



International
Labour
Organization

ILO Curriculum on Building Modern and Effective Labour Inspection Systems

Module

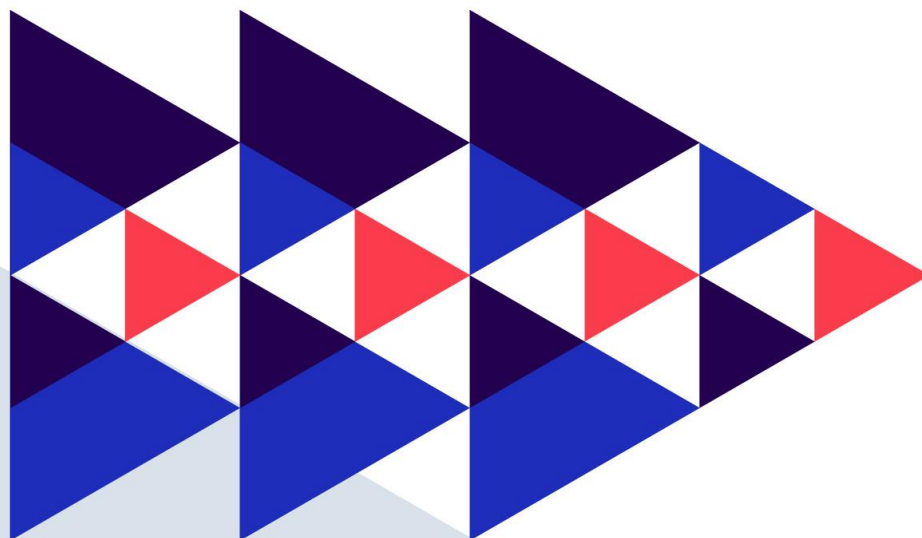
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► Inspection of the employment relationship

ILO Curriculum on Building Modern and
Effective Labour Inspection Systems

▶ Module **7**

Inspection of the employment relationship





► What this module is about

This module examines some of the issues and trends relating to employment relationships in the world of work today, and how this impacts on the role of labour inspection. Where employment relationships are concerned, there are a number of ambiguities and challenges that labour inspectors have to be aware of and work through if they are to carry out their tasks effectively.

The module pays particular attention to the Employment Relationship Recommendation, 2006 (No. 198), which provides guidance to all ILO Member States on how they can address the above issues comprehensively.



► Objectives

The aim of this module is to explain the role of labour inspection in promoting worker protection in the context of the employment relationship, in accordance with ILO Recommendation No. 198.

At the end of this module, participants will be able to:

- explain in what ways dependent workers may lack labour protection because of the narrow scope of legislation, ambiguities in its interpretation or lack of clarity in its application;
 - make reference to Recommendation No. 198, in particular the areas in which labour inspection should play a role, and explain this role;
 - discuss the situation and trends in employment relationships in their respective countries, and their national regulation.
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▶ 1. Overview

1.1 Background

Recent decades have seen major changes in patterns of employment, both nationally and globally. In particular, there has been rapid growth in small firms following the demise of many state-owned enterprises, with the consequent emergence of contractors, sub-contractors and self-employed individuals in developed, transition and developing countries. These changes have been accompanied by marked changes in employment relationships, with many employers now contracting out functions that they used to carry out themselves. Global supply chains have proliferated, and multinational enterprises have in many cases introduced stringent contractual terms and conditions for their suppliers, who are often based in developing countries.

In both industrialized and developing countries, there has been a marked shift away from standard to non-standard employment. Non-standard forms of employment (NSE) are a grouping of employment arrangements that deviate from standard practice. They include temporary employment, part-time and on-call work, temporary agency work and other multi-party employment relationships, disguised employment relationships and dependent self-employment. Workers in these categories increasingly work alongside “normal” employees. Some workers may be providing services under a civil or commercial contract, while others are in fact employed by another employer, who is providing work or services to an enterprise under a commercial contract. The provider might even be a workers’ cooperative. Such diversity in employment relationships is becoming increasingly common across different employment sectors.

In addition, with the advance of digitization and the establishment of digital labour platforms (new and emblematic manifestations of the work of the future), the labour market has seen the arrival of new types of workers, as well as sophisticated disguises of labour relationships.

1.2 Different forms of employment relationship

The employment relationship is the legal link between employer and employee; it exists whenever a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the two parties. It has been, and continues to be, the main vehicle whereby workers gain access to the rights and benefits associated with employment in the areas of labour law and social security.

In the contemporary world of work, however, employment relationships and contracts are varied and complex, often making it difficult to ascertain employers' rights and obligations, and in

practice leading to a lack of protection for many workers. The different forms of employment relationship and contract include:

- ▶ Permanent contracts, written or otherwise, whereby employer and employee are clear as to their respective obligations and rights. Such contracts may be full-time or part-time.
- ▶ Indeterminate contracts, under which obligations and rights are often less clear and less onerous than in the case of permanent contracts. This may be the case for casual or seasonal work, as in construction or agriculture. Involuntary part-time work or overtime may also be a feature of such arrangements.
- ▶ Other kinds of employment contract, which may be ambiguous or disguised in some way, with the intention of weakening the employer's obligations and workers' rights under labour law.

Indeterminate, ambiguous, multi-party or disguised employment relationships can all lead to poor working conditions. For example, employees may have to agree to involuntary part-time work or, in some cases, to accept a dismissal letter at the same time as they sign their contracts. Aspects of ambiguous and disguised employment relationships are considered in more detail below.

How to determine the existence of an employment relationship is discussed in Chapter 4, which also provides guidance on distinguishing employees from self-employed individuals.



▶ Diversity in employment relationships - Modern supermarkets

Modern supermarkets provide an example of diversity of employment relationships within a single workplace. As well as employing its own regular staff, a supermarket may have legally distinct businesses operating within it, such as those selling dairy products, fresh meat or fish. Shelf-stackers, product demonstrators and security workers may also be employed by other companies, while specialized contractors may be responsible for equipment maintenance and repair. Cashiers may have been sent by a temporary employment agency, while home-workers may handle certain administrative tasks and communicate with the supermarket via the Internet.

Such diversity in employment relationships is justified on grounds of efficiency and competitiveness, but it means that different employment conditions will apply to different groups of workers within the same workplace.

Unclear situations

The situation of the "self-employed", "temporary workers" and workers from other enterprises may often not be as clear as it appears, and their working conditions may vary considerably, even

if they work on the same premises and ostensibly for the same main enterprise. For example, there may be:

- ▶ different arrangements for collective bargaining and representation by trade unions;
- ▶ different standards of safety and health, and representation by safety and health representatives or committees;
- ▶ different working-time requirements and leave allowances;
- ▶ different social security arrangements;
- ▶ different degrees of solvency of their respective employers, with implications for job security.

Some or all of the workers may appear to be direct employees of the main enterprise, but their employment relationship may have been disguised, and consequently they may have been deprived of some of the benefits of social protection law. It is common practice for enterprises to recruit workers with no contractual employment relationship, even when all the elements which characterize an employment relationship in law are present.

Alternatively, employees may be considered as self-employed persons by their work provider, and paid as such because their employment relationship is made ambiguous or is disguised. It is also possible for an employee working for a contractor company, or provided to such a company by an agency, to be performing services for another person (the user), without really knowing who their employer is, what rights they have, or who is responsible for their safeguarding. The result is that such workers lack labour protection. This has important repercussions, especially for women and migrant workers and their families, but also in terms of lower enterprise productivity and competitiveness, and a higher incidence of accidents.

Non-standard forms of employment

Non-standard employment (NSE) refers to a number of contractual arrangements that deviate from the standard employment relationship. Standard employment, while not a legal concept, is nonetheless associated with a certain conception of work (open-ended, full-time and part of a dependent, bilateral relationship with an employer), and this is the basis of most labour and social security law

According to the conclusions of the February 2015 ILO Meeting of Experts on Non-standard Forms of Employment, there are four main types of NSE, though two or more dimensions of NSE may be present in the same employment relationship (for example, a part-time worker may be employed by a private employment agency or a subcontractor under a fixed-term contract). The four types are:

a) Temporary employment relationships

Under a temporary employment relationship, workers are engaged for a specific period of time. Contracts may be fixed-term, or project- or task-based. This type of relationship also includes seasonal or casual work, including day labour.

Fixed-term contracts are characterized by a predefined or predictable term. Their termination is implicitly or explicitly tied to conditions such as reaching a particular date, the occurrence of a certain event, or the completion of a specific task or project (project- or task-based contracts).

Casual work is the engagement of workers on a very short-term — or on an occasional and intermittent — basis, often for a specific number of hours, days or weeks, in return for a wage set by the terms of the daily or periodic work agreement.

b) Part-time employment relationships

Under a part-time employment arrangement, the normal hours of work are fewer than those of comparable full-time workers.¹ Many countries have specific legal thresholds that define part-time as opposed to full-time work, thus distinguishing part-time work in legal terms.

In some instances, working arrangements may involve very short hours or no predictable fixed hours, and the employer thus has no obligation to provide a specific number of hours of work. These arrangements take different contractual forms, depending on the country concerned. They include so-called “zero-hours contracts”, but are commonly referred to as “on-call work”. Their main characteristic is the high variability of the number and scheduling of working hours, which poses problems for the income security and work—life balance of the workers concerned.

c) Triangular employment relationships

In the case of so-called “triangular” employment relationships, a worker’s labour or services are provided to a third party (the user). Such arrangements need to be carefully scrutinized as they may result in a lack of protection, to the detriment of the employee.

In such cases, the major problem is to determine *who the employer is*, what rights the worker has, and who is responsible for them. Mechanisms are therefore needed to clarify the relationships between the various parties and to allocate their respective responsibilities. This issue is obviously highly relevant for the labour inspectorate concerned.

One of the most common forms of triangular employment relationship is the provision of work or services through temporary work agencies. There are two ILO instruments that provide guidance to Member States on how to address this issue: the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188).

Besides temporary agency work, another very significant contractual arrangement involving multiple parties is subcontracting. This differs from temporary agency work mainly in that subcontractors generally do not hire out workers, but execute work that provides goods or a service, although this difference may be blurred, depending on the relevant jurisdiction. In addition, subcontractors generally manage their own workforce, even if their personnel work on the principal employer’s premises.

Contractual arrangements involving multiple parties may extend beyond temporary agency work and subcontracting. The fragmentation of workplaces and business organizations may also give

¹ ILO Part Time Convention, 1994 (NO. 175).

rise to other contractual arrangements, such as franchising, with important implications for labour protection and working conditions.

Finally, contractual arrangements involving multiple parties can extend over many countries, when global supply chains are involved.

d) Disguised employment relationships

In the vast majority of legal systems across the world, there is a binary divide between employment and self-employment, with employment serving as the basis for labour regulation. While there has always been a grey area between these two legal categories, in recent decades changes in business organization, technological developments and new business practices have rendered the distinction between employed and self-employed workers more blurred, and have contributed to an increase in the number of workers within this grey area.

Disguised employment occurs when an employer treats a person who is an employee as other than an employee so as to hide his or her true legal status. This can be engineered through the inappropriate use of civil or commercial arrangements. It is detrimental to the interests of workers and employers, and an abuse that is inimical to decent work, and should not be tolerated. False self-employment, false subcontracting, the establishment of pseudo-cooperatives, the false provision of services and false company restructuring are amongst the most frequent means adopted to disguise the employment relationship.

The effect of such practices is to deny labour protection to workers, while avoiding costs such as the payment of taxes and social security contributions (Recommendation No. 198, Paragraph 4).

Workers on digital platforms

Technological innovation has caused significant changes to work organization, employment relationships and labour relations, with both positive and negative impacts. While “gigs” — or one-off jobs — are not new, the increased use of technology has contributed to a rapid proliferation of this type of work. The gig economy has contributed to the growth of certain forms of non-standard employment dependent on digitally mediated labour marketplaces, or labour platforms. Labour platforms use technology to connect workers with consumers for one-off tasks, or jobs that are completed either virtually or in person by an on-demand workforce. This workforce may operate with limited social and labour protection, which is increasingly the case as more workers rely on platforms for their primary source of income.

It is precisely the use of digital platforms that characterizes the “platform economy” (known in everyday parlance as the “gig-economy”² or the on-demand economy), which is growing

² See De Stefano, V. Aloisi, A., *European legal framework for “digital labour platforms”*, European Commission, 2018, Luxembourg, p. 7. The term “gig” evokes artists jumping from one concert to another. According to <https://dictionary.cambridge.org/pt/dicionario/ingles/gig-economy>, the “gig economy is a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer”. The “gig economy” is a phenomenon that has existed for a long time, but that digital platforms have accelerated. In fact, “emerging technologies have allowed for better connectivity, empowering more ways of remote working

exponentially, much stimulated of late by global restrictions resulting from the SARS-CoV-2 pandemic.

Digital labour platforms include both web-based platforms, where work is outsourced through an open call to a geographically dispersed crowd (“crowdwork”), and location-based applications (apps), which allocate work to individuals in a specific geographical area. While digital labour platforms are a product of technological advances, work on these platforms resembles many long-standing work arrangements, but with a digital tool serving as intermediary.³

Crowdwork emerged in the early 2000s with the growth of the Internet and the need for human input in tasks to ensure the smooth functioning of web-based industries. Workers may work from anywhere in the world, as long as they have a reliable Internet connection. Jobs range from sophisticated computer programming, data-analysis and graphic design to relatively straightforward “microtasks” of a clerical nature. But while crowdwork is a product of technological progress, it also represents a return to the casual labour of the past in industrialized economies, while in developing economies it adds to the existing casual labour force. Currently, most crowdwork is not subject to labour regulations, therefore workers have little control over when they will have work, or their working conditions. They also have limited options for recourse in cases of unfair treatment.

On the other hand, “work-on-demand via apps”, though platform-facilitated, is place-based and geographically limited. This includes delivery driving, transportation, domestic work, home repairs and so on, all requiring direct interface between gig workers and those requesting gig services. The difference between this and crowdwork is that the work activity is selected and agreed online, but is then executed locally. In recent years, there has been a great deal of litigation in cases of misclassification of employment status against businesses running work-on-demand via app.

Though currently representing only a tiny percentage of the overall workforce, these apps have a global reach and affect the lives of millions. The potentially disruptive effects of platforms on labour markets far outweigh their current importance as a source of employment. Their expected growth has led many to speculate that these forms of work may contribute to the disappearance of formal employment completely.

and helping the gig economy to grow”; see Mandloi, R., *Making the Most of Talent in the Gig Economy*, Harvard Business Publishing, 2020, at <https://www.harvardbusiness.org/making-the-most-of-talent-in-the-gig-economy/>.

³ ILO, *Digital labour platforms and the future of work - Towards decent work in the online world*, 2018, Geneva, pp XV.

▶ 2. International instruments

The employment relationship is a key issue in labour law. The labour and social protection of workers depends on the existence of an employment relationship and, importantly, on whether it can be proved.

Several ILO Conventions and Recommendations have therefore been adopted on various aspects of employment relationships, starting in the 1950s:

- ▶ The Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and its accompanying Recommendation, which both refer to employees of contractors for public authorities, protecting their rights in respect of working conditions.
- ▶ The Home Work Convention, 1996 (No. 177) and its accompanying Recommendation, which define the particular conditions characterizing dependent home work. This is often not well regulated by law and tends to be ambiguous or disguised as false self-employment.
- ▶ The Private Employment Agencies Convention, 1997 (No. 181) and its accompanying Recommendation, which deal with the specific issue of agency workers.
- ▶ The Promotion of Cooperatives Recommendation, 2002 (No. 193), which refers to disguised employment relationships. Under this standard, national policies should “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”.⁴
- ▶ The Employment Relationship Recommendation, 2006 (No. 198), discussed in more detail below.

2.1 The Employment Relationship Recommendation, 2006 (No. 198)

The adoption of Recommendation No. 198 was the culmination of several years of discussion and research on the subject. The International Labour Conference discussed the employment relationship, under different titles, on three different occasions. First, there was a standard-setting session on Contract Labour in 1997—98, without results; second, a general discussion on The Scope of the Employment Relationship, in 2003; and finally, in 2006, a further standard-setting session, this time on The Employment Relationship. The need for multiple rounds of discussions

⁴ Paragraph 8(1).

over several years demonstrates the complexity of the issue, and the difficulty in achieving an international tripartite agreement on it.

The aim of this non-binding tool is to provide guidance to Member States on extending the protection afforded by labour legislation, thereby bringing workers back into the ambit of the law and out of informality. This detailed Recommendation has three features:

- a) It encourages States to formulate and apply a national policy for reviewing at regular intervals and, if necessary, clarifying the scope of laws and regulations in order to guarantee effective protection for workers who perform work in the context of an employment relationship.⁵ Such policies should provide guidance to the parties concerned, seek to combat disguised employment relationships, ensure that standards are applicable to all types of contracts, and provide for adequate training of the judiciary, arbitrators, mediators and labour inspectors.⁶
- b) It recommends ways of determining the existence of an employment relationship and lists pertinent criteria, based primarily on facts relating to the performance of work and the remuneration of the worker. It advocates legal assumptions deeming specific workers to be employees and clearly defines the conditions applied for determining the existence of an employment relationship (such as subordination or dependence), notwithstanding the way in which the relationship is characterized in any contrary arrangement agreed between the parties. It also suggests a number of indicators that could be used to ascertain the existence of an employment relationship.
- c) The establishment of an appropriate mechanism — or the use of an existing one — for monitoring developments in the labour market and the organization of work, so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship within the framework of national policy.

A historical overview of the ILO debate about Recommendation No. 198 is set out in **Annex 1**.

The adoption of Recommendation No. 198 gave a new dimension to the issue of the employment relationship, confirming it as a global issue and a common problem, shared by countries with different cultures and at different stages of economic development. It offers a new approach to solving problems in a modern way through action at international, national and enterprise levels, for the protection of dependent workers throughout the world.

⁵ ILO, *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*, 2007, Geneva, p. 4.

⁶ ILO, *The informal economy and decent work: a policy resource guide, supporting transitions to formality*, Employment Policy Department, 2013, Geneva, p. 127.

▶ 3. National policy and legislation

3.1 The need for clear national policy and legislation

Legal definitions are the cornerstone of labour regulation and therefore clear and comprehensive definitions are crucial for both understanding and responding to regulatory gaps and loopholes that may have negative implications for employment relationships. National legislation can be ambiguous as to what constitutes an employment relationship and it is often far from comprehensive in its coverage. Such ambiguities and gaps can lead to confusion and different legal interpretations, as well as weaknesses in application of the law. Moreover, the national legislation of some countries allows for different forms of temporary-casual work in sequence, so that workers can work for years within the same enterprise under different forms of short-term contracts.

Isolated ad hoc measures are insufficient to address these issues and clear and comprehensive national policy and legislation is vital. Thus, the first objective of Recommendation No. 198 is for the State to:

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.⁷

States therefore need to carefully examine their overall labour situation, by branch of activity, kind of enterprise, type of work, gender and worker nationality. They should determine how any lack of labour protection for dependent workers can be identified in their particular national situations, mapping ambiguous or disguised employment relationships, identifying the situations of unprotected dependent workers, and the related causes and consequences. Subsequently, Member States should establish specific national actions and objectives in the short, medium and long term according to available resources, and adopt concrete measures to address the problems.

Tripartite policy making

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.⁸

⁷ Recommendation No. 198, Paragraph 1.

⁸ Ibidem, Paragraph 3.

At the same time, the national policy for the protection of workers in an employment relationship “should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due”.⁹

3.2 Policy implementation

Recommendation No. 198 also contains specific suggestions on how to make the national policy a real practical tool. As well as setting out a diagnosis, definitions, principles and priorities, the national policy should include a minimum of concrete measures tending to make it effective, such as:

- ▶ giving guidance to the parties concerned on how to establish the existence of an employment relationship and on the distinction between employed workers and the self-employed;
- ▶ combating disguised employment relationships;
- ▶ regulating all forms of contractual arrangements, including those concerning multiple parties (triangular relationships);
- ▶ providing effective access to good procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;
- ▶ ensuring compliance with, and effective application of, laws and regulations concerning the employment relationship;
- ▶ providing appropriate and adequate training in relevant international labour standards, and comparative and case law for those responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards;¹⁰
- ▶ giving guidance to the parties concerned, in particular employers and workers.¹¹

3.3 Inclusive approach

A lack of labour protection for dependent workers tends to exacerbate discrimination and inequalities in the labour market.

The gender dimension

Data from around the world confirms the increased participation of women in the workforce, particularly in the informal economy, where there is a high prevalence of ambiguous or disguised employment relationships. The gender dimension of the problem is reinforced by the fact that

⁹ Ibid. Paragraph 8.

¹⁰ Ibid. Paragraph 4.

¹¹ Ibid. Paragraph 4(a).

women workers predominate in certain occupations and sectors where the proportion of disguised and ambiguous employment relationships is relatively high, such as domestic work, the textile and clothing industry, sales/supermarket jobs, nursing and the care professions, and home work. Exclusions from or restrictions on certain rights, for example in export processing zones, disproportionately impact women.

There is a need for clearer policies on gender equality, and better enforcement of the relevant laws and agreements at national level, so that the gender dimension of the problem is effectively addressed. At the international level, the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) clearly apply to all workers, and the Maternity Protection Convention, 2000 (No. 183) specifies that it applies to all employed women, including those in atypical forms of dependent work.

*Special categories of workers*¹²

The national policy should pay special attention to workers affected by uncertainties in their employment relationship, in particular the most vulnerable, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.¹³

Governments should therefore take measures to identify those sectors and occupational groups with high levels of disguised employment, and adopt a strategic approach to enforcement.¹⁴

Governments should also consider the case of migrant workers, including those engaged to work in foreign countries.



▶ The “Kafeel system” for foreign workers

The so-called “Kafeel system” for importing foreign workers operates in some Arab countries (the term “Kafeel” means a person who sponsors another). Under this system, governments registered foreign workers under the name of the employer importing them. Employers had full control over such workers, who had little choice but to stay with their employers or return home. Only if their employers issued “release letters” could other employers legally recruit them. The system enables employers to take advantage of foreign workers and exploit them.

Some Gulf countries have now abandoned the system and others are considering doing so.

¹² Module 9 of this training package deals specifically with vulnerable groups of workers.

¹³ Recommendation No. 198, Paragraph 5.

¹⁴ International Labour Conference, 91st session, Geneva, 2003, General Discussion report, Conclusions, Paragraph 19.

3.4 Legislative framework

Many countries have adopted new laws or revised existing ones to tackle issues relating to the employment relationship, from different perspectives and with a variety of provisions.

For example, Chile, Peru and Ecuador have adopted new rules on triangular employment relationships, which seem to be the most problematic for them, reflecting the need for clear policy frameworks to address this issue. In the case of Ecuador, the relevant rules are contained not in a normal law, but in a text adopted by the Constituent Assembly, before it produced the new Constitution. The Mandato Constituyente 8 (2008) banned triangular employment, labour outsourcing and hourly labour contracts on the grounds that such contractual arrangements contribute to poorer working conditions, threaten labour stability, prevent unionization and ignore international agreements.¹⁵

In Spain on 12 May 2021, a Royal Decree-Law was published, known as the “Rider Law”, whereby the revised text of the Workers’ Statute Law was modified to guarantee the labour rights of delivery personnel working on digital platforms.¹⁶

This is seen as a pioneering standard for the protection of delivery workers on digital platforms. The text, in accordance with prior rulings by several courts (including the Supreme Court) that found in favour of delivery workers, stipulates in one article and two final provisions that those working on platforms such as Glovo, UberEats or Deliveroo are employees, not self-employed individuals.

In the case of Finland, there is legislation dealing in detail with an employer’s obligation to inform employees of their principal terms of work. By the same token, an employer has to decide whether a worker should be considered as an employee or as self-employed, since the obligation only exists towards employees. Workers who do not receive information on their conditions of employment and see themselves as employees may file a complaint with the competent authority.¹⁷

Under the Labour Code of Quebec (Canada), any employer wishing to change the status of an employee to that of contractor not having employee status must inform the workers’ association concerned in a written notice containing a description of the changes. If there is no agreement between the employer and the association as to the consequences of the change in the employee’s status, the latter may apply to the *Commission des relations du travail* for a decision.¹⁸

¹⁵ See Mandato Constituyente 8, <https://www.trabajo.gob.ec/wp-content/uploads/downloads/2012/08/Mandato-Constituyente-No.-8.pdf>.

¹⁶ Spain, *Real Decreto-ley 9/2021, de 11 de mayo*, Boletín Oficial del Estado, n.º 113, de 12 de mayo 2021, Sec. I.P., pág. 56733, accessible at: <https://boe.es/boe/dias/2021/05/12/pdfs/BOE-A-2021-7840.pdf#BOEn>.

¹⁷ Finland Employment Contracts Act, Ch. 2, s.4.

¹⁸ Labour Code, s. 20.01, as amended on 21 June 2001. See 2006 Report V (1), p. 50.



▶ European Union: Resolution on modernizing labour law

In 2007, the European Parliament adopted a Resolution to meet the challenges of the 21st century. This was to be a “new approach to labour law that aims to cover all workers regardless of their contractual situation” and specifically notes “the need to reduce the insecurity sometimes associated with non-standard forms of employment and to enhance the protection of vulnerable workers”.

The Resolution calls on EU member States to promote implementation of Recommendation No. 198. It also refers to the ILO Fundamental Conventions, such as the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the ILO decent work agenda. In particular, it states that “any form of employment, whether non-standard or otherwise, should carry with it a core of rights regardless of the specific employment status” and requests that “all workers have access to the same level of protection”.¹⁹

3.5 Law enforcement

It is common practice in many countries to recruit workers with no employment relationship, even when all the elements which characterize an employment relationship in law are present. The intention of companies that adopt this practice is to reduce the high costs arising from the payment of labour-related charges. When such practices occur, the existence of an employment relationship may be questioned in different ways.

Judiciary

The first is for the individual lacking a formal employment relationship to file a claim in the courts. In this case, the judge may recognize the employment relationship between the parties if there is sufficient evidence that relevant factors of employment are present. The company will then have to accord the individual all the labour rights to which he or she was entitled during the period of work.

Labour Inspection

Labour inspectors may also take remedial action based on *prima facie* evidence that an employment relationship exists, even if there is some doubt about this. It is not necessary for inspectors to conclusively prove that an employment relationship exists, as it is for an employer to demonstrate that one does not exist where there are indications to the contrary.

¹⁹ European Parliament Resolution of 11 July 2007 on modernizing labour law to meet the challenges of the 21st century. See particularly paragraphs 17, 19, 40 and 41 at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0339+0+DOC+XML+V0//EN> and <http://www.ilo.org/public/english/dialogue/ifpdial/areas/legislation/employ.htm>.

In any case, in most countries it is only a judge who can finally say whether or not an employment relationship actually exists.

Courts should be best placed to settle disputes regarding the existence and terms of an employment relationship. Labour inspectors are, however, often closer to workers and are more accessible to them. It is therefore important that a choice of procedures and mechanisms, including the labour inspectorate, be available to workers and employers to enable them to settle their disputes and help them in this regard.

Dispute settlement mechanisms

In addition to these means, many countries have adopted mechanisms for dispute resolution, which contribute to law enforcement.

One of the most common problems that unprotected dependent workers face, as is also true for those who are legally protected, is the lack of an accessible and efficient process for the settlement of disputes.

This is so even in countries with acceptable legislation. Employees often have to wait for the termination of their contract before they are in a position to make a complaint against their employer, and they cannot always afford the cost of such action. For unprotected workers, their unclear legal situation also undermines their position for making a complaint, because of practical difficulties in legitimizing their circumstances.

Dispute resolution machinery and/or administrative procedures for determining the status of workers are important services. These should be provided by an appropriate agency, which could have general competence or be limited to specified sectors of the economy. It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms and procedures to resolve disputes about employment status (Recommendation No.198, Paragraph 14).

3.6 Information and advice

It should be easy for workers and employers to get technical information and advice on the nature of the relationship in place between them, or the relationship they are contemplating. It is useful in many circumstances to know whether there is, or will be, an employment relationship between them, and consequently whether the worker is or will be an employee or a self-employed person. This is especially true for micro or small-sized enterprises that do not have ready access to legal advice.

Providing information is the minimum action that should be taken to combat disguised employment relationships, informing people of the elements of an employment relationship, how it can be disguised, and what can be done to prevent abuses.



▶ New Zealand - website of the Employment Relations Authority²⁰

In New Zealand, the Employment Relations Authority (ERA) website informs workers in very concrete terms of the nature of an employment contract and what can be done in cases of ambiguity. The website provides information concerning the legal tests that can be performed to distinguish between an employee and a contractor:

“Legal tests

To make the correct decision you must focus on the real nature of the working relationship not just the label the parties are calling it. The courts have developed some legal tests to help you tell the difference, they are:

- ▶ *Intention test*
- ▶ *Control vs independence test*
- ▶ *Integration test*
- ▶ *Fundamental/economic reality test*

You need to think about your situation and apply all the tests to help you to decide. No one test will give you the correct answer. If you are still unsure after you’ve applied the tests, [Employment Mediation Services](#) can help you decide the real nature of your relationship, or you should seek legal advice.

If you get it wrong

- ▶ *Some employers accidentally classify employees as contractors not realising the consequences of their mistake.*
- ▶ *A sham contracting arrangement happens if an employer deliberately attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done so the employer can avoid their responsibility for employee entitlements. The [Employment Relations Authority](#) will not support a sham contracting arrangement and the employer will still have to give the ‘employee’ their employment entitlements. The ‘employer’ may also receive penalties against them.”*

3.7 Training

All persons responsible for dealing with the resolution of disputes and the enforcement of national laws and standards concerning employment relationships should have a clear understanding of the matter. We refer in particular to judges, arbitrators, mediators, conciliators and labour inspectors, as well as employers’ and workers’ representatives.

²⁰ Contractor versus employee » Employment New Zealand.

They should know the different types of employment relationship and other contractual arrangements that may exist between employer, employee and the self-employed, between user and provider, and the rights, obligations and responsibilities of each party. Ideally, they should know not only the national law applicable to the different arrangements, the competence limits of the different authorities and the rules governing relevant procedures and mechanisms (including the burden of proof and the existence of presumptions), but also the international labour standards, comparative law and case law pertinent to employment-relationship-related issues.

Useful guidance on the practical application of the Employment Recommendation is provided by the “[Annotated Guide to ILO Recommendation No. 198](#)” (ILO, 2007).

▶ 4. Determining the existence of an employment relationship

4.1 Definition and identification

The nature of the employment relationship can be complex even when the working environment is relatively stable, but becomes even more complicated and sometimes confusing when it is changing. For example, business takeovers, new forms of work organization and the promotion of civil or commercial contracts in place of labour law contracts all have an impact on employment relationships. In such circumstances, workers can feel isolated and in difficulty when asking their employers for appropriate legal protection. For many workers, there will often be no alternative but to accept the situation imposed on them.

For this reason, according to Recommendation No. 198, governments “may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence”.²¹ They should also consider defining, in legislation or otherwise, “specific indicators of the existence of an employment relationship”.²²

Many countries have established such conditions or indicators, either by stipulating formal definitions or by other means. In other countries, judges perform this function, applying tests that assess such factors as control, integration into the enterprise, economic reality (who bears the financial risk) and mutuality of obligation.²³

Conditions

It is often considered that an employment relationship exists when a person works for another in conditions of *dependence or subordination or for his or her benefit*. To define or indicate a specific condition defining the employment relationship is very useful for distinguishing between dependent and self-employed work, and for minimizing or simplifying conflicts in this area between workers and employers. Some central authorities have fixed internal criteria for this.

Even so, conditions and criteria are still abstract concepts that need to be applied. What does it mean in practice to work under somebody, to depend on somebody? Should it be a legal or an economic dependence, or both? When and how can it be recognized? Judges have given practical replies to these kinds of questions, identifying a number of concrete indicators that confirm the existence of an employment relationship. Such indicators are particularly useful for labour inspectors in their dealings with employers and workers, during enterprise visits and in other circumstances.

²¹ Recommendation No. 198, Paragraph 12.

²² Ibid. Paragraph 13.

²³ Report V, 2003, p. 23.

Indicators

Recommendation No. 198 contains a number of examples of indicators, taken from comparative law, which are set forth in the box below.



▶ Classical indicators of the employment relationship: ILO Recommendation No. 198²⁴

The fact that the work:

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

Periodic payment of remuneration to the worker;

- a) the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment may be in kind, such as food, lodging or transport;
- b) entitlements such as weekly rest and annual holidays are recognised;
- c) the party requesting the work pays for travel undertaken by the worker in order to carry out the work; and
- d) there is an absence of financial risk for the worker.

In Ireland a list of indicators for determining employment and self-employment was developed in a Code of Practice, drawn up during tripartite negotiations as part of the 2000–2002 Programme for Prosperity and Fairness.

²⁴ Recommendation No. 198, Paragraph 13.



▶ Ireland: indicators in the code of practice for determining the employment or self-employment status of individuals²⁵

EMPLOYEES

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

- ▶ Is under the control of another person who directs as to how, when and where the work is to be carried out.
- ▶ Is not exposed to personal financial risk in carrying out the work.
- ▶ Supplies labour only, and does not supply materials for the job in hand.
- ▶ Receives a fixed hourly, weekly or monthly wage; works set hours or a given number of hours per week or month.
- ▶ Cannot subcontract the work. If the work can be subcontracted and paid by the person subcontracting the work, the employer/employee relationship may simply be transferred on.

SELF-EMPLOYED

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

- ▶ Owns his or her own business.
- ▶ Is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract.
- ▶ Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account.
- ▶ Has control over what is done, when and where the job is done and whether he or she does it personally.
- ▶ Is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken.

²⁵ Code of Practice on Determining Employment Status (revenue.ie).

- ▶ Does not assume responsibility for investment and management in the enterprise.
- ▶ Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements.

- ▶ Assumes responsibility for investment and management in the enterprise.
- ▶ Has opportunity to profit from sound management in the scheduling and performance of engagements and tasks.

4.2 The primacy of facts

As a complement to the above conditions and indicators, Recommendation No. 198 restates a fundamental principle common in labour law: the primacy of facts.²⁶ This means that when a person works for another for remuneration, under certain circumstances an employment relationship exists irrespective of whether one or both of these persons says that the work is done under a civil or commercial contract, or under another kind of arrangement. What matters are the actual facts of the work and remuneration, not what it is said in a contract or other document, if it is in contradiction with reality.

The principle of the primacy of facts is very important. All too often, a worker provides labour without a written contract, or under what appears to be a civil or commercial contract drafted by the employer, sometimes in a language the worker cannot understand. To ensure worker protection, therefore, the labour inspector (or whoever is making a judgement about the situation) needs to look at the actual working conditions to ascertain whether an employment relationship exists or not.

South Africa has established a presumption based on certain indicators.

²⁶ Recommendation No. 198, Paragraph 9.



▶ **South Africa: Presumption of employee status²⁷**

The 2020 Amendment of BCEA 1A stipulates a presumption as to who is an employee. Thus, a person who works for, or provides services to another person, is presumed to be an employee if

- (i) his or her manner of working or hours are subject to control or direction;
- (ii) he or she forms part of the employer's organization;
- (iii) he or she has worked for the other person for at least 40 hours per month over the previous three months;
- (iv) he or she is economically dependent on the other person;
- (v) he or she is provided with his or her tools or work equipment; or
- (vi) he or she only works for, or renders service to, one person.

If one of these factors is present, the person is presumed to be an employee, until the employer proves that he or she is not.

4.3 Facilitating proof of employment

To assist workers who have difficulty in proving the existence of their employment relationship and in accessing competent settlement procedures, Recommendation No. 198 suggests the adoption of the following measures:²⁸

- ▶ Allowing a broad range of means of proof;
- ▶ Providing for a legal presumption that an employment relationship exists where one or more relevant indicators are present;
- ▶ Deeming workers with certain characteristics to be either employed or self-employed; this would be appropriate for workers whose situation is borderline between employed and self-employed, as such situations are often subject to contradictory judicial decisions;
- ▶ Deciding that the settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities, to which workers and employers should have ready access in accordance with national law and practice.

Several countries have developed their own guidance to facilitate proof of the employment relationship.

²⁷ Republic of South Africa, *Amendment 1A of Basic Conditions of Employment Act*, Government Gazette n.º 43026, p. 12, accessible at: https://www.gov.za/sites/default/files/gcis_document/202002/43026rg11041gon174.pdf.

²⁸ Recommendation No. 198, Paragraphs 11 and 14.

► 5. Monitoring, review and updating

5.1 Rapid changes

Given the ongoing changes in patterns of employment, good policies for the protection of dependent workers can become obsolete and ineffective if they are not regularly reviewed and updated.

Changes in employment patterns have been constant and sometimes dramatic. Agency work, for instance, has meant radical changes in employment practices. This type of work has become well developed in many countries and needs specific regulation and follow-up.

Furthermore, many enterprises have adopted a wide range of “indirect employment” practices, involving complex networks of agreements with other enterprises providing services, sometimes in different countries, with the result that employees often do not know who their real employer is. The consequent lack of worker protection has become a serious and extended problem. For example, teleworking in one country or for transnational services may leave workers unprotected. The same situation can arise under certain new forms of “civil” or “commercial” contracts.

5.2 Tripartite approach to monitoring

Tripartite mechanisms, established specifically for this purpose or already existing, should be used to monitor developments in the labour market and the organization of work and to give advice on the adoption and implementation of measures concerning the employment relationship within the framework of national policy.²⁹ The monitoring mechanism should be supported by the most representative organizations of employers and workers, represented on an equal footing. They should be consulted as often as necessary and, wherever possible and useful, on the basis of experts’ reports or technical studies.³⁰

In the most important and complex cases of transnational provision of services, the Recommendation suggests that specific national mechanisms be established to ensure that the employment relationship is effectively identified. Transnational networking and exchanges of information are also encouraged³¹ and this is increasingly happening, for example among labour authorities across the European Union. One obstacle that needs to be overcome is the lack of harmonization of specific criteria for preventive action in different countries. In Spain, for example, the validity of medical certificates issued in other countries is of particular concern.³²

²⁹ Recommendation No. 198, Paragraph 19.

³⁰ Ibid. Paragraph 20.

³¹ Ibid. Paragraph 22.

³² Spain, Ministry of Labour and Immigration, Labour and Social Security Inspection Annual Report 2008, pp. 41—42, 89: http://info.mtin.es/itss/web/Que_hacemos/Estadisticas/

5.3 Data and research

Evidence-based policymaking requires objective and updated information, statistics, data and research. Recommendation No.198 invites Member States to “collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors”.³³ Research has sometimes been initiated at regional level, as in the European Union.



▶ European research on fraudulent contracting of work, 2016³⁴

The “Exploring the fraudulent contracting of work in the European Union” report is part of a Eurofound project initiated in 2015 that aimed to map the features, extent and impact of the fraudulent contracting of work and self-employment in the EU.

The project addressed two key questions:

- a) Which types of fraudulent contracting of work (or services) can be identified in the EU, including in the context of the cross-border mobility of workers?
- b) What measures are being developed by the national authorities, including labour inspectorates and other competent agencies, and the social partners, to identify, prevent and combat the fraudulent contracting of work

The study is based on 29 national reports, covering the EU28 and Norway. It was updated on 17 December 2017.

National consultation, documentation and research should be carried out in an appropriate manner in each country, taking into account the resources available. These measures need not be too complicated or expensive, but they make an important contribution to gathering information on the situation of unprotected dependent workers, their problems, and progress being made to protect them. Statistics relating to the employed and self-employed are very useful, although national figures often fail to take into account disguised employment relationships and cases in which the “self-employed” are in fact economically dependent on one or more employers. Moreover, there is a lack of information on the frequent change of status of many workers from self-employment to waged employment and vice-versa. Widespread implementation of the Recommendation would be very helpful in this respect.

Information on triangular employment relationships at national and sectoral level, ideally disaggregated according to sex, is also very important for the formulation and implementation of national policy, but is generally insufficient. Countries should be aware of the numbers of people

³³ Recommendation No. 198, Paragraph 21.

³⁴ Republic of South Africa, *Amendment 1A of Basic Conditions of Employment Act*, Government Gazette n.º 43026, p. 12, accessible at: https://www.gov.za/sites/default/files/gcis_document/202002/43026rg11041gon174.pdf.

working for contractor and subcontractor companies, including private employment agencies; the problems for worker protection that this kind of employment raises; and existing good practice.

▶ 6. The role of labour inspection

6.1 A challenging context

The lack of effective application and enforcement of legislation by labour inspectorates is a problem in many countries, and as a result unprotected workers are especially affected. Thus, the ILO Report for the General Discussion in 2003 comments as follows:³⁵

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

The labour inspectorates face considerable difficulties in carrying out their tasks. In some countries, the probability that an inspector will visit a particular enterprise, detect shortcomings, impose corrective measures and enforce them is very low or non-existent. Particular difficulties arise where the premises are extensive or located in remote places and, for different reasons, in small and micro-enterprises.

The situation is even more uncertain as regards the possibility of action by labour inspectors concerning workers in disguised or objectively ambiguous employment relationships, even in countries where inspectors are empowered to identify such cases and remedy them....

So, in addition to the lack of resources and internal problems that labour inspectorates face, a lack of clarity in the employment relationship itself makes it difficult to apply and enforce the law effectively. The relationship may, for example, be a borderline one between dependence and independence, where the employer in good faith considers the dependent worker as a self-employed person. Similar ambiguities can occur with triangular relationships, especially if the legislation is silent or vague concerning them. Often the employment relationship is disguised, and the disguise may be successful, especially if the gap between legislation and reality is very wide, sanctions are not sufficiently dissuasive, and labour administration, labour inspection and the judiciary are weak.

6.2 Key functions

Inspection and enforcement

The role of labour inspectors is therefore to identify the main parties in the employment relationship, as far as possible, bearing in mind that in most countries it is only the courts that can

³⁵ Report V, 2003, pp. 34—35.

finally establish such matters. Inspectors can nevertheless look out for certain indicators that point to a particular type of employment relationship, and work on that basis.

Most importantly, inspectors should assess the working conditions that workers are actually facing and whether the law is being complied with, and take action accordingly. This would include the usual range of options, including enforcement where justified, taking action against those who are evidently responsible for violations and abuses.

Providing input for policy formulation and revision

Labour inspectors should be prepared to identify disguised employment relationships, during inspections or in other circumstances, and alert their office to current practices. By doing so, they will not only ensure application of the law, they will also be making an important contribution to work in preparing or updating the national policy to which the Recommendation refers.

Information, advice, training

As mentioned in Chapter 3, innovative programmes of information and education, and the provision of services, guidance and advice are important pillars of any law enforcement and policy implementation strategy.

These tasks are part of the duties of a labour inspector, and play a key role in assisting the social partners. To target a wider audience, awareness-raising campaigns could be organized in cooperation with other bodies and the media.

6.3 Qualified human resources

The employment relationship and the responsibilities it confers have a daily impact on labour relations and working conditions. These issues are therefore fundamental to the work of inspectors, whatever their mandate and whatever legislation they have to enforce. Moreover, changes in patterns of employment, as well as the growth in the informal economy and undeclared work, represent formidable challenges for labour inspectorates. It is therefore vital that inspectors receive thorough training on these issues and their complexities, so that they can make the right judgements when it comes to taking decisions about responsibilities and taking appropriate enforcement action. Labour inspectors should become experts in distinguishing self-employment from dependent employment, and in identifying the ways in which employment relationships are disguised as civil contracts, or bilateral employment relationships as false triangular employment relationships. They should have a good knowledge of the relevant laws and regulations, including court decisions relating to the existence or non-existence of an employment relationship.

Labour inspectorates should have a wide range of tools at their disposal, including training materials, guidelines and checklists, to enhance the skills of inspectors and their capacity to tackle the problems associated with disguised and ambiguous relationships. Training also needs to take into account technological and methodological innovations. While a classic inspection of

traditional workplaces may be sufficient to identify bogus self-employed workers, the same cannot be said of inspections in respect of teleworking or digital platforms.

In these cases, innovative methodologies must be used, aided by interaction with databases maintained by different institutions. Access to multiple datasets from different institutions can greatly augment the scope for identifying previously hidden patterns of misclassification and increase investigative efficiency, enhancing outcomes without requiring additional staff.

Exchanges of experience and working methods in different countries could be achieved by seconding professional staff, particularly between the labour administrations and labour inspectorates of developed and developing countries.

6.4 Cooperation

As noted earlier, it is essential to ensure cooperation, and strategic and operational coordination, at national and international level between the competent public authorities (social security agencies, taxes authorities, police and foreign police forces). Such cooperation could take the form of joint inspection actions; the setting up of special multidisciplinary units to combat the misclassification of workers; the exchange and interconnection of information and data; and joint training of inspectors from different public authorities.

▶ Summary

Under existing laws, regulations and collective agreements, there are rights and entitlements which are specific to workers who work within the scope of an employment relationship. The employment relationship is a notion that creates a legal link between a person (the employee) and another person or legal entity (the employer) to whom she or he provides labour or services under certain conditions in return for remuneration.

Self-employment and independent work, based on commercial and civil contractual arrangements, are by definition beyond the scope of the employment relationship.

Changes in the structure of the labour market and in the way in which work is organized are leading to changing patterns of work, extending the use of different types of non-standard forms of employment to all economic sectors.

In some situations, it may be unclear whether a worker is an employee or is genuinely self-employed. Sometimes the employment relationship is on the borderline between dependence and independence, and the employer can in good faith consider the dependent worker to be a self-employed person. Similar situations can occur with triangular relationships, especially if the legislation relating to them is silent or vague. The employment relationship is often disguised, and the disguise may be successful, especially if the gap between legislation and reality is very wide, sanctions are not sufficiently dissuasive, and the labour administration and judiciary are weak.

Disguised employment occurs when the employer treats a person who is really an employee as other than an employee, using a legal stratagem to conceal his or her true status. False legal employment, false subcontracting, the establishment of pseudo-cooperatives, the false provision of services and false company restructuring are among the most frequent means used to disguise employment relationships.

An ambiguous employment relationship exists whenever work is performed or services are provided under conditions that give rise to genuine doubt about the existence of an employment relationship.

Labour inspectors need to become experts in distinguishing self-employment from dependent employment. They should be familiar with the main ways in which an employment relationship is disguised as a civil contract, or a bilateral employment relationship as a false triangular employment relationship. Labour inspectors should be prepared to identify disguised employment relationships during their visits, and alert their office to current practices. In so doing, labour inspectors will not only ensure that the law is effectively applied, they will also be making an important contribution to the work involved in preparing or updating national policy.



Exercise 1

TITLE *Formulating a national policy*

TASK

- ✓ In small group, list five of the more common and significant situations of ambiguous or disguised and/or triangular relationships in your country, specifying the sectors, types of enterprises and occupations in which these situations occur; also specify the ways in which women workers are affected by them.
- ✓ Secondly, the group should summarize the “national problem” where lack of protection is concerned, taking into account the situations presented by each member.
- ✓ Finally, the group should establish which of these situations are priority issues and what kind of action should be taken for each of them.

TIME

- ✓ 60 minutes for group work.
- ✓ 10 minutes for each group presentation.
- ✓ 20 to 30 minutes for final discussion.



Exercise 2

TITLE	<i>Indicators</i>
TASK	<ul style="list-style-type: none">✓ Individually, read the list contained in Paragraph 13 of Recommendation No. 198.✓ In small groups, list three indicators concerning work and three concerning remuneration, by order of importance or frequency in your country.✓ Discuss and add one more indicators to the list, not included in the Recommendation but taken from your national law or case law.✓ In plenary, compare the lists made by the different groups and identify those indicators that are common to all of them.
TIME	<ul style="list-style-type: none">✓ 45 minutes for group work.✓ 5 minutes for each group presentation.✓ 20 minutes for final discussion.

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► Annex 1. Developing an international standard on the employment relationship - a historical overview

By Enrique Marin

On three different occasions, the International Labour Conference discussed the employment relationship under different titles. First, there was a standard-setting session on Contract Labour in 1997-1998, without results; second, a general discussion on The Scope of the Employment Relationship, in 2003; and third, there was a further standard-setting session, this time on The Employment Relationship, in 2006. The need for multiple rounds of discussions over several years, not common at the Conference, confirms the complexity of the issue, the difficulty of having an international tripartite dialogue on the subject, and the importance that the ILO has ascribed to this issue.

Three sensitive questions emerged from the ILO Conference when it first discussed the matter of unprotected dependent workers in 1997-98: the terminology, the conceptual framework, and the radically opposed views of employers and workers, which also divided governments. Terminological and conceptual differences were overcome after several years of effort and substantial progress was made, but the difference of views remained, even if reduced.

The subject the Conference discussed in 1997-98 was “Contract Labour”. Contract labour is a very common and popular English expression, but it is vague and difficult to translate into other languages, and has been a source of confusion. The type of work associated with this expression was considered to be similar to the work of a person engaged in an employment relationship, but there was no clear definition of it. For the purposes of the proposed Convention, the term “contract labour” meant “work performed for a natural or legal person (referred to as a “user enterprise”) by a person (referred to as a “contract worker”) where the work is performed by the contract worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice but where the contract worker is not the employee of the user enterprise”.³⁶

Discussions in 1997 and 1998 caused confusion. Contrary to the tradition of the Conference, no instrument was adopted. Employers adamantly opposed the drafts proposed, considering that the issue was not suitable for standard setting because of the variety of national situations and approaches; and that the proposed instruments would interfere with civil and commercial arrangements. Furthermore, employers and some governments said that these texts would create a third and ill-defined category of workers, between dependent and self-employed

³⁶ Proposed Convention concerning contract labour, article 1. ILC, 86th Session, Geneva, 1998, Committee on Contract Labour, Report V (2B) Addendum. <http://www.ilo.org/public/english/standards/reIm/ilc/ilc86/rep-vadd.htm>.

workers. In the end, delegates decided to stop using the expressions “contract labour” and “contract worker”.

The lack of consensus over adopting instruments did not mean, however, that the Conference denied the existence of the problem. On the contrary, it was convinced that there were workers who were not being protected, and employers recognized that something had to be done about disguised employment relationships. For fresh discussions to take place, further work was required to determine which workers were in need of protection in the situations that the Committee on Contract Labour had begun to identify, how they could be protected, and how such workers would be defined, bearing in mind the existence of different languages and legal regimes. The issue was provisionally called “Workers’ Protection” for the wording of the Resolution.

From “contract labour” to “workers’ protection” and the “employment relationship”

The Office launched a research programme on “Workers’ Protection”, which involved national studies and meetings to identify the workers that had attracted the attention of the Conference as needing labour protection.

Using a common approach and methodology, national authors identified the characteristics of the following kind of workers in their own countries: self-employed; dependent, linked by a bilateral or triangular employment relationship; and self-employed but economically dependent on the work provider. They also examined the situation of certain specific workers, to facilitate comparisons between them from one country to another. This exercise was performed in the case of truck drivers, construction workers, clothing workers, sales staff in department stores, and workers in supermarkets and hypermarkets. The idea was to observe and describe workers’ situations without ascribing preconceived and ill-defined labels to them, such as contract workers. This exercise was very useful and later inspired some aspects of the monitoring mechanism of Recommendation No. 198. It also provided a useful tool for the training of labour inspectors, and for organizing strategic activities of the labour inspectorate.

The results of this research and technical discussions were subsequently presented to a tripartite meeting of experts, who discussed the issue and produced a common declaration. The experts concluded that the persons in need of protection as referred to by the ILO Conference were either dependent workers linked to the work provider by an ambiguous or disguised employment relationship, which was difficult to identify as such; or dependent workers in a confusing triangular employment relationship. The experts confirmed that the central problem was the scope of the employment relationship, in the sense that many dependent workers were legally or *de facto* outside the protection of labour law. The experts’ common declaration was an important sign of consensus. With it, the work of the ILO on this issue took a new turn.

Under a new approach, the issue of the Employment Relationship was discussed again at the Conference in 2003 and 2006.

In 2003, a “general discussion” provided an opportunity to continue the exchange of ideas on this issue. The discussion was extremely useful and productive. Linguistic and conceptual problems

were substantially overcome. Members of the Committee on the Employment Relationship seemed familiar with and concerned by the problems raised, and saw them as real and sensitive. After difficult negotiations, the Committee unanimously adopted some important Conclusions,³⁷ which contained the basis for a possible future international instrument.

In accordance with these Conclusions, the ILO was tasked with facilitating the adoption of a Recommendation, and placing this item on the agenda of a forthcoming International Labour Conference. The ILO was asked to focus on disguised employment relationships and on the need for mechanisms for effective protection, at national level, of persons in such relationships. The ILO was to provide guidance to States, without forcing a universal definition of the substance of the employment relationship. It would also be flexible enough to take account of different national realities, address the gender dimension and not interfere with genuine commercial and independent contracting arrangements. The ILO would promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level and would take into account recent developments in the employment relationship, as well as the Conclusions. The issue of triangular employment relationships was, however, not resolved on this occasion.³⁸

Labour inspection was mentioned several times in the Conclusions. According to the latter, there should be a strong political commitment on the part of the State to ensure compliance with the law, and to support all mechanisms that facilitated this, which also involved social partners where appropriate. To this end, cooperation would be promoted among the different government enforcement agencies, particularly the labour inspectorate. The Conclusions recalled how this strong political commitment was conceived at the Labour Inspection Convention, 1947 (No. 81), and how it is essential that labour administration staff, and particularly the labour inspectorate, where applicable, receive appropriate training. To this effect, the ILO was to strengthen its assistance to national labour administrations and, in particular, to labour inspectorates.³⁹

The moment for standard setting finally arrived in 2006, when Recommendation No. 198 was adopted. The proposed Recommendation received broad support from workers' and government delegates as a basis for discussions. Employers, on the other hand, considered that it contained important principles, but had gone beyond the issue of disguised employment relationships. The discussion was a very difficult but exciting exercise in tripartite dialogue, during which amendments and sub-amendments from employers, workers and governments were adopted and important progress was made, including on the sensitive matter of triangular employment relationships. However the employers, who had expressed their reservations from the beginning, decided not to support the Recommendation when the paragraphs concerning criteria, indicators and the presumption of the employment relationship were adopted.⁴⁰

³⁷ See Annex 1, Conclusions concerning employment relationship, in: <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>.

³⁸ Ibidem, Paragraph 25.

³⁹ Ibidem, Paragraphs 10,11,12 and 21.

⁴⁰ See *Report of the Committee on the Employment Relationship*, Provisional Record 21, paragraph 576; and its submission, discussion and approval in Plenary, Provisional Record; 23, p. 23/17, Geneva, International Labour Conference, 95th Session, at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/records.htm>.

Recommendation No. 198

During the 2003 General Discussion, it was agreed that a Recommendation might be a suitable instrument to deal with this matter. Employers strongly opposed the idea of a Convention, and several States shared this view. As opposed to Conventions, Recommendations only provide guidance. Nevertheless, Recommendation No. 198 asks for precise measures from Member States and, as a standard instrument, it implies “submission to the competent authorities” and reporting obligations to the ILO under Article 19 of the ILO Constitution.⁴¹

⁴¹ Article 19 (...) Obligations of Members in respect of Recommendations.

6. In the case of a Recommendation:

- (a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;
- (b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;
- (c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them;
- (d) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them. (See ILO Constitution at <http://www.ilo.org/ilolex/english/constq.htm>).

