



International
Labour
Organization

Executive Summary

The employment relationship: A comparative overview

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Recent decades have witnessed a progressive crisis regarding the legal frameworks for determining whether workers are or are not in an employment relationship and thus entitled to a range of protections under labour law. This crisis has come about both as the result of major changes in the world of work and the inability of legal regulation to adapt quickly and effectively to these changes. At the heart of the matter is the fact that the traditional paradigms of, on the one hand, subordinate employment, based on such models as the blue-collar worker working in an assembly line of a large and vertically integrated firm, and on the other, autonomous self-employment, are less often the norm. A growing grey area between dependent work and self-employment has made it increasingly difficult to establish whether or not an employment relationship exists, as in many situations the respective rights and obligations of the parties concerned are not clear. In certain other situations, attempts are made to disguise the employment relationship or to exploit the inadequacies and gaps that exist in the legal framework or in its interpretation or application. All too often, it is vulnerable workers who suffer most in such situations.

The employment relationship is thus under ever-closer scrutiny, not only by labour lawyers, but also by workers, employers and the judiciary, since changes to the “standard employment relationship” shape the scope and application of labour legislation and automatically affect the way labour law is implemented.

This book examines the many ways labour legislation applies to the realm of the employment relationship, covering a wide range of related issues. Along with the essential terms, notions, definitions and laws, the volume gives an overview of the historical background and current practice in various

regions of the world. It also documents and analyses the legislative approaches countries are developing in response to new forms of work. Specific chapters examine Europe, Latin America and the Caribbean, Africa, Asia, and Canada, Mexico and the United States.

A central feature of the traditional employment relationship, one that can be found in different countries and legal traditions, is the hierarchical power of employers over employees. This hierarchical power combines three related elements: (i) the power to assign tasks and to give orders and directives to employees (directional power); (ii) the power to monitor both the performance of such tasks and compliance with orders and directives (power of control); and (iii) the power to sanction both improper or negligent performance of the assigned tasks and given orders and directives (disciplinary power). The presence of hierarchical power in a working relationship, established either by statute or case law, has been the element that distinguishes employment from self-employment, and accordingly is the access key to the wide range of regulations set up to protect employees in the different jurisdictions.

The current progressive reduction of hierarchy and parcelization of work has materially changed the way in which work activities are being performed. These developments, together with the spread of new activities in the service sector and the growing use of information technology in business, have challenged the traditional legal categories of the employment relationship. Increasingly, new working practices are coming to lawyers' attention that cannot be classified as either employment or self-employment. These may embody new forms of integration of work in business organizations which do not match with all the elements of hierarchical power as construed by legal experts and case law.

Globalization is of course a key factor as well. Rapid economic integration and the liberalization of trade, investment and capital flows have accelerated the pace of change in the world of work and given rise to myriad new forms of the employment relationship. As employment patterns become more and more complex and the range and variety of work arrangements expands, this creates opportunities as well as risks for countries, enterprises and workers alike. While these changes have increased labour market flexibility, they have also led to a growing number of workers whose employment status is unclear and who do not enjoy the protections normally associated with the employment relationship. Substantial stages

of production are now contracted out, and these are becoming more and more significant in the production cycle. With “horizontal” outsourcing, a business strategy often aimed at reducing workforce costs, activities as important as accounting, marketing and client care are now being entrusted to third parties. For enterprises, there is the prospect of short-term gains but also of adverse long-term impacts on competitiveness and viability. In this way, globalization is challenging the relevance of labour laws, which for many countries have been an instrument for the orderly organization of the relationships between major labour market players (employers and workers).

Significant problems of classification have therefore emerged with regard to a growing number of working activities where directional power and hierarchical organization are more flexible. In terms of labour law, the dual risks are, on the one hand, excluding workers in relationships deserving the legal protection afforded to employees, and on the other including in the same scope workers who do not deserve such protection. Neither exclusion nor inclusion can be determined taking into account the mere written or oral declaration of the parties, since courts – in the majority of jurisdictions – must rely principally on the factual circumstances and characteristics of the relevant relationship.

As this volume describes, in order to avoid a borderless expansion of the scope of employment, the labour courts initially adopted a rigorous and narrow approach. Accordingly, directional (and thus hierarchical) power was deemed present only where the worker was subject to directional, organizational and disciplinary control by the relevant employer, who issued specific orders and assiduously monitored the working activity. This approach, however, risked excluding from the scope of the employment relationship and relevant legal protection a wide range of work activities that in fact deserved such protection. Consequently, over the years the judicial approach in a good number of countries has been to become more flexible in addressing working activities that displayed forms of hierarchical power differing from traditional ones. Judges now often decide that hierarchical power – and therefore an employment relationship – is present when a worker performs his/her activities on a continuous, loyal and diligent basis, following the general directives issued in accordance with the programmes and goals of the firm in question. But new work activities and employer–employee relationships are constantly appearing that challenge accepted legal categories. For

example, in many European jurisdictions a growing number of workers are in a grey area between employment and self-employment, since their working relationships only partially fulfil the requirements of employment under the relevant laws. This problem is becoming a serious one not only in Europe, but also in Africa, Asia and Latin America, as testified by the regional contributions to this volume. And in countries with no “median” legal category between employment and self-employment, there is no protection – or at least no significant protection – for the self-employed, who are not covered by any legal structure.

While the examples above are only the tip of the iceberg when it comes to the changes currently taking place in global labour markets, they offer ample evidence that the legal framework governing the employment relationship is crucial to managing these changes. Failure to adapt labour laws could result in the perpetuation of regulations that are at best ill-suited to the new realities of the contemporary work world, and at worst calamitous. This is why discussion over the future of the employment relationship and its legal framework is rapidly gaining momentum at both national and international levels, and why the ILO is at the forefront of these debates.

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