relationship shall be so qualified.”

242. In addition to the factors or conditions referred to in Paragraph 12, the Recommendation also encourages Members to set out in their laws, regulations or through other means, specific indicators to be considered in determining the existence of an employment relationship. Paragraph 13 of the Recommendation provides a non-mandatory, non-exhaustive list of two types of indicators or criteria. One focuses on characteristics that demonstrate economic dependency, while the other focuses on how, when and where work is performed and the characteristics that demonstrate subordination (the left and right columns in figure 2.3 below).

243. These indicators aim at assisting in determining whether, irrespective of how it is described by the parties, the relationship between them is indeed an employment relationship. These indicators assist in the determination of subordination, dependency or other factors that may be used to establish an employment relationship, and take into consideration the evolving nature of the relationship. The indicators may be established by law.

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216 For example, Australia, Namibia (Labour Amendment Act, No. 2 of 2012, section 128A), Norway (Working Environment Act, section 14), Philippines (Order No. 147 of the Department of Labor and Employment, section 3) and Portugal (Labour Code, section 12).
by the courts or even through social dialogue. In some countries, the law provides that whenever a certain number of indicators are present, an employment relationship shall be presumed. National courts generally apply an established set of indicators \textit{(faisceau d’indices)} in examining the relationship. Some trade unions request that the law codifies the criteria for determining the existence of an employment relationship, while others consider that, on the contrary, this will restrict judges’ freedom to evaluate the real relationship.

\textit{Bolivarian Republic of Venezuela} – The Basic Labour Procedure Act, section 116, provides that indicators and presumptions are auxiliaries established by law or by case law with the object of corroborating and supplementing the means of proof.

The NZCTU from \textit{New Zealand} calls for consideration of changes to the law to codify criteria for employment in statute.

The TUC (\textit{United Kingdom}) considered that the existing common law tests on employment status in employment law or tax law should not be codified in legislation. Codification would restrict the ability of the courts to adapt and apply the tests to new emerging forms of work, including platform work.

\[317\] For example, \textit{Australia} (Stevens \textit{v}. Broadribb Sawmilling Co.), \textit{Croatia}, \textit{Ireland}, \textit{Jamaica}, \textit{Mauritius} and \textit{Sweden}.

\[318\] For example, \textit{Ireland} (Programme for Prosperity and Fairness: Employment Status Group: Code of Practice for determining employment or self-employment status of individuals, 2007).


\[320\] For example, \textit{France} and \textit{Belgium}. In most Latin American countries, the courts use indicators to determine the existence of subordination.
The IOE indicates that the criteria and indicators, as well as the presumption of employment relationships set out in Recommendation No. 198 pose a risk in that many independent contractor relationships may be mischaracterized as employment relationships, giving rise to new uncertainties and threatening many enterprises in the service industry. In the Employers’ view, the Recommendation goes beyond disguised employment relationships and its provisions interfere with legitimate civil and commercial relationships. These issues are still relevant, particularly in light of the new ways of working that (digital) technology allows, including in the platform and gig-economies. In this respect, it is crucial to correctly classify the work relationship.

(iii) Multi-factor test

244. In some jurisdictions, however, the courts base their decisions on a combination of conditions, applying so-called “multi-factor” tests. Each factor is examined and analysed in relation to each other, and no single factor is dispositive. The factors should be considered in their totality to determine whether a worker is subordinate or economically dependent on the employer, and should thus be considered an employee.

Australia – The courts have identified key indicators to help distinguish between employees and independent contractors. They consider the “totality” of the relationship, having regard to a number of factors, none of which is solely determinative. These factors include: the terms of the contract; who controls how the work is performed and the degree of that control; hours of work; expectation of work; who bears the risk; whether wages are paid; whether tools and equipment are supplied; and how tax is paid.

245. Many jurisdictions do not distinguish between conditions and indicators, and use such terms as “factors”, “conditions”, “indicators”, “criteria” and “tests” interchangeably, without making a clear distinction between them. Some authorities consider that indicators are too rigid, as their strict application may exclude many workers who should be considered to be in an employment relationship. For example, subordination or control may be inadequate to serve as a principal benchmark in the case of professional workers who enjoy objective

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321 For example, in the United States, the Equal Employment Opportunities Commission manual establishes that “The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker’s work performance. This determination requires consideration of all aspects of the worker’s relationship with the employer. Factors indicating that a worker is in an employment relationship with an employer include the following: The employer has the right to control when, where, and how the worker performs the job. The work does not require a high level of skill or expertise. The employer furnishes the tools, materials, and equipment. The work is performed on the employer’s premises. There is a continuing relationship between the worker and the employer. The employer has the right to assign additional projects to the worker. The employer sets the hours of work and the duration of the job. The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job. The worker does not hire and pay assistants. The work performed by the worker is part of the regular business of the employer. The employer is in business. The worker is not engaged in his/her own distinct occupation or business. The employer provides the worker with benefits such as insurance, leave, or workers’ compensation. The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes). The employer can discharge the worker. The worker and the employer believe that they are creating an employer-employee relationship. This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.”

322 See for example, Federal Court of Australia, *ACE Insurance Limited v. Trifunovski* [2013] FCAFC 3, and High Court in *Hollis v. Vabu Pty Ltd* [2001] HCA 44.
independence in carrying out their work due to their high level of skills. These factors may also give rise to difficulties in determining the employment status of homeworkers.

246. The Committee notes that the interpretation of some indicators may be problematic in certain cases. For example, the provision of materials, machinery and tools by the worker is often considered as an indicator of the inexistence of an employment relationship. However, in some cases, such as in homework, workers normally use their own materials. This also happens in digital platform work, where workers provide their bicycles or their computers. For example, in delivery services provided through a digital application, the bicycle or motorcycle used by the person making the delivery does not constitute the essence of the business, and it is instead a service provided through the algorithm that manages and evaluates the work performed. While noting that, in general, the material provided by workers does not necessarily constitute the essence of the business, the Committee considers that this element alone could not be taken as the only determinant of an employment relationship, as there may be other elements or indicators that more clearly demonstrate the essence of the business and the true relationship that exists between the parties, and the manner in which workers are integrated in the main business.

247. Consideration of “mutuality of obligations” as an indicator of an employment relationship, interpreted in some jurisdictions as “continuity of obligations”, might have the effect of excluding many casual workers who do not work on a continuing basis. Moreover, in such situations as workers covered by zero-hours contracts, this indicator would not appear to encompass situations in which the existence of an “umbrella contract” or “global employment agreement” allows a multiplicity of casual individual contracts (see the section below on zero-hours contracts). Another indicator that requires careful consideration, particularly in light of new and emerging forms of work, such as platform work and new forms of the organization of work in supply chains, is the worker’s “integration in the business organization”. Due to the diversification of employment relationships, it is important to identify and consider the main objective of the business and the role of the specific worker in fulfilling this objective. This is particularly the case where reporting lines are blurred, control hierarchies are not readily apparent or workers are not in one established workplace, but are scattered around different locations. In such cases, the fact that the activities carried out by the worker are integrated

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323 See in this respect, V. De Stefano and A. Aloisi, European legal framework for “digital labour platforms”, European Commission, Luxembourg, 2018, p. 32.
2. The employment relationship

in the organization of the business could demonstrate the existence of a closer link between the worker and the employer than is described in the contract. This factor can be crucial in determining responsibilities in situations of agency work, subcontracting and complex supply chains (see also the concept of employer below).

Sri Lanka – The Supreme Court, in *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation*, citing a previous decision, found: “In my judgment, it is really not possible, in Mr Atiyah’s words to lay down ... a number of conditions which are both necessary to, and sufficient for, the existence of ... (a contract of service). The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly, no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.”

United States. On 10 September 2019 the California Senate passed legislation known as AB 5 – a law codifying the “ABC test” from the landmark *Dynamex v. Superior Court* case, 4. Cal. 5th 903 (2018), to determine whether a service provider is an independent contractor or employee. The ABC test provides that, to classify a worker as a contractor instead of an employee, the hiring entity must prove each of the following three factors: (1) the worker is free of control from the company, both under contract and in fact; (2) the worker performs work outside the usual course of the hiring entities business; and (3) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed. The failure to prove any one of the three above factors would render a worker an employee of the hiring entity.

249. The relevance of each factor and indicator is very much determined by the nature of the work and the conditions in which it is carried out in each specific case. In the event of dispute, it is for the courts or other dispute resolution bodies to determine on a case-by-case basis whether or not an employment relationship exists in light of the legally established indicators or factors. It is important in this respect to assess the manner in which new technologies may enable new forms of remote control, such as in telework arrangements. Moreover, control may no longer be exercised directly or solely by the employer. For example, in the platform economy, control is partially exercised through evaluations made by clients.

United Kingdom – The *Employment Status Manual (HMRC, 2016)* indicates, in the section on determining status, that: “In deciding whether a person is in business on his own account or working under the control of and as part of the business of another, a variety of factors are relevant. ... The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case.”
250. The Committee emphasizes that the conditions and indicators described in Paragraphs 12 and 13 of the Recommendation should not be considered exhaustive, nor do they establish any hierarchy. The elements set out in the Recommendation leave room for the establishment of others at the national level, and it is also necessary to take into account the evolution of the employment relationship, and the consequent requirement for new means of proving its existence. Current indicators may no longer be useful in determining the existence of future employment relationships. Member States should therefore consider the need to establish new criteria and disregard existing criteria when they are no longer useful. This would be in accordance with Paragraph 1 and the need to periodically review, clarify and adapt the scope of relevant laws to guarantee the effective protection of workers in an employment relationship.

3. Personal scope

251. The elements gathered through presumptions, factors and indicators serve to determine whether or not the employment relationship exists (Paragraph 4(a)). Although the Recommendation does not provide a definition of “employer” or “dependent employee”, the great majority of national laws, regulations and case law do.

(a) The employer

252. As the counterpart of the worker in the employment relationship, the employer has received much less attention than the worker. Courts are generally concerned to determine whether or not a worker is an employee. But neglecting the definition of employer may result in reduced protection for workers. In the traditional bilateral employment relationship, the employer is conceived as a singular person who coincides with the enterprise. However, transformations in the economic organization of enterprises have also had an impact on the concept of the employer, which is now envisaged as a plural subject. This is more evident in employment relationships involving multiple parties, in which it is more difficult to identify the real employer, or where responsibilities are distributed among a group of employers. This is sometimes referred to as the bifurcation of the employer’s function.

253. In most cases, the national legislation provides a definition of a singular employer and its representatives. The term “employer” is used to refer to a natural or legal person for whom an employee performs work or provides services within an employment relationship. There are also some countries in which the law does not define employer, leaving the issue to the judiciary. In some cases, the concept is only deduced from the definition of worker.

254. Courts have endeavoured to address this situation when trying to determine the true employer in a relationship by examining factors relevant to the employer–employee relationship, such as the selection process, hiring, training, discipline, evaluations, supervision and the assignment of duties, remuneration and integration into the business. In such cases, the end user may be found to be the “true” employer for the purposes of the claim.
2. The employment relationship

255. In addition, some countries have begun to gradually incorporate, in jurisprudence and even in the legislation, a broader concept of employer in the case of group undertakings and networks of enterprises which recognizes the notion of associated employers or co-employers.

*Canada* – The courts have held that: “... when there is a certain splitting of the employer’s identity in the context of a tripartite relationship, a comprehensive 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.”

*Italy* – Act No. 99/2013 amended section 30 of Legislative Decree No. 276/2003 to recognize enterprise networks that are allowed to co-employ workers, in accordance with the engagement rules established in the network contract.

*Italy* – the Civil Court of Cassation found that: “In the presence of a group of companies, the interference of the parent company in the management of the employment relationship of employees in the companies in the group, which exceeds the role of general management and coordination to which it is entitled with regard to the activities of its subsidiaries, determines that the Board of Directors of the parent company is considered to be an employer, as it is the actual user of the service and the owner of the production organization in which the work has been carried out in a subordinate manner.”

256. Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union recognizes the possibility of multiple employers, including the fact that the person or persons ultimately responsible for the execution of the obligations for employers are not party to the employment relationship. Other jurisdictions have addressed this bifurcation of the employer through recognition of the vicarious liability of employers and subcontracting enterprises.

*Brazil* – The Consolidation of Labour Laws, section 2(2), provides that: “Whenever one or more enterprises, each with its own legal personality, constitute an industrial or commercial group, or for any other economic activity, the principal enterprise and each of the subordinate enterprises shall be jointly and severally liable for the effects of the employment relationship.”

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336 See also United States: the National Labour Relations Board (NLRB) has proposed a regulation establishing the standards for determining joint employer status.
337 Cassazione Civile, 29 November 2011, No. 25270. See also, European Court of Justice, the “Heineken” case, *Albron Catering BV v. FNV Bondgenoten and John Roest*, Case No. C-242/09, 21 October 2010.
338 Article 1(5).
339 Similarly, for example, *Panama* (Labour Code, sections 88–90).
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(b) The traditional binary approach: Employee or self-employed

257. The Recommendation adopts a binary approach to the definition of employee: either the worker is in an employment relationship, or is not. Paragraph 4(a) refers to the need to clearly establish the distinction between employed and self-employed workers. However, current realities are not clear and a range of workers remain in the grey zone between these two categories. The increased occurrence of work outside the traditional employment relationship challenges the validity of a binary distinction between employment and self-employment.

(i) Employee

258. The 2003 ILC Conclusions indicate that the term “employee” is “a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship. The term “worker” is a broader term that can be applied to any person who works.”

259. The Recommendation, instead of providing a definition, contains guidance on the determination of the employment relationship to which the employee and the employer are parties.

260. The legislation in most countries establishes a definition of “employee”, in relation to which the main elements referred to are subordination, the provision of work to another person and the receipt of remuneration in exchange.

Germany – In accordance with section 611a of the Civil Code (BGB):

“An employee is any person who, pursuant to a civil law contract, is expected to perform a working activity ... subject to instructions by a third party on whom the person is personally dependent ...; (a) The right to give instructions can concern the content, performance, time, duration and place of the activity; (b) An employee is any person who cannot essentially determine freely his/her activities and his/her working hours; (c) The degree of personal dependency shall also be determined by the specific nature of the activity in each case.”

(ii) Self-employed worker

261. When the factors or indicators required for the establishment of the employment relationship are not present, the worker is often considered to be self-employed. Although normally considered a residual category, in terms of its legal definition, more and more workers are being classified as self-employed, depending on the work arrangement.

262. The increase in self-employment rates in certain countries is a response to the desire of workers for more autonomy and the development of self-entrepreneurship, or to a contracting labour market. Platform work has also affected the increase in self-employment.

Self-employed workers fall within the category of workers, and as such are entitled to all the fundamental principles and rights at work, even though in many cases these rights (particularly freedom of association, collective bargaining and non-discrimination) are not recognized for them, as noted by Committee of Experts and the Committee on Freedom of Association (see chapter VI). In some countries, self-employed workers enjoy certain labour rights, for example in relation to occupational safety and health or social protection.

341 See, for example, Burkina Faso (Labour Code, section 2).
342 Some trade unions such as the CGT RA from Argentina refer to the tendency to foster self-employment relations over the dependent one.
344 For example, Belgium (Social Criminal Code, sections 43–49 and chs IV and V) and Italy (Legislative Decree No. 81 of 2008).
263. Self-employed workers are normally excluded from the coverage of labour legislation, and no definition of this category is therefore normally set out in national labour legislation.\textsuperscript{345} In their reports, some countries indicate that the condition of being self-employed is deduced from the absence of elements characterizing employees.\textsuperscript{346}

264. If a worker is not considered to be an employee, is not integrated in a business or where he or she assumes personal business risks, she or he is generally considered to be self-employed.\textsuperscript{347} As a residual category, the self-employed are engaged in a vast range of heterogeneous economic activities. In the end, it is the role of the courts to determine whether or not a specific economic activity in itself is to be considered as being carried out within an employment relationship. For instance, many circumstances that would be considered as self-employment could, following closer scrutiny, be considered as constituting an employment relationship. The fact of working for only one client, with the consequent economic dependency, has been assimilated to subordination. The provision of services to a multiplicity of clients or customers has not been considered, in some limited cases, as an indicator of independence, for example in the case of domestic workers, carers or nurses.\textsuperscript{348} Similarly, ownership of tools, materials, and even the workplace, as already seen, does not exclude qualification as an employee.\textsuperscript{349}

265. In case of doubt, lack of clarity or the absence of legal provisions, responsibility for the determination of the employment status of workers lies with the judiciary or specific institutions established at national level for this purpose.\textsuperscript{350}

266. Self-employed workers are sometimes covered by specific laws or regulations.\textsuperscript{351} However, in an increasing number of countries, a definition of self-employed workers is established in labour or employment law,\textsuperscript{352} although they are more commonly defined in the civil code,\textsuperscript{353} commercial code,\textsuperscript{354} or social security,\textsuperscript{355} tax\textsuperscript{356} or health insurance\textsuperscript{357} regulations.

\textit{Colombia} – Section 34 of the Substantive Labour Code defines independent contractors (the self-employed) as “natural or legal persons who contract the execution of one or several tasks or the rendering of services for the benefit of third parties, for a determined price, assuming all the risks, to carry them out with their own means and with freedom and technical and managerial autonomy”.

\begin{itemize}
  \item \textsuperscript{345} For example, \textit{Canada}, \textit{New Zealand} and \textit{Seychelles}.
  \item \textsuperscript{346} For example, \textit{Burkina Faso}.
  \item \textsuperscript{347} Contouris and De Stefano: \textit{New trade union strategies for new forms of employment}, 2019, op. cit., p. 34.
  \item \textsuperscript{348} For example \textit{France} (Labour Code, section L7231-1 C-trav).
  \item \textsuperscript{349} Contouris and De Stefano: \textit{New trade union strategies for new forms of employment}, 2019, op. cit., p. 35.
  \item \textsuperscript{350} For example, the Government of \textit{Canada} indicates in its report that the Canadian Association of Administrators of Labour Legislation (CAALL) had recently discussed the issue of the status of workers as independent contractors or as employees.
  \item \textsuperscript{351} For example, \textit{Morocco} (Act No. 114-13 on self-entrepreneurship) and \textit{Spain} (Act No. 20/2007 regulating the status of self-employment).
  \item \textsuperscript{352} For example, \textit{Colombia} (Substantive Labour Code, section 34), \textit{Lithuania} (Law on Employment, section 5) and \textit{Namibia} (Labour Act 2012).
  \item \textsuperscript{353} For example, \textit{Austria} (Civil Code, section 1151) and \textit{Italy} (Civil Code, section 222).
  \item \textsuperscript{354} For example, \textit{Germany} (section 84(1)).
  \item \textsuperscript{355} For example, \textit{Bulgaria}, \textit{Croatia}, \textit{El Salvador}, \textit{Gabon}, \textit{Jamaica}, \textit{Latvia}, \textit{Switzerland}, \textit{Trinidad and Tobago}, \textit{Turkey}, \textit{United Arab Emirates} and \textit{United Kingdom}.
  \item \textsuperscript{356} For example, \textit{Armenia} (Law on taxation privileges of persons, section 1) and \textit{Slovakia} (Act No. 595/2003).
  \item \textsuperscript{357} For example, \textit{Costa Rica}.
\end{itemize}
2. The employment relationship

(c) Third categories? Dependent self-employed workers or other categories

267. A grey zone has always existed between employed and self-employed workers. However, recent changes in the organization of work, together with technological developments, has resulted in an expansion of this grey zone.

268. In 1998, the main objective of the ILC was to address the categories left out of the protections provided by the law. In 2003, such workers were described as those “who perform work or provide services to other persons within the legal framework of a civil or commercial contract, but who in fact are dependent on or integrated into the firm for which they perform the work or provide the service in question”. However, in 2006, the Conference addressed the scope of the employment relationship as a whole, instead of addressing only specific categories of unprotected workers. As a result, the Recommendation adopted the binary approach that workers may be either employees or self-employed (Paragraph 4(a)).

269. Although not covered by labour law, the systems in some countries have progressively recognized some level of protection for certain categories of workers who do not fall squarely under the concepts of employee or self-employed worker and are commonly designated as “dependent self-employed” or “economically dependent” workers. Although formally self-employed, and not therefore covered by labour law, they remain economically dependent on a single principal client/employer for their source of income. In this intermediate situation, they retain more or less discretion concerning the manner and timing of the performance of their work, but are economically dependent on the payment of fees or wages. This is a form of self-employment in which the worker performs services for a person or business under a contract that is different from a contract of employment, depends on one or a small number of clients for income and receives instruction concerning how the work is to be performed.

The CTA Autónoma from Argentina and the FNV and CNV from the Netherlands refer to the need to address the difficulties in establishing a difference between dependent and self-employed workers. The FNV and CNV expressly indicated that they refuse that a third category of workers between employees and employers be created. Either the person is a real entrepreneur with capacity to negotiate and the means to insure him or herself, or he or she is unable to negotiate, depends on one or more clients and thus should be considered an employee.

The NZCTU from New Zealand supports the review in the country of the situation of dependent contractors.

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358 During the 1998 ILC discussion on contract labour, many countries expressed opposition to the creation of this third category, in which workers have diminished protection. During the 2000 Meeting of Experts, dependent self-employed workers were described as autonomous workers who continue to provide services on a relatively continuous basis to one or a small number of persons, on whom they depend for their work and livelihood. This concept covers situations which fall between the two established concepts of subordinate employment and independent self-employment.

In various European countries, at least some labour protections have been extended to dependent self-employed workers, although the level of protection and even the definition of “dependent self-employment” varies between countries. Some jurisdictions focus on economic dependency, while others give precedence to the role of the worker in the employer’s business. In the European Union, dependent self-employment includes persons classified as self-employed who do not meet one or more of the following criteria: they have more than one client; they have the authority to hire staff; and/or they have the authority to make important strategic decisions about how to run the business. The objective is to safeguard the legal status of economically dependent and vulnerable self-employed workers who remain in the grey zone between employed and self-employed workers.

It is important to highlight that these new measures appear not to have succeeded in breaking the binary division between employment and self-employment. Dependent self-employed workers are referred generally as a subgroup of the self-employed. Measures have been adopted in certain countries such as Austria, Germany, Italy, Ireland, Spain and the United Kingdom establishing this category of workers. However, they are not necessarily equal. The main characteristic is that labour and social protection has been extended beyond employment. They all fit the “modified binary divide” model.

Source: Eurostat (Ifso, 17csna).

Figure 2.4

Self-employed persons by professional status and economic activity EU-28, 2017 (percentage of professional status)

Activities of households as employers; producing activities of households for own use
Independent self-employed without employees
Dependent self-employed without employees

Other service activities
Real estate activities
Financial and insurance activities
Accommodation and food service activities
Construction
Human health and social work activities
Professional, scientific and technical activities
Transportation and storage
Education
Information and communication
Manufacturing
Arts, entertainment and recreation
Administrative and support service activities
Agriculture, forestry and fishing
Wholesale and retail trade; repair of motor vehicles and motorcycles

Source: Eurostat (Ifso, 17csna).
Some examples of dependent self-employment

**Germany** – Section 12a (1) of the Act on Collective Agreements states the following:

“The provisions of this Act shall apply mutatis mutandis

1. For persons who are economically dependent and comparable to an employee in their need of social protection (employee-like persons) if they work for other persons on the basis of service or work contracts, render the owed services personally and essentially without the cooperation of employees, and

(a) work predominantly for one person, or

(b) they are entitled to an average of more than half of a person’s remuneration for their total gainful employment; (...),

2. For the persons referred to in point 1, for whom the employee-like persons work, as well as for the legal relationships established between them and the employee-like persons by service or work contracts [civil law contracts]. This “employee-like persons” (arbeitnehmerähnliche Personen) have also the right to 24 days paid annual leave every year, occupational safety and health and protection against discrimination.

364 According to the German courts, “arbeitnehmerähnliche Personen” are economically but not personally dependent (Federal Court of Labour, 15 November 1991).

365 The Committee notes that this issue presents considerable challenges with respect to antitrust law and the right to collective bargaining of independent contractors particularly taking into account the ECJ decision in *FNV Kunsten Informatie en Media v. Staat der Nederlanden*.
Canada – The Labour Relations Act, 1995 defines the dependent contractor as: a person 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.  

Ireland – The Competition (Amendment) Act of 2017, section 15D, introduces two categories of workers over and above “employees”, one of which is the “fully dependent self-employed worker”, who is an individual: “(a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and (b) whose main income in respect of the performance of such services under contract is derived from not more than 2 persons”.

Italy – “Parasubordinazione” was addressed by section 409(3) of the Code of Civil Procedure, as amended by Act No. 533 of 1973, which applies to workers who collaborate with a principal client under a continuous, coordinated and predominantly personal relationship, even if subordinate by nature. They were granted access to the labour courts and (minimum) pension/social security coverage by the “Dini reform” of 1995. The main characteristics of parasubordination are: (i) continuity of the relationship; (ii) coordination between the worker and the client; and (iii) the predominantly personal provision of labour. Legislative Decree No. 81 of 2015, section 2, applies the characteristics of the subordinate work relationship to collaborative relationships in which the work performed is exclusively personal, continuous and the arrangements for its performance are organized by the client also in terms of the time and place of the work. Some differences with self-employment subsist between the parasubordinatti and the self-employed, as the former have access to the labour courts and are subject to higher social security contributions.

Spain – Act No. 2007/20, section 11, defines “economically dependent self-employed workers” (trabajadores autónomos económicamente dependientes – TRADE) as workers who: (a) perform an economic or professional activity in return for payment in a regular, personal, direct and predominant manner for an individual or organization, called the client; and (b) whose income is derived for at least 75 per cent from the client. They have the right to collective bargaining, but not the right to strike, and are entitled to annual leave.

United Kingdom – The category of “worker” is an intermediate category between “employee” and “self-employed”. Workers are entitled to certain employment rights, including: the national minimum wage; protection against unlawful deductions from wages; the statutory minimum level of paid holiday; the statutory minimum length of rest breaks; to not work more than 48 hours on average per week, or to opt out of this right if they choose; protection against unlawful discrimination; protection for whistleblowing (reporting wrongdoing in the workplace); and to not be treated less favourably if they work part time. They may also be entitled to statutory sick pay, statutory maternity pay, statutory paternity pay, statutory adoption pay and shared parental pay.

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366 Although there has been some departure from previous case law in this respect. See in this regard: McKee v. Reid’s Heritage Homes Limited [2009] ONCA 916 and Thurston v. Ontario (Children’s Lawyer) [2019] ONCA 640.

367 See, in this regard, HM Revenue and Customs (HMRC): “Employment status”.
(d) **Statistical concepts**

272. International labour standards do not establish common definitions of employee, employer or self-employed worker. For statistical purposes, however, the ICLS has periodically adopted uniform criteria and definitions of these terms to ensure that the statistics collected at the national level are reliable and comparable. These statistical definitions do not replace legal definitions, as their purpose is different. They serve to seize a situation and gather data on the incidence of a phenomenon at the national and international levels. The statistical category is the result of an observation in reality without there being any type of prejudice regarding the desirability or not of the phenomenon. In contrast, the establishment of a legal category implies attaching to it attributes, rights and responsibilities. **The Committee encourages governments to take the necessary measures to collect information on the basis of the statistical concepts developed by the ICLS to enable policymakers and the social partners to gain a better understanding of the national and global situation, particularly with respect to dependent contractors, for which data appears to be scarce.**

### Resolutions concerning employment status

**Employers**

Employers are those workers who, working on their own account or with one or a few partners, hold the type of job defined as a “self-employment job”, and, in this capacity, on a continuous basis (including the reference period) have engaged one or more persons to work for them in their business as “employee(s)”. The meaning of “engage on continuous basis” is to be determined by national circumstances, in a way which is consistent with the definition of “employees with stable contracts”.

**Employees and employed workers**

Employees are those workers who hold the type of job defined as “paid employment jobs”. Employees with stable contracts are those “employees” who have had, and continue to have, an explicit (written or oral) or implicit contract of employment, or a succession of such contracts, with the same employer on a continuous basis. “On a continuous basis” implies a period of employment which is longer than a specified minimum determined according to national circumstances. (If interruptions are allowed in this minimum period, their maximum duration should also be determined according to national circumstances.) Regular employees are those “employees with stable contracts” for whom the employing organization is responsible for payment of relevant taxes and social security contributions and/or where the contractual relationship is subject to national labour legislation.

**Self-employed workers**

Self-employment jobs are those jobs where the remuneration is directly dependent upon the profits (or the potential for profits) derived from the goods or services produced (where own consumption is considered to be part of the profits). The incumbents make the operational decisions affecting the enterprise, or delegate such decisions while retaining responsibility for the welfare of the enterprise. (In this context “enterprise” includes one-person operations).

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368 The Committee recalls in this regard the relevance of the Labour Statistics Convention, 1985 (No. 160).
Resolution concerning statistics on work relationships

The Resolution classifies work according to the type of economic risk and type of authority. The classification based on the type of economic risk establishes a dichotomy between employment for pay and employment for profit which is analogous to the traditional distinction between paid employment and self-employment. Workers in employment for profit are assimilated to self-employed workers, who include independent workers in household market enterprises, dependent contractors and contributing family workers.

Dependent contractors

Dependent contractors are workers with contractual arrangements of a commercial nature (but not a contract of employment) to provide goods or services for or through another economic unit. They are not employees of that economic unit, but are dependent on that unit for organization and execution of the work, income, or for access to the market. They are workers employed for profit, who are dependent on another entity that exercises control over their productive activities and directly benefits from the work performed by them. (a) Their dependency may be operational (organization of the work) and/or economic (control over access to the market, price for the goods, or services or access to raw materials or capital items. ... (c) The activity of the dependent contractor would potentially be at risk in the event of termination of the contractual relationship with that economic unit. Dependent contractors are employed for profit and paid by way of a commercial transaction. They are therefore usually responsible for arranging their own social insurance and other social contributions...

273. It was recognized during the preparatory work for the Recommendation that vast categories of workers, despite being in an employment relationship, are not protected. Two important phenomena were observed when the Recommendation was adopted in 2006, and are still relevant. One is the outsourcing of functions within the enterprise (described in some Latin American countries as deslaboralización) either to other enterprises or to self-employed workers (with varying degrees of independence). The other is the gradual replacement of the full-time, open-ended, with-one-employer and in the workplace relationship (or standard employment relationship) by other contractual arrangements.372

1. Different forms of employment relationships

274. Recommendation No. 198 is silent respecting the various forms of the employment relationship. The only specific contractual arrangement explicitly mentioned is the multiple-party employment relationship. However, as provided for in Paragraph 4(c) and (d), the Recommendation applies to all contractual arrangements in which an employment relationship can be demonstrated, which may range from traditional full-time, open-ended, permanent and one-employer relationships to part-time, fixed-term, intermittent and multi-party relationships, or a combination of the two.373

The Bulgarian Industrial Association (BIA) submitted proposals for amendments to the Labour Code for more flexible forms of employment.

The NZCTU from New Zealand supports the adoption of regulation concerning triangular employment relationships.

According to the TUC of the United Kingdom, the issue of employment status has long been a problem for workers and their employers. Indeed, the current rules on status are complex and confusing. Partial deregulation of labour markets allowed for a wider use of temporary contracts and agency work, by expanding their scope to jobs that were not temporary in nature and by increasing the allowed duration and number of renewals. Involuntary part-time, including on-call work and zero-hour contracts have also increased. The TUC indicates that thanks to several union-backed cases, the courts and tribunals have rightly concluded that staff employed in the gig economy have many of the features of standard employment relationships and are therefore entitled to rights. These developments are welcome. But this does not mean that the issue of status is finally resolved. The problems relating to employment status are also not limited to the so-called gig economy but can be found across more traditional workplaces and sectors. The TUC believes that all workers, including agency workers, zero-hours contract workers and casual workers, should be entitled to the same floor of rights currently enjoyed by employees. A new single and broad “worker” definition should be adopted in UK employment law.

371 Measures concerning the protection and equality of opportunity and treatment of all workers in contractual arrangements are addressed in ch. VI.
372 These contractual arrangements are also known as non-standard forms of employment. See for example in this respect: ILO: Non-standard employment around the world: Understanding challenges, shaping prospects, 2016, op. cit. See also B. Wass, G. van Voss (eds): Restatement of Labour Law in Europe, Volume II: Atypical employment relationships (Hart Publishing, UK, 2020).
373 Home work and telework are examined in ch. IV.
275. These various types of contractual arrangements lie within the framework of the employment relationship and as such should enjoy adequate protection. However, as noted below, differences exist concerning the rights and protections that workers enjoy under different contractual arrangements.\textsuperscript{374} Greater attention is required in this regard as full-time, open-ended and permanent employment relationships have been progressively losing ground in relation to other types of employment relationships. Moreover, while other contractual arrangements may fall within the scope of the employment relationship, they may not fulfil the objectives of Convention No. 122 of the promotion of full, productive and freely chosen employment.\textsuperscript{375} Workers covered by such arrangements may be compelled to accept these conditions if they are unable to secure traditional employment. They may be underemployed and unable to realize their potential, and often lack access to training and opportunities for advancement. On many occasions, the principle of equality of opportunities and treatment is directly not respected, although many countries have taken measures in this respect as will be seen in chapter VI.

276. As the labour market continues to evolve, and new forms of the organization of work and new work arrangements emerge, there is a blurring of roles that often has the effect of shifting onto the worker risks and responsibilities that were formerly borne by the employer. Examples include digital labour platforms and supply chains.

\textsuperscript{374} In this regard, for example, the Termination of Employment Convention, 1982 (No. 158), provides that a Member may exclude from the protection workers engaged under a contract of employment for a specified period of time or a specified task (Article 2(2)(a)).

\textsuperscript{375} There are, however, some legal provisions that facilitate moving from temporary to open-ended contracts. For example, Italy with the aim of ensuring transparency and proper coordination of employment incentives, section 30 of Legislative Decree No. 150 of 14 September 2015 establishes the national inventory of employment and labour incentives, which includes an incentive to turn a fixed-term contract into an indefinite contract for young people under the age of 35 (under 30 years as from 1 January 2019).
277. In contrast with permanent or open-ended jobs, temporary employment exists when workers are engaged for a specific period of time. These arrangements include fixed-term, project- or task-based contracts, as well as seasonal or casual work, including day labour. Both permanent and fixed-term contracts can be written or oral, formal or informal.

**Brazil** – The Temporary Work Act was amended by Act No. 13,429 of 31 March 2017 to clarify the scope of temporary contractual arrangements and the procedures for the registration of temporary employment. It also includes other provisions designed to give the parties the necessary legal certainty.

**Notes**

276 The measures taken by governments to address workers' rights in this regard are dealt with in ch. VI.


The FKTU from the Republic of Korea indicates that temporary workers are excluded from some of the protections provided for in the law, such as the recently adopted regulations on the reduction of working time.

282. In most countries, fixed-term contracts are regulated by specific legal provisions limiting the maximum period for which they can be used, the number of successive renewals and the requirements justifying their use.

Bolivarian Republic of Venezuela – Section 60 of the Basic Labour Act (LOTTT) provides for the possibility of open-ended contracts, fixed-term contracts or project contracts. Fixed-term contracts may only be extended twice. Section 62 provides that, following these two extensions, the contract shall be considered permanent.

283. In general, workers on project- or task-based contracts are even more precarious than workers on fixed-term contracts, and often have unstable earnings due to contract gaps. Project- or task-based work often gives rise to limited social security contributions, does not provide maternity or sick-leave compensation, and does not entitle workers to unemployment benefit. Such workers also lack representation and are usually not covered by collective agreement. Moreover, they may have little, if any, contact with other employees, further limiting their ability to voice concerns and seek compensation in the event of occupational accidents or illness.

(ii) Casual work

284. The most common features of casual work are that it is: temporary, intermittent or seasonal; detached from the ordinary or permanent business activity of the employer; paid on a daily or hourly basis, or displays a combination of all these characteristics. The 1993 ICLS resolution concerning the International Classification of Status in Employment (ICSE) describes “casual workers” as “workers who have an explicit or implicit contract of employment which is not expected to continue for more than a short period, whose duration is to be determined by national circumstance”.

285. Casual work is defined or regulated in the labour legislation of over 40 countries, most of which are developing countries, although casual working arrangements are also regulated in industrialized economies. Enforcement of the provisions governing casual and daily work varies, and in some cases is non-existent.

Cambodia – The Labour Law, section 9, defines casual workers as those “engaged to perform an unstable job” and to “perform a specific work that shall normally be completed within a short period of time; perform work temporarily, intermittently and seasonally”.

380 ibid.
381 ibid.
382 ibid., p. 22.
Ecuador – The Labour Code, section 17, defines occasional contracts as those with the objective of dealing with emerging or extraordinary needs not related to the employer’s usual activity, the duration of which shall not exceed of 30 days in a year. The wage or salary paid for occasional contracts shall be increased by 35 per cent of the hourly amount of the basic wage in the sector.

Egypt – The Labour Code, Book One, defines “casual work” as work not naturally part of the business performed by the employer and which does not require more than six months to be completed.

286. Casual work is often informal and, as such, is very often assumed to be outside the scope of employment regulation. Moreover, it is often used to conceal other forms of more protected employment relationships. Digital Platform work is on many occasions casual work. In some countries, the law explicitly excludes casual workers from the employment relationship. Some national laws do not contain provisions on casual work, but instead cover daily or hourly work, although under conditions that are very similar to those of casual work. Casual work is sometimes regulated in the context of fixed-term contracts, or certain activities.

Brazil – Act No. 8,212 of 1991, section 12, provides that anyone who performs services of an urban or rural nature as defined in the regulations to several enterprises in the absence of an employment relationship shall be registered with the social security system as a casual worker.

287. In other cases, casual work is excluded from certain types of protection provided by law, such as protection against dismissal, rest periods, holiday and leave. It is sometimes possible to compensate leave through the payment of an indemnity. At the regional level, certain instruments explicitly exclude casual workers. Casual work is also considered in some international labour standards. The Committee would like to highlight that the use of casual work on a regular basis, to carry on activities that concern the main business of the enterprise contributes is a form of disguised employment relationship and contributes to the natural precariousness of this type of work.

384 For example, Qatar (Labour Law, section 3), Syrian Arab Republic (Labour Law, section 5), Sudan (Labour Code, section 3) and Yemen (Labour Law, section 3).
385 See in this regard, for example, V. De Stefano and A. Aloisi, European legal framework for “digital labour platforms”, 2018, op. cit., p. 32.
386 For example, Gabon (Labour Code, section 26), Lebanon (Labour Code, section 3) and Saint Lucia (Labour Code, section 95).
387 For example, Central African Republic (Labour Code, section 94) and Togo (Labour Code, section 49).
388 For example, France, casual workers are allowed in agricultural seasonal work.
389 For example, Costa Rica, (Labour Code, section 156).
391 The Workmen’s Compensation (Accidents) Convention, 1925 (No. 17), and the Sickness Insurance (Industry) Convention, 1927 (No. 24), allow the exclusion of casual workers not employed for the purpose of the employer’s trade or business. Convention No. 158 and Recommendation No. 166 also allow the exclusion of casual workers.
**Part-time work**

288. In part-time work, the normal hours of work are fewer than those of comparable full-time workers. In many countries, there are specific legal thresholds that define part-time compared with full-time work. The great majority of international labour standards do not make a distinction between full-time and part-time workers, although some specifically address their situation.

**Argentina** – Act No. 20744, section 92 ter, defines part-time contracts as those under which the worker is required to provide services for a certain number of hours a day or a week for less than two thirds of the normal working day. In this case, the remuneration may not be less than the proportional remuneration corresponding to a full-time worker, as established by law or collective agreement, in the same category or position. If the agreed working time exceeds this proportion, the employer must pay the corresponding remuneration of a full-time worker.

2. Part-time workers may not work additional or overtime hours, except as provided for in section 89 of this Act. Any failure to comply with the daily hours set out in the part-time contract shall give rise to the requirement for the employer to pay the wage for the full working day for the month in which it occurred, without prejudice to other consequences arising out of such non-compliance.

3. Social security and other contributions collected with them shall be paid in proportion to the worker’s remuneration and shall be consolidated in the event of multiple employment. In the latter case, the worker shall choose from among the social schemes to which the contributions are paid the one by which she or he will be covered.

4. Social security benefits shall be determined by regulation, taking into account the hours worked, the payments and contributions made. The payments and contributions made to the social scheme shall be those corresponding to a full-time worker in the same category as the worker.

5. Collective agreements shall determine the maximum percentage of part-time workers in each establishment who may work under this type of contract. They may also establish the priority for them to fill full-time vacancies in the company.

289. Part-time workers face discrimination in several ways due to their shorter working hours. They may be excluded from coverage by regulations or collective agreements, based on the number of hours they work or their earnings. They may also be subject to “less than proportional” treatment through the payment of lower wage rates for the same work or work of equal supply. Moreover, social benefit or labour protection provisions may be so designed that they do not take into account the circumstances associated with part-time work. Finally, they may experience discrimination in terms of work schedules, as well as access to training and career development opportunities, and they may encounter difficulties in exercising freedom of association and collective bargaining rights.

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392 As the Part-Time Work Convention, 1994 (No. 175), exceeds the scope of the present General Survey, the Committee refers to its previous Survey, *Ensuring decent working time for the future* ILC, 107th Session, 2018, Report III(Part B), ch. V. The present General Survey only addresses issues pertaining exclusively to the employment relationship, and the rights and protections ensured to part-time workers deriving from an employment relationship. See also, ILO: *Non-standard employment around the world: Understanding challenges, shaping prospects*, 2016, op. cit., especially chs 1, 2 and 6.

393 In addition to Convention No. 175 and its corresponding Recommendation No. 182, the ILO instruments that address part-time work include: the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), the Employment Promotion and Protection against Unemployment Recommendation, 1988 (No. 176), the Nursing Personnel Recommendation, 1977 (No. 157), and the Workers with Family Responsibilities Recommendation, 1981 (No. 165).
The DGB of Germany indicates that in early 2019, the time limit for short-term employment exempt from social security contributions was increased indefinitely from two months or 50 days to three months or 70 days (amendment to section 8, para. 1(2) of the Fourth Book of the Social Code (SGB IV)). The change makes it possible for the volume of work without paying social security contributions or receiving social protection to be extended indefinitely. The provision has been implemented on a large scale in enterprises. The DGB opposes this increase in the limit and, as in the case of mini-jobs, advocates transferring workers into regular employment that is subject to mandatory social insurance contributions.

United Kingdom – “Full-time, permanent work as an employee continues to make up the majority of employment … (63.0%). However, there has been a notable shift towards more flexible forms of working overtime, with changes in levels of self-employment and part-time working in particular. Currently, almost 26.2% of employment is in part-time work, compared to 25% in 1997 and self-employment now accounts for around 15.1% of total employment…. Part-time working has generally been on the rise for the past 20 years, hitting a high of 27.6% in 2012 suggesting that reduced hours working may have protected some jobs in the aftermath of the recession…. 12.4% of part-time workers say that they are working part-time because they could not find a full-time job. However, the majority of part-time workers (70.7%) say that they do not want a full-time job. This means that the ability to work part-time has benefitted around 18.4% of the total workforce who do not want a full-time job.”

(i) On-call work and zero-hours contracts
290. On-call work is an increasingly common form of part-time work that consists of working-time arrangements involving highly variable and unpredictable hours of work. On-call workers commonly receive very short advance notice of their work schedules, experience broad fluctuations in working hours and have little or no input into the timing of their work. Such arrangements have become increasingly common, particularly in industrialized countries, to enable employers to adapt quickly as business needs change. In Latin America, the concept of “hourly work” (trabajo por hora) has a similar meaning to “on-call work.”

394 The German minijob is a specific kind of employment whereby the employee earns no more than €450 per month. The system was developed to allow companies to hire staff without the insurance obligations, making it easier for part-time workers to take on another side job.

395 Good Work, op. cit., pp. 18 and 19.

396 In some developed countries, businesses use just-in-time scheduling software to determine “optimum staffing” in their stores, based on weather forecasts, sales patterns and other data. When sales are slower than foreseen, managers can send employees home before the end of a scheduled shift, or even cancel shifts at the last minute to reduce costs. In developing countries, although labour laws mainly include provisions on casual work and do not specifically address on-call work, these two forms of employment overlap to a certain extent. In Case C-518/15, the CJUE has recently determined that “Article 2 of Directive 2003/88 as applying to a situation in which a worker is obliged to spend stand-by time at his home, to be available there to his employer and to be able to reach his place of work within 8 minutes. It follows from all the foregoing that the answer to the fourth question is that Article 2 of Directive 2003/88 must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as ‘working time.’” European Union-Directive on Transparent and Predictable Working Conditions (Directive 2019/1152) contains provision on the need to provide workers with relevant information on working conditions.

397 For example, Honduras has adopted Decree No. 354-2013 on hourly work which was criticized by the CGT Honduras as being a form of precarious work.
According to the DGB of Germany, “the largest group of people in precarious work are those with mini-jobs. In 2018, 7.5 million employees were in mini-jobs. Of those, 4.7 million were in only marginal employment, 2.7 million of them in the traditional working age bracket between 25 and 64. With an upper limit of €450 per month, mini-jobs are dead-end jobs with few prospects, low income and often poor working conditions. For example, employees working on call are only schedule to work when it suits the company. In many cases, mini-jobs are abused in order to circumvent the statutory minimum wage. To do so, the working times are increased without any adjustment in wages or a reduced wage adjustment is paid illegally.”

291. Zero-hours contracts are similar to on-call work as, under such contracts, employers are not required to offer workers any fixed number of hours of work a day, a week or a month. Many countries report frequent recourse to zero-hours contracts and similar contractual arrangements. Conversely, some countries report that on-call work is prohibited by the national legislation. In other countries, legislation has recently been adopted limiting or prohibiting the use of such contracts.

**United Kingdom** – The Employment Rights Act of 1996 (ERA 1996), section 27A, provides that:

“(1) In this section ‘zero hours contract’ means a contract of employment or other worker’s contract under which –

(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and

(b) there is no certainty that any such work or services will be made available to the worker.

(2) For this purpose, an employer makes work or services available to a worker if the employer requests or requires the worker do the work or perform the services.”

According to the TUC of the United Kingdom: “In recent years, the issue of the employment status has become more complex, with the growth in zero hours working, agency worker and platform work. It is not uncommon for employers to tell zero hours contract workers and agency workers that they have no rights – even though the legal reality may be very different. Employers also seek to avoid their employment and tax obligations by misclassifying staff as self-employed.”

292. A significant challenge with on-call work, particularly with zero-hours contracts, is that the conditions that demonstrate the existence of an employment relationship may not be:

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398 For example, Bulgaria.
399 For example, Ireland. In New Zealand, major changes were introduced in the Employment Relations Act in 2016, prohibiting certain forms of zero-hours contracts and providing that employment contracts or collective agreements must specify, inter alia, the number of guaranteed hours of work, if any. If a number of guaranteed hours has not been set, the worker cannot be required to remain at the employer’s disposal and can refuse hours of work that are offered. In addition, the employer cannot cancel shifts unless the contract contains a provision specifying a reasonable notice period and, if notice is not given, reasonable compensation to be paid in the event of cancellation.
readily apparent. For example, the indicator of “mutuality of obligation” between the parties is used by the courts in some countries to demonstrate the existence of a contract of employment. This concept requires “the presence of mutual commitments” to maintain the employment relationship over a period of time. This requirement may prevent a short-term engagement from constituting a contract of employment, in view of the lack of mutuality of obligation as to future performance. The requirement of mutuality of obligation may be difficult to prove for zero-hours workers, as it may be argued that there is no commitment by the employer to provide work and often no commitment by the worker to accept any work proposed.

Ireland – The Employment (Miscellaneous Provisions) Act of 2018 prohibits the use of zero-hours contracts (with exceptions in limited circumstances). It requires minimum payments for low-paid employees who are required to be available for work but are not called into work (section 18). It creates a new entitlement to banded hour contracts (section 16), and it requires employers to notify employees in writing of the core terms of employment within five days of starting employment (section 7).

Table 2.1 Zero-hours contracts in Europe

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<th>Allowed</th>
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<th>Not generally allowed</th>
<th>Not used/rare</th>
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Source: A. Adams and J. Prassl.

(c) Multiple-party employment relationships

293. Multiple-party arrangements are the only type of employment arrangement explicitly referred to in the Recommendation (Paragraph 4(c)), as an example of an arrangement other than the standard full-time employment relationship with one employer.

Australia – The Industrial Relations Act 2016, section 398, provides that:

“A person is a private employment agent if the person, in the course of carrying on business and for gain –
(a) offers to find –
   (i) casual, part-time, temporary, permanent or contract work for a person; or
   (ii) a casual, part-time, temporary, permanent or contract worker for a person; or
(b) negotiates the terms of contract work for a model or performer; or
(c) administers a contract for a model or performer and arranges payments under it; or
(d) provides career advice for a model or performer.”

(i) Temporary agency work

294. In temporary agency work, workers are hired by an entity, the temporary work or employment agency (TWA), for the purposes of assigning them to perform work for a third party (a person or an enterprise) under its control and supervision. In some countries, temporary agency work is referred to as “labour dispatch,” “labour brokerage” or “labour hire.”

295. The Private Employment Agencies Convention, 1997 (No. 181), and its corresponding Recommendation, 1997 (No. 188), provide definitions of multiple-party work arrangements. Article 1 of Convention No. 181 defines private employment agencies (PEAs) as providing: (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; or (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 as the “user enterprise”) which assigns their tasks and supervises the execution of these tasks.

Croatia – Chapter 6 of the Labour Act provides that the term “temporary employment agency” means an employer who, based on a worker assignment contract, assigns workers to another employer to work there temporarily.

296. Private employment agencies may therefore match workers to jobs, acting as employment mediators, without becoming a party to the employment relationship. Where so permitted by national law, they may also hire workers to make them available to an individual or corporate user. In such cases, the private employment agency assumes the role of employer. It recruits and employs workers, who perform work for a user enterprise under its supervision and control. Under this second model, the relationships are usually governed by two types of contracts: an employment contract between the temporary work agency and the worker, and another type of contract (either civil or commercial) between the agency and the user enterprise.

The CGTP-IN from Portugal indicates that fixed-term and temporary employment contracts are commonly used to fill permanent positions rather than to meet the temporary needs of enterprises.

297. The Committee noted in its 2010 General Survey that temporary work agencies are in operation in nearly all countries that permit the establishment of private employment agencies.

298. While there may be no direct employment relationship between temporary agency workers and users, they nevertheless bear certain responsibilities towards the temporary agency under the law of a number of countries, particularly with respect to occupational safety and health, and in cases where there is joint and several liability or subsidiary liability between the agency and the user. The law in many countries provides for such joint or
subsidiary liability in order to ensure greater protection for agency workers, in recognition of
the difficulties that they may face in identifying their true employer and ensuring the protection
of their labour rights.

The courts in many countries therefore apply a series of factors to determine the allocation of responsibility between temporary work agencies and users, where this is not addressed by the law. In the case of temporary agency work, Convention No. 181 provides guidance concerning allocation of responsibilities with respect to worker’s rights in accordance with Paragraph 4(c) and (d) of Recommendation No 198.

**New Zealand** – An Employment Relations (Triangular Employment) Amendment Bill was introduced to Parliament in February 2018 and is currently under consideration by the Select Committee. The Bill seeks to ensure that employees employed by one employer, but who work under the control and direction of another business or organization, are not deprived of certain rights.

299. Paragraph 23 of the Recommendation explicitly provides that Recommendation No. 198 does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), and that it cannot revise Convention No. 181, recognizing the close link with the issues dealt with in those instruments.

(ii) **Subcontracting**

300. In the case of subcontracting, the subcontractor does not provide the workers (as a temporary work agency does) but executes work, provides goods or services. Subcontractors normally manage their own workforce, even if they work on the premises of the principal employer. However, the lines between the two are often blurred. Many jurisdictions establish a clear distinction between temporary agency work and subcontracting. Temporary work agencies are generally subject to licensing and, if they are licensed, may be allowed to hire workers, while subcontractors act as service providers. Some trade unions refer to a considerable increase in recourse to subcontracting.

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408 See for example, Chile (Labour Code, section 183D); Costa Rica (Labour Code, section 399); Peru (General Labour Law, section 78), Spain, Hungary (Labour Code 221), Greece (Law 4554/2018).

409 See for example, Philippines, Pentagon International Shipping Services, Inc., Petitioner, v. The Court Of Appeals, Filomeno V. Madrio, Luisito G. Rubiano, JDA Inter-Phil Maritime Services Corporation, Respondents, GR No. 169158, July 2015. In the case of subcontracting, see also Colombia, the decision of the Constitutional Court, T-889/14, and Spain, Supreme Tribunal, Chamber 4 on social issues, decision No. 978/2017 of 5 December 2017, appeal for unification of doctrine. See also India, Balwant Rai Saluja and anr. v. Air India Ltd. and ors., Civil Appeal Nos 10264-10266, 2013.

410 Convention No. 181 establishes the requirement in Article 12 for ratifying States to “determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies ... 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”.

411 For example, CGT RA Argentina.
2. The employment relationship

Philippines – Order No. 174 of 2017 of the Department of Labor and Employment, section 8, permits contracting and subcontracting when:

(a) The contractor or subcontractor is engaged in a distinct and independent business and undertakes to perform the job or work on its own responsibility, according to its own manner and method;
(b) The contractor or subcontractor has substantial capital to carry out the job farmed out by the principal on his account, manner and method, investment in the form of tools, equipment, machinery and supervision;
(c) In performing the work farmed out, the contractor or subcontractor is free from the control and/or direction of the principal in all matters connected with the performance of the work except as to the result thereof; and
(d) The Service Agreement ensures compliance with all the rights and benefits for all the employees of the contractor or subcontractor under the labor laws.”

(iii) Challenges for workers in multiple-party arrangements

301. Outsourcing has become a widespread practice in the labour market which is used, not only for peripheral activities, but also to carry out the “core activities” of businesses. This is, for example, one of the main features of domestic and global supply chains, in which production is broken up into several stages. At the national level, provisions have been adopted allocating rights and responsibilities. In many countries, there are specific provisions to ensure equality of opportunity and treatment, clarify roles and responsibilities or establish limits for the use of subcontracting.

Argentina – Act No. 20774 on the employment contract, section 136, provides that workers engaged by contractors or intermediaries shall be entitled to require the principal central employer, for whom such contractors or intermediaries provide services or perform work, to withhold from the amount that the latter are to receive and to pay them the amount owed to them by way of remuneration or other entitlements that can be accounted in financial terms arising out of the employment relationship.

Nicaragua – The Labour Code, section 9, provides that: “Contractors, subcontractors and other companies that hire workers to carry out work for the benefit of third parties, with capital, patrimony, equipment, management or other elements of their own, have the character of employers”.

302. Some countries have adopted specific provisions prohibiting the use of subcontractors to replace full-time permanent workers.

412 See, in this regard, ch. VI.
2. The employment relationship

Philippines – Order No. 174 of 2017 of the Department of Labor and Employment, section 5, provides that the rules shall apply to all parties in an arrangement where an employer–employee relationship exists. Section 5 also prohibits labour-only contracting in an arrangement where the contractor or subcontractor does not have investments in the form of tools, equipment, machineries or work premises, and the contractor’s or subcontractor’s employees recruited and placed are performing activities which are directly related to the main business of the principal, or the contractor or subcontractor does not exercise the right to control over the performance for the work of the employee.

303. Some countries even consider subcontracting to be a form of disguised employment relationship.

Bolivarian Republic of Venezuela – The Basic Labour Act, section 47, provides that: “... outsourcing is understood as the simulation or fraud committed by employers in general, with the purpose of distorting, ignoring or hindering the application of the labour legislation ...”.

Similarly, section 48 provides that: “Outsourcing is prohibited, and it is therefore prohibited to contract work entities to perform work, services or activities that are permanent within the facilities of the contracting work entity, and directly related to the production process of the contracting company. The hiring of workers through intermediaries to evade the obligations of the labour relationship of the contracting party is also prohibited, as are work entities created by the employer to evade obligations in respect of the workers, and fraudulent contracts or agreements intended to simulate the labour relationship, using the legal forms of civil or commercial law, and any other form of labour simulation or fraud.”

The Irish Congress of Trade Unions expresses concern over the practice by some employers that deliberately misclassify workers as self-employed subcontractors to avoid payment of social security, and established pay rates. Furthermore, workers employed with such contracts do not enjoy the same labour protections as directly employed workers.

304. The Committee emphasizes in this regard the paramount role of the principle of primacy of facts to determine the true identity of the employer in cases of multiple-parties relationships.

(d) Homework and telework

305. Labour markets and the relationship between the employer and the employee are being redefined across the globe. As new types of casual jobs and non-standard employment arrangements emerge, in the form of short-term engagements and independent gig-economy contractors, the location of work is becoming less important. Technology and changes in the organization of work have also led to an increasing number of enterprises having recourse to homeworking and teleworking.

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2. New forms of organization of work and contractual arrangements

(a) Digital or platform work – defining features

306. Many of the elements that characterize other types of employment relationship are present in digital platform work. Platform work offers a good illustration of how the problems and lack of clarity concerning the employment relationship that may exist in more traditional working arrangements, particularly in relation to the roles and responsibilities of the parties, are also present in new forms of work.

307. Platform work is an arrangement that uses a digital platform through which organizations or individuals make contact and engage a third party (an individual or an entity) to provide a product or service in exchange for payment. Many different terms are used to describe the activities mediated through platforms. In addition to “platform work”, these include: “gig work”, “on-demand work”, “work-on-demand via app”, “digital labour”, “digital (gig) economy”, “crowdsourcing”, “piecwork” and “collaborative consumption”.

308. The gender dimension of platform work should also be taken into consideration. It has been found that those who engage in platform work as a main source of income are primarily men, while those who use platform work as a secondary source of income are primarily women.

309. Digital platforms can be divided into two basic types: “web-based platforms”, on which work is outsourced through an open call disseminated through the internet platform to a geographically disperse population; and “location-based applications (apps)”, which allocate work to individuals located in a limited area. In the case of web-based platforms, work may be performed digitally by people connected with the platform who are located in different places worldwide (crowdwork). In this way, specific, often repetitive, tasks are distributed across the globe to a flexible workforce of indeterminate size. Those providing the work, those who agree to perform the tasks and the platform are often located in three different countries. Accordingly, in the event of a dispute, conflicts of law issues inevitably arise.

310. In location-based or work-on-demand platforms, jobs are advertised online, but are performed locally. As a general rule, payment for work performed through work-on-demand platforms is centralized. The worker, the client-user and the platform are normally located in the same jurisdiction. The platform intermediary normally assumes greater responsibilities in the selection, supervision and discipline of the workers. However, there is no uniform model for platforms and differences between both types of platform may be blurred. In certain platforms, the management of workers and the evaluation of their performance are carried out through algorithms that enable client-users to rate individual workers. The main features of platform work include:

- paid work is organized through platforms, normally paid on a piecework basis;
- three parties are involved: the platform, the client-user and the worker;
- the work involves the performance of specific tasks;

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417 See in this regard, M. Cherry, Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy, ILO, Conditions of Work and employment series, No. 106, 2019, p. 8 ff.: see also, V. De Stefano and A. Aloisi, European legal framework for “digital labour platforms”, 2018, op. cit.
418 For example, Uber rating system: How is my rating determined?, www.help.uber.com.
2. The employment relationship

- there is no guarantee of a minimum number of hours or of continued employment;
- intermediation and management are carried out by the internet platform;
- it is a form of outsourcing;
- jobs are broken down into time-bound “tasks”;
- on-demand services are provided and work schedules are irregular or non-existent;
- workers provide some or all of the equipment required, such as transport (bicycle, car), computer and internet; and
- workers perform the task outside a specific workplace.

311. Platform work is a globalized phenomenon with impacts that vary across regions.

Figure 2.7

Top occupations by country

Source: Online Labour Index, 1–6 July 2017.

(b) Advantages and disadvantages of digital or platform work

312. From a business perspective, platform work enables enterprises to significantly reduce costs by outsourcing certain (core or accessory) activities. The employer is therefore able to adapt rapidly to specific needs and demands, by choosing from a vast pool of workers, without having to establish a long-term employment relationship with any of them. Moreover, digital platforms ensure 24-hour access to labour.

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From the employment policy perspective, platform work may constitute a welcome source of employment for various reasons. It can facilitate access to the labour market for specific groups, such as young persons, workers with family responsibilities, workers with disabilities, or other groups facing difficulties in securing traditional full-time employment. Platform work can also benefit workers who require flexibility in terms of when, where and how much they wish to work.

However, many workers engage in platform work through necessity. Platform work is often perceived as "dead-end" work that does not lead to lasting employment. Many platform workers are subject to excessive working hours in a highly competitive context that pushes down wages. There are also increased occupational safety and health problems in some sectors, associated in many cases with a lack of training. In addition, platform workers often spend many unpaid hours searching for work. The level of remuneration varies depending on the sector and type of platform work. Platform workers may also suffer wage penalties, such as fees for cross-currency payments. Moreover, due to the fragmented nature of platform work, their social and professional isolation creates barriers that make it difficult for them to join organizations representing their interests.

However, this may be changing, as some trade unions of digital workers have been established, and systems are also being developed that allow workers to evaluate platforms. Furthermore, new technologies are helping workers, particularly platform workers, to unionize.422

Argentina – The Platform Personnel Association (Asociación de Personal de Plataformas – APP) is a first level union with its registration pending with the National Directorate of Trade Union Associations.

Germany – IG Metall is open to self-employed members since 1 January 2016, with a focus on crowd- and platform-based workers. As of April 2017, self-employed members of IG Metall may receive insurance for legal costs up to €100,000 in cases of legal disputes with clients.

Figure 2.8

Worker distribution within regions (percentage)

Source: Online Labour Index.

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2. The employment relationship

**Italy** – The “Charter of the fundamental rights of digital workers in the urban context” was signed in May 2018 by the Mayor of Bologna and the Councillor for Labour, the Riders Union Bologna, the CGIL, the CISL and the UIL, and the “Snam” and “Mymenu” brands of the new company, Meal SRL.

**United Kingdom** – The London-based Couriers and Logistics Branch of the Independent Workers of Great Britain is doing pioneering work defending the rights of workers in the British courier and logistics industry, including self-employed workers for major courier companies and food delivery companies such as Deliveroo and UberEats.

**United States** – In 2015, the State of Washington passed an ordinance that allowed drivers working for companies such as Lyft and Uber to unionize. The law faced challenges from multiple parties. In *Chamber of Commerce v. Seattle*, plaintiffs argued that the ordinance was pre-empted by federal antitrust law and the NLRA. The district court granted the city’s motion to dismiss, holding that the state-action immunity doctrine exempted the ordinance from pre-emption by federal antitrust law. Plaintiffs appealed, and on 11 May 2018, the Ninth Circuit reversed and remanded the federal antitrust claims to the district court for further proceedings. The ruling followed the filing of an amicus brief by the Federal Trade Commission and DOJ that argued that the ordinance would violate federal law against price fixing. Additionally, a California court found that food-ordering service Grubhub correctly classified a delivery driver as an independent contractor. Since federal law does not give independent contractors a right to unionize, these cases have important implications for these workers’ ability to unionize.

(c) **Determining employment status in digital platforms**

316. One of the most important challenges posed by platform work is the determination of the employment status of those working through digital platforms. While, in most cases, workers sign contracts as though they were independent contractors, examination of the conditions under which work is provided makes it possible to identify certain indicators of the existence of an employment relationship.

The FNV and CNV of the Netherlands and the Single Central Organization of Chile indicate that platform work is unregulated at national level. The status of workers and employers is not clear. The Socio-economic Council is currently studying the issue. As stated by the CTA Autónoma of Argentina, these workers are often classified as self-employed.

317. For example, even though the worker bears most of the risk, the platform exercises some degree of supervision and control, determining precisely when, how and where work must be performed.\(^{423}\) In addition, the use of ratings systems or automatic review mechanisms to monitor and evaluate work performance is in contradiction with the presumed self-employed status of platform workers.\(^{424}\)

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\(^{423}\) Although this has been denied in some Spanish decisions already examined under the legal presumption of the existence of an employment relationship in this chapter.

318. The nature of platform work varies from one case to the other. Platform work is in some instances a form of temporary work that could be equated to casual work or zero-hours contracts.\textsuperscript{425} It may also be considered as a triangular or multiple-party employment relationship. The relationship between the worker and the intermediary, the platform, is governed by a contract, the nature of which is fairly difficult to determine.

319. Interesting measures have been adopted throughout the world to address digital platform work.

Germany – Eight European crowdsourcing platforms, the German Crowdsourcing Association (Deutscher Crowdsourcing Verband), and the German Metalworkers’ Union (IG Metall) announced the establishment of a joint Ombuds Office. The Ombuds Office will be tasked with resolving disputes between crowdworkers, clients, and crowdsourcing platforms and with overseeing enforcement of the “Crowdsourcing Code of Conduct” adopted by the platforms. The Code of Conduct was signed by the German crowdsourcing platforms Testbirds, clickworker, Streetspot, Crowd Guru, Appjobber, content.de, and Shopscout and by the British platform Bugfinders. In total the eight platforms counted approximately 2 million worker registrations between them. Online labour platforms voluntarily agree to hold themselves to minimum standards with respect to working conditions and relations between workers, clients, and platforms. The goal of the Code of Conduct is to codify the existing standards in Germany with respect to fair dealings with crowdworkers and to ensure that these standards are maintained as the market for crowdwork grows.

The Ombuds Office board represents platforms and workers equally and its members are volunteers.\textsuperscript{426}

320. There are certain examples of legal provisions that specifically regulate platform work, and in particular which address the employment status of platform workers. Indeed, in some cases, avoiding regulation appears to be the rationale for the development of digital labour platforms.\textsuperscript{427}

321. Some countries have recently adopted measures to improve control over platforms and provide further clarity concerning taxation.

Belgium – The “Croo” Act requires platforms to be approved by the federal authority in order to be recognized as collaborative economy platforms. Below the threshold of €5,100, incomes are subject to an effective tax rate of 10 per cent and social legislation does not apply.

\textsuperscript{425} ibid., p. 8.
\textsuperscript{426} The Ombuds Office presented its report of the activities for 2017-18 in January 2019. In 2017 (November-December), seven cases were submitted to the Ombuds Office. In five of these cases, the mediation of the Ombuds Office panel produced consensual solutions. In the remaining two cases, the process was not pursued further by the complainant. In 2018, 23 cases were submitted to the Ombuds Office. In 15 of the 23 cases, the mediation of the Ombuds Office panel produced consensual solutions. In three of the 23 cases, the Ombuds Office panel issued a decision. Three of the 23 cases are still in mediation. The Ombuds Office mediates disputes that may arise between potentially opposed interests in the course of work on crowdsourcing/crowdworking platforms. The Ombuds Office seeks to find consensual solutions that are accepted by all parties. The Ombuds Office mediates individual cases in which the disputed sums are often relatively small, as well as complaints of a “fundamental” nature, for example regarding a platform’s work processes or technical problems. In these cases, the Ombuds Office seeks to develop solutions in the common interests of both workers and platforms. In several cases, for example, the Ombuds Office recommended that a platform establish a worker advisory board to which workers could make suggestions regarding the platform’s work processes and functionality.

\textsuperscript{427} Stewart and Stanford: “Regulating work in the gig economy: What are the options?” 2017, op. cit.
The CSC, the FGTB and the CGSLB of Belgium refer to the adoption of a specific category of worker “the semi-agoral worker” that is midway between the employment relationship and voluntary work. According to the trade unions, this legal form is applicable to platform work. This has been widely criticized because in principle workers do not enjoy collective bargaining.

Portugal – Act No. 45/2018 addressing employment conditions in platforms in the transport sector provides that: drivers must have an employment relationship with the platform; platforms are considered transport operators, not intermediation services; drivers are required to obtain a special certificate; and there is 5 per cent tax on the net profits of platforms to cover administrative costs.

322. Some countries have amended their legislation to increase the level of protection afforded to platform workers.

France – The Labour Act of 2016 added provisions concerning the social responsibility of platform enterprises. The provisions apply to “independent” workers who provide services through a platform and relate to social security and access to training. If the platform engages workers to provide a service, it must also take responsibility for occupational liability and vocational training.428

323. In other countries, legislation is at the draft stage.429 Some provisions go as far as suggesting that a specific category of workers should be created, while in other countries existing regulations are being examined to determine their applicability to platform workers.

324. The legal void in some cases, and the lack of clarity in others, has given rise to a growing number of judicial rulings on the employment status of platform workers. The judicial rulings available to date are mainly based on the elements and criteria described in the present General Survey to establish the employment status of workers, including:430

- there must be, at a minimum, an obligation for the worker to perform work when it is demanded by the employer;431
- the applicant worked in the respondent’s business as part of that business;432
- the company “exercised power and control over the manner in which the services were rendered, particularly accepting or rejecting requests. Respect of these requirements was essential for the worker to receive good ratings and remain a “collaborator” with the company and retain authorization to access the platform”;433

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428 France (Labour Code, sections L7341-1 and L7342-1 and 2).
429 For example, Chile (Bill on labour modernization for family reconciliation, section 8 bis, platform work).
430 For a description of the most relevant judicial decisions, see: M.L. Rodriguez Fernández: Plataformas digitales y mercado de trabajo, Informes y Estudios Empleo No. 56, Ministry of Employment and Social Security, Madrid, 2019; and I. Beltrán de Heredia Ruiz: “Una mirada crítica a las relaciones laborales” Blog de Derecho del Trabajo y de la Seguridad Social.
431 Australia, Fair Work Ombudsman, decision of 7 June 2019 concerning Uber.
432 Australia, Joshua Klooger v. Foodora Australia Pty Ltd: 16 November 2018.
the customer and the delivery route are assigned to the driver through an algorithm;\textsuperscript{434}
the contract is drawn up completely and unilaterally by the enterprise and is not negotiable, thereby demonstrating the existence of a relationship of authority between the company and the worker. The digital system also imposes the worker’s schedule;\textsuperscript{435} and
the dominant feature of the worker’s contract with the enterprise is the obligation of personal performance. The facility to appoint a substitute is limited by the fact that the substitute must come from the ranks of the same enterprise.\textsuperscript{436}

325. Other jurisdictions have considered platform workers as independent contractors on the basis of such criteria as:

\begin{itemize}
\item the right to reject requests means that workers are “free to make money elsewhere as independent contractors pursing their own entrepreneurial opportunities in search of profit”;\textsuperscript{437} and
\item the so-called ABC criteria for differentiating the self-employed from employees, according to which a worker is considered an independent contractor when: (a) the worker is free from the control and direction of the company in relation to the execution of the work, both under the contract for the execution of such work and in fact; (b) the employee performs work that is not part of the contracting entity’s normal business activity; and (c) the employee is habitually engaged in an established independent commercial activity, occupation or business of the same nature as the work performed for the contracting entity.\textsuperscript{438}
\end{itemize}

326. The Committee notes the very diverse criteria used to determine the status of platform workers, and the varied outcomes. It considers that this new form of work calls for a thorough examination of the real conditions of such workers, which is not always readily apparent.

327. The Committee considers that the common characteristic of the use of technological means to distribute tasks to an indeterminate workforce cannot justify these activities being considered forms of work separate from the rest of the labour market.\textsuperscript{439} In any case, the Committee recalls that the full range of fundamental principles and rights at work are applicable to platform workers in the same way as to all other workers, irrespective of their employment status.

\textbf{(d) Supply chains}

328. Supply chains may be considered an extreme example of the extension of multiple-party employment relationships. They are complex, diverse, fragmented, dynamic and evolving organizational structures which involve sometimes the cross-border organization of the activities required to produce goods or services and bring them to consumers, through inputs and various phases of development, production and delivery. Indeed, global supply chains depend on foreign direct investment (FDI) by multinational enterprises (MNEs) which participate either through wholly-owned subsidiaries or joint ventures in which the MNE has direct responsibility for the employment relationship. They also include the increasingly predominant model of international sourcing in which the engagement of lead firms is defined by the terms and conditions of contractual or sometimes tacit arrangements with suppliers and subcontracted

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\textsuperscript{434} France, Court of Appeal of Paris, 2nd Chamber, 10 January 2019, S N° RG 18/08357 - N° Portalis, 3SL7-V-B7C-B6AZK.
\textsuperscript{435} Netherlands, FNV v. Deliveroo, \textit{decision of 15 January 2019}.
\textsuperscript{436} United Kingdom, Supreme Court, 13 June 2018, \textit{Pimlico Plumbers Ltd & anor v. Smith}.
\textsuperscript{438} United States: Supreme Court of California, \textit{Dynamex Operations West, Inc. v. Charles Lee et al.}, April 2018. In this case, the court stated that workers will be considered as dependent employees unless the ABC criteria are met.
\textsuperscript{439} See in this regard, for example, I. Beltran de Heredia Ruiz: \textit{Work in the platform economy: Arguments for an employment relationship} (Barcelona, Huygens Editorial, 2019) p. 11 ff.
\end{flushright}
firms for specific goods, inputs and services. The growth of international outsourcing through global supply chains has significant employment and governance implications. The Committee notes that while wholly-owned subsidiaries of MNEs have direct responsibility for employees, in global supply chains coordinated by a lead firm, where production is outsourced and subcontracted without ownership, the buyer is not the legal employer and has no formal responsibility for the employment relationship in the supplying company or further subcontracted firms, despite the significant impact of the lead firm – positive or negative – on conditions of work. The Committee highlights that this presents challenges for the promotion of decent work in global supply chains.

329. Supply chains create opportunities for formal employment relationships that are compliant with international labour standards. This may be done through mechanisms of responsible business conduct or through less stringent MNE codes of conduct. Labour force flexibility can also be increased through the use of third party labour intermediaries or labour contractors/brokers. This is associated with multiple-party employment relationships, in which the legal employer is separate from the entity for which the work is carried out. While the use of various types of employment relationships and contractual arrangements have contributed to increasing labour market participation, there is a risk that the workers concerned more frequently lack labour protection in law and/or practice. The use of different types of employment relationships presents significant regulatory, compliance and enforcement challenges. Employers may choose not to comply with protective labour legislation owing to the precarious nature of their orders. The labour inspectorate may face difficulties in enforcing the application of laws, especially in work outsourced to homeworkers or informal labour contractors, or in the challenging conditions of rural work or work beyond borders. The workers concerned may also experience difficulties in joining trade unions or being covered by collective bargaining agreements.

330. In the ILC general discussion on global supply chains in 2016, it was noted that there are clear governance gaps that need to be addressed, and recognized that the use of non-standard forms of employment and of intermediaries is common in this form of the organization of work.

331. The conclusions of the discussion call on governments to “[s]et out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations, and the fundamental principles and rights at work for all workers, including migrant workers, homeworkers, workers in non-standard forms of employment (other modalities of contractual arrangements) and workers in” export processing zones, and to “[i]mplement measures to improve working conditions for all workers, including in global supply chains, in the areas of wages, working time and occupational safety and health, and ensure that non-standard forms of employment meet the legitimate needs of workers and employers and are not used to undermine labour rights and decent work. Such measures should go hand in hand with increasing productivity.”

The NZCTU from *New Zealand* urged the Government to consider the monitoring and regulation of employment standards within international supply chains.

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441 ibid., para. 24.
442 See in this respect ch. VIII.
443 ibid., paras 67 and 68. See also chs III and IV.
444 ibid., para. 132.
VI. The establishment of an appropriate mechanism to monitor labour market developments

332. The third part of Recommendation No. 198 focuses on the establishment of a mechanism to monitor developments in the labour market. The national policy should include an appropriate mechanism, or make use of an existing one, to monitor and review developments in the labour market and in the organization of work, and to formulate advice on the adoption and implementation of measures concerning the employment relationship (Paragraph 19). This mechanism should be given the responsibility of suggesting measures to fine-tune the relevant legal provisions or their application, as well as economic and social initiatives to correct dysfunctional trends, including initiatives to ensure that the necessary statistics are collected on a regular and systematic basis. Social dialogue is crucial in this respect, and the most representative workers’ and employers’ organizations should therefore be represented in the mechanism and consulted regularly (Paragraph 20). For this purpose, information and statistical data should be collected and research undertaken on changes in the patterns and structure of work (Paragraph 21).

333. The Recommendation does not contain precise indications on the nature and scope of the mechanism, which should be defined at the national level. But it must be consistent with the possibilities and specific conditions of each country, and may be a new or existing mechanism.

334. The Committee suggests that consideration is given to the possibility of the mechanism for the review and monitoring of labour market developments relating to the “employment relationship” being embedded in the wider employment policy reviews in the framework of Convention No. 122. These reviews are intended to ensure the effective implementation of the national employment policy to promote full, productive and freely chosen employment. The lack of clarity and concealment of employment relationships have an impact on the quality and quantity of work, the taxes collected and social security systems, as well as on economic and social policies as a whole.

335. Several countries indicate that they are currently examining labour market developments to assess whether the existing legislation remains appropriate and to reflect on the best way of regulating new forms of work and the organization of work. In some cases, the monitoring is undertaken within the framework of existing institutions. Other governments indicate that, in the context of social dialogue institutions, consultations are held on existing legislation and its adequacy to respond to labour market needs and developments. Some trade unions indicate that this policy for the revision has not been adopted.

336. Other governments indicate that they are in the process of establishing specific institutions responsible for monitoring the labour market and determining future trends. The issue of the future of work and the impact of new technologies and new forms of work on the labour market have triggered in-depth reflection processes in many countries around the world. These processes are being carried out in the framework of already existing mechanisms or new ad hoc commissions.

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448 For example, Afghanistan (High Labour Council), Benin (National Labour Advisory Council), Canada (Canadian Association of Administrators of Labour Legislation), Chile (National Labour Observatory) and Sweden (Swedish Agency for Work Environment Expertise, which has been commissioned to compile research and develop in-depth knowledge reviews of future working life).
449 For example, Algeria, China and Oman.
450 For example, the CGT RA from Argentina.
451 For example, Brazil (Committee for Advanced Research on the Future of Work) and Sweden.
Denmark – The Government, the social partners and representatives of youth have established the Disruption Council to examine more flexible ways of working, and to review social security benefits for self-employed and temporary workers.452

337. In some countries, specific studies have been commissioned on the future of work and new forms of work.453

Business NZ of New Zealand considers that while monitoring the labour market developments has its merits, it is not clear whether engagement with the social partners on the issue will address its rigidities.

The NZCTU from New Zealand indicates that it is not aware of any formal mechanism to monitor developments in the labour market related to the employment relationship.

338. Paragraph 22 of the Recommendation calls for the establishment of specific national mechanisms to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services, and the development of systematic contacts with other States for this purpose. This provision is therefore particularly relevant to borderless digital work. While many governments indicate that there are no specific measures in this regard, others have provided information on anti-dumping measures or controls on the illegal employment of cross-border workers.454 Some refer to their migration policies.455

339. The Committee addresses the general role of law and judicial decisions with respect to Recommendation No. 198 in chapter VII.

453 For example, Switzerland.
454 For example, Austria (Anti-Wage and Social Dumping Act, No. 44/2016).
455 The Committee further refers to its General Survey of 2016, paras 473–475.
VII. Conclusions

340. As demonstrated by the examples referred to in previous sections, the courts and other forms of adjudication authority play a substantive role in the determination of the existence of an employment relationship, depending on the circumstances of each case. The law always leaves space for interpretation and clarification.

341. There is a growing debate about the role of the employment relationship as the most efficient channel for ensuring labour protection. Many forms of substantive protection are ensured for all workers. Irrespective of where and for whom they work, many other forms of protection are being progressively extended to workers beyond the employment relationship. The Committee highlights at the same time that the employment relationship can take a variety of forms, ranging from the most formal and clearly established employment relationship to more looser, evolving and less clear relationships.

342. The Committee considers that even if there are certain considerations suggesting the need for reviewing the employment relationship to recognize the evolution of the world of work and go beyond the factors and indicators referred to above, the Committee observes that an examination of the latest court rulings on platform work and the status of workers shows that the courts are continuing to base their decisions on conditions and indicators as examined above.

343. The Committee considers that the employment relationship is a mechanism that offers clarity to the labour market in relation to the attribution of the respective rights and responsibilities of workers, employers and third contracting parties. The Committee highlights in this respect the importance of taking measures to effectively remove incentives to disguise the employment relationship. Moreover, the Committee emphasizes that any evolution of the employment relationship should not result in a reduction of the scope of application of the labour law or in a reduction of workers’ labour protection.