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"TOWARDS SAFE, HEALTHY AND DECLARED WORK IN UKRAINE"

Employment Relationship

Online training series
International and EU Labour Standards
Background paper

June, 2020

This material was developed within the EU-ILO Project “Towards safe, healthy and declared work in Ukraine” www.ilo.org/shd4Ukraine.

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Contents

EXECUTIVE SUMMARY

The employment relationship is a familiar concept in most countries, regardless of the differences that may exist in national legal frameworks. It refers to the relationship between a worker (employee) and an employer for whom the former performs work under specified conditions in exchange for remuneration (ILO, 2020).

The employment relationship gives rise to reciprocal rights and obligations between the employer and the employee and ensures the access to employment-related rights and benefits.

The issue of who is or is not in an employment relationship, and what rights and protections flow from that status, has become problematic in recent decades as a result of major changes in work organization, leading to the appearance of new forms of work that do not necessarily fit within the traditional notion of the employment relationship and challenging the adequacy of legal regulation in adapting to those changes. Such changes have accelerated as a result of globalization, characterized by a rapid economic integration among countries driven by the liberalization of trade, investment and capital flows, as well as by digitalization and other technological innovations (ILO, 2011).

The consequent rapid changes in the labour market and increased flexibility has led to a growing number of workers whose employment status is unclear and who, as a consequence, fall outside the scope of the employment relationship, being therefore unprotected by those labour and employment (ILO, 2020).

The present background paper, on Employment Relationship, was prepared under the scope of the Activity 1.3.1 of the EU funded and ILO implemented technical cooperation project “Towards safe, healthy and declared work in Ukraine”[1].

[1] Additional information on this project can be found https://ilo.org/shd4Ukraine.

It is intended to support the training actions on the Employment Relationship, targeting project stakeholders, and to provide them with technical advice and guidance on how to better align Ukrainian legal framework with the European and International Labour Standards[2] and best practices, with the aim of transforming undeclared into declared work and foster decent working conditions in Ukraine.

It should not be seen as a code of practice, neither its recommendations should be understood as official guidelines of the ILO or as a replacement of the positions of its supervisory bodies.

The paper starts with the definition of the concept of Employment Relationship and moves to the discussion on the relevance of its determination and to the analysis of the importance of creating legal mechanisms to facilitate its establishment.

It continues, addressing the main provisions of the aforesaid labour standards and with the presentation of their most important implications for political decision-makers and legal acts' drafting experts.

It concludes with the some examples of how some countries defined the employment relationship and related concepts, and introduced legal mechanisms and criteria to determine the existence of an employment relationship, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

Kyiv, 3 June 2020

António J. Robalo Santos
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"Towards safe, healthy and declared work in Ukraine"
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[2] In particular, with the ILO Employment Relationship Recommendation, 2006 (No. 198) and with the Directive (EU) 2019/1152, of the European Parliament and of the Council, of 20 June 2019, on transparent and predictable working conditions in the European Union (L 186), 105–121.

EMPLOYMENT RELATIONSHIP

The employment relationship is a universally recognized legal concept which is taken into account explicitly or implicitly in a number of ILO standards, providing a framework for the functioning of the labour market in many countries (ILO, 2020), but its definition varies considerable between countries.

In many countries, the legislation contains a substantive definition of a contract of employment, worded in such a way as to establish what conditions constitute such a contract and hence what distinguishes it from other contracts; in other countries, however, the legislation is less detailed and the task of determining the existence of an employment relationship is largely left to case law. The description of the conditions for determining whether work is being performed under an employment contract varies in wording and level of detail from one country to another. Thus, the most commonly used terms are 'dependency', 'subordination', 'supervision', 'direction', 'control', 'authority' of the employer, or the latter's 'orders' or 'instructions' or for the 'employer's account'. Some legal systems use the terms 'subordination' and 'dependency' as alternatives or together, either with different meanings or as synonyms. Sometimes, the law assigns a different meaning to each word, and each is accompanied by a different qualifier: 'legal subordination' and 'economic dependency'. 'Legal subordination' is understood to mean that the employer or his or her representatives direct or are likely to direct the performance of the work. There is deemed to be 'economic dependency' where the sums received by the worker constitute his or her only or main source of income, where such sums are paid by a person or enterprise as a result of the worker's activity, and where the worker does not enjoy economic autonomy and is economically linked to the sphere of activity in which the person or enterprise that may be considered as the employer operates. It is interesting to note that in case of doubt, 'economic dependency' may be used as a factor for determining whether there is an employment relationship (ILO, 2011).

The different national laws, however, appear to share some common elements. Employment relationship is commonly understood as 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, subordination is the key element. Three elements are commonly present: work performed for another person; in exchange for remuneration; and within a relation of subordination.

The concept of the employment relationship, moreover, has evolved over time and become more diversified, covering situations that differ from traditional full-time employment, in response to the challenges faced by enterprises' and workers' needs to work under flexible work arrangements. 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.

An employment relationship can be seen as one by which a natural person (employee) undertakes, by way of remuneration, to provide his activity to another (employer), under his direction, supervision, control and authority.

In an employment relationship, the worker (employee) assumes the obligation, for remuneration, to provide an intellectual or manual activity to the employer, within the scope of a relation of subordination.

The establishment of the existence of an employment relationship is pretty straightforward when there is a formal written labour contract between the person providing an activity and the one benefiting from it. The written labour contract is the evidence of the existence of such employment relationship.

The absence of a formal written labour contract between the natural person that provides an activity and the other benefiting from it, or the existence of any contrary arrangement (contractual or otherwise) between them, makes it more difficult to proof the existence of an employment

relationship. The latter, however, does not necessarily mean that there is no employment relationship between them.

Indeed, the existence of an employment relationship shall not depend on the existence of a formal written labour contract between the person providing an activity and the one benefiting from it. Neither shall it depend on the formal aspects of any eventual contrary arrangement existing between them.

In cases where there is no formal written labour contract between a worker and the beneficiary of its activity, or in cases where there is a contrary arrangement (contractual or otherwise) between them, the existence of an employment relationship should depend on the facts relating to the performance of work and the remuneration (i.e., on the factual and substantive nature of the relation existing between the person providing an activity and the one benefiting from it), in particular, on the existence of subordination or dependence of the person providing an activity towers the one benefiting from it.

The relevance of establishing the existence of an employment relationship — either by the formalization of the employment relationships through a formal written labour contracts, or through the creation of legal mechanisms aimed at facilitating the identification and recognition of employment relationships —, is that the rights and obligations provided for in labour legislation and occupational safety and health regulations are only applicable, in principle, to the subjects of employment relationships — employees and employers.

It means that a natural person (a worker) that provides an activity to another but whose relationship is not legally recognized as an employment relationship (either by the existence of a formal written labour contract or by the aforesaid legal mechanisms), will not be under the scope of labour legislation and occupational safety and health regulations, as it also happens with the person benefiting from its activities provision. These situations may happen when, for example:

- Workers do not have a formal, written signed labour contract, but have an employment relationship with the beneficiary of their activities, such as informal workers and total undeclared workers;

- The beneficiaries of the activities use workers to provide them services under conditions typical of an employment relationship (e.g., provision of an activity, for a remuneration, with subordination to its beneficiary) but in a seemingly or apparent autonomous manner, thus concealing, disguising or dissimulating their employment relationship through a fake services provision, bogus self-employment (or bogus civil contracts) or through an apparent internship, training or voluntary scheme, involving fake interns, bogus trainees or fake volunteers;
- The beneficiary of the activity dissimulates the employment relationship through the form of a partnership agreement, through which he transforms a former employee in a subcontractor (and, not rarely, even supports the costs of his constitution as a company or of its establishment as a self-employed individual), which continues to provide him work, in his premises, with subordination, under his orders, direction and supervision;
- The beneficiary of the activity disguises the employment relationship through the transformation of a former employee into a junior partner, which continues to provide him subordinated work.

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 (ILO, 2020).

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 (ILO, 2020).

ILO EMPLOYMENT RELATIONSHIP RECOMMENDATION, 2006 (NO. 198)

The International Labor Conference during, its 95th session, recognized that there are situations where contractual agreements have the consequence of depriving workers of the protection to which they are entitled to.

It considered that difficulties in establishing the existence of an employment relationship can create serious problems for interested workers, their environment and society in general. Especially when the rights and obligations of the parties are unclear, where there has been an attempt to disguise the employment relationship, or when the law is manifestly insufficient or limited.

In this context, it decided to address the uncertainty as to the existence of an employment relationship, in order to guarantee fair competition and effective protection of workers in an employment relationship, through the adoption, in 15 June 2006, of its Recommendation No. 198, on the Employment Relationship (ILO, 2006).

Thought this Recommendation, ILO urges its Members to formulate and apply a national policy to guarantee effective protection for workers who perform work in the context of an employment relationship.

It also recommends the creation of mechanisms and criteria to be used to determine the existence of an employment relationship and the consecration of the principle of legal presumption of its existence, whenever one or more relevant indicators are present.

The recommended national policy should foresee measures aimed at, inter alia:

- Guiding workers and employers on how to determine the existence of an employment relationship;

- Fighting against disguised employment relationships, which deprive workers of the protection they are due (e.g., through the use of other forms of contractual arrangements that hide the true legal status as an employee);
- Ensuring standards applicable to all forms of contractual arrangements (including those involving multiple parties) so that employed workers have the protection they are due and that those standards establish who is responsible for the protection contained therein;
- Facilitating the access of workers and employers to appropriate, speedy, inexpensive, fair and efficient mechanisms to settle disputes on the existence and terms of an employment relationship;
- Ensuring that laws and regulations concerning the employment relationship are effectively applied and complied with;
- Providing 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;
- Removing incentives to disguise an employment relationship;
- Promoting the role of collective bargaining and social dialogue as means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

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

The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services

and their collaboration with the social security administration and the tax authorities. National labour administrations and their associated services, moreover, should regularly monitor their enforcement programmes and processes.

As regards, specifically, the determination of the existence of an employment relationship, the recommendation advises constituents to adopt, among other, the following principles, processes and measures (ILO, 2006):

- The determination of the existence of an employment relationship should be based primarily on the facts relating to the provision of work and the remuneration of the worker (i.e., on the substantive nature of the relationship), regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between the parties. 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 (ILO, 2020).
- Clear definition of the conditions determining the existence of an employment relationship, in particular, the existence of subordination or dependence;
- Provision of a legal presumption of the existence of an employment relationship, whenever one or more relevant indicators are present and, consequently, the inversion of the burden of the proof to the employer;
- Legal definition of a set of specific indicators to determine the existence of an employment relationship, which may include:
  - The fact that the work: takes place under the instructions and control of another person; involve the integration of the worker into the organization of the company; be carried out solely or primarily

for the benefit of another person; be carried out personally by the worker, within a specified time, or in a place indicated or accepted by those who request the work; have a certain duration and have a certain continuity, or require the availability of the worker; involve the provision of tools, materials and machinery by the person who requires the work; and

– The fact that a periodic remuneration is paid to the worker; the latter constitutes the sole or main source of revenue of the worker; effective payments in kind (e.g., food, accommodation, transport and others); recognition of rights such as such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

DIRECTIVE (EU) 2019/1152, ON TRANSPARENT AND PREDICTABLE WORKING CONDITIONS IN THE EU

This Directive is aimed at framing the development of new forms of employment, providing workers with a number of new minimum rights to promote and guarantee an adequate degree of transparency, security and predictability as regards their employment relationships and working conditions, while preserving a reasonable labour market adaptability and flexibility of non-standard employment, thus preserving its benefits to workers and employers.

Besides the changes introduced in Directive 91/533/EEC (European Council, 1991), regarding the time-frame and content of the information that the employers have to provide to workers and the redress mechanisms, the Directive (EU) 2019/1152 introduced several additional mechanisms, which are relevant to the determination and recognition of the existence of an employment relationship. In particular:

- Institution of legal presumptions and early settlement mechanisms, according to which, if the worker has not received in due time all or part of the documents s/he shall be entitled to (eventually subjected to prior notification of the employer and the failure of the employer to provide the missing information in a timely manner):
  - Benefit from favourable presumptions which employers shall have the possibility to rebut;
  - The possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.
- Provision of measures to prevent abusive practices in the use of on-demand or similar employment contracts, including:
  - Limitations to their use and to their duration;

  - 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.

- Provision that workers (including those whose employment relationship has ended), have access to effective and impartial dispute resolution and a right to redress in the case of infringements of their rights foreseen in Directive (EU) 2019/1152.

- Provision for the introduction of measures to protect workers (including those who are workers' representatives) from any adverse treatment by the employer and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the provisions of Directive (EU) 2019/1152.

- Provision foreseeing the prohibition of the dismissal (or its equivalent) and all preparations for dismissal of workers, on the grounds that they have exercised the rights foreseen in Directive (EU) 2019/1152 and the corresponding inversion of the burden of the proof.

- Provision for the introduction of effective, proportionate and dissuasive penalties for the violations of the provisions of Directive (EU) 2019/1152.

According to point 39 of Directive (EU) 2019/1152, these provisions are based on the results of the public consultation on the European Pillar of Social Rights that showed the need to strengthen enforcement of Union labour law to ensure its effectiveness.

The consultation showed that redress systems based solely on claims for damages are less effective than systems that also provide for penalties, such as lump sums or loss of permits, for employers who fail to issue written statements. It also showed that employees rarely seek redress during the employment relationship, which jeopardises the goal of the provision of the written statement.

Moreover, the evaluation of Directive 91/533/EEC conducted under the Commission's Regulatory Fitness and Performance Programme also

confirmed that strengthened enforcement mechanisms could improve the effectiveness of Union labour law.

It was therefore understood the need to introduce enforcement provisions which ensure the use of favourable presumptions where information about the employment relationship is not provided, or of a procedure under which the employer may be required to provide the missing information and may be subject to a penalty if the employer does not do so, or both.

As such, Directive (EU) 2019/1152 foresees that, where the relevant information is missing, such favourable presumptions might include a presumption that:

- The worker has an open-ended employment relationship;
- That there is no probationary period; or
- That the worker has a full-time position.

Redress could be subject to a procedure by which the employer is notified by the worker or by a third party such as a worker's representative or other competent authority or body that information is missing and to supply complete and correct information in a timely manner.

In addition, and as noted in point 8 of Directive (EU) 2019/1152, the determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship.

The criteria for determining the status of a worker, established in the case law[3] of the Court of Justice of the European Union (Court of Justice), should therefore be taken into account for that effect. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers,

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[3] Judgments of the Court of Justice of 3 July 1986, Deborah Lawrie-Blum v Land Baden-Württemberg, C-66/85, ECLI:EU:C:1986:284; 14 October 2010, Union Syndicale Solidaires Isère v Premier ministre and Others, C-428/09, ECLI:EU:C:2010:612; 9 July 2015, Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH, C-229/14, ECLI:EU:C:2015:455; 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411; and 17 November 2016, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH, C-216/15, ECLI:EU:C:2016:883.

voucher based-workers, platform workers, bogus self-employed[4], trainees and apprentices should fall within the scope of Directive (EU) 2019/1152. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria.

[4] The abuse of the status of self-employed persons, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work. Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations.

IMPLICATIONS FOR POLITICAL DECISION-MAKERS AND LEGAL ACTS' DRAFTING EXPERTS

Labour contract and employment relationship

The meaning and legal definitions of the terms "labour contract" and "employment relationship" varies considerable between countries. In some jurisdictions they are seen as synonymous; in others, they might refer to different yet related things.

"Labour contract", for example, can be assimilated to a formal "employment agreement" or "employment contract", as a formal written contract between two parties (employer and employee) that defines the main aspects of the employment relationship, proves its existence and regulates the relation between the parties.

In these cases, it typically contains the information on the main aspects of the employment relationship, including the most important rights and obligations of the parties, and most of the information foreseen in Articles 4 and 7 of Directive (EU) 2019/1152. For example: the identification and address of the parties; the place of work; the title, grade, nature or category of work for which the worker is employed or a description of the work; the date of commencement of the employment relationship (and its end, if applicable); the duration and conditions of the probationary period (if any); the amount of paid leave to which the worker is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave; the remuneration, including the initial basic amount, any other component elements, if applicable, indicated separately, and the frequency and method of payment of the remuneration to which the worker is entitled; if the work pattern is entirely or mostly predictable, the length of the worker's standard working

day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes; if the work pattern is entirely or mostly unpredictable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours, the reference hours and days within which the worker may be required to work, and the reference hours and days within which the worker may be required to work; etc.

However, "labour contract" can also have a wider meaning. It can be defined as the employment relationship itself. This is the case, for example, of Portugal, where "Labour contract is one by which a natural person undertakes, for remuneration, to provide his activity to another person or other persons, within its organization and under their authority".

It is important to note, however, that in Portugal it is not mandatory to conclude a formal written and signed contract between the employer and the employee prior or after the commencement of the employment relationship (the employment agreement can be verbal), except for a limited and specific type of employment relationships, specified in the legislation: temporary work, teleworking; part-time, fixed-term, etc. By default, and since the elements foreseen on the above definition of labour contract are present in a given relationship, along with the indicators of its existence, it is presumed to exist an employment relationship.

In general, the notion of "employment relationship" is broader than the concepts of "labour contract", "employment agreement" or "employment contract".

It usually refers to the relationship within which a natural person (employee) undertakes, by way of remuneration, to provide its intellectual or manual activity to another (employer), under his direction, supervision, control and authority.

While the existence of a formal written labour contract proofs the existence of an employment relationship, its absence does not necessarily means that there is no employment relationship.

In fact, the existence of an employment relationship does not depend on the existence of a formal written labour contract. It can exist without a written labour contract or even when exists a contrary arrangement (contractual or otherwise) between the parties, whenever a natural person provides its intellectual or manual activity to another, by way of remuneration, under his direction, supervision, control and authority.

In conclusion, when legislating, the following should be considered:

1) **To define employment relationship as the relationship within which a natural person undertakes, by way of remuneration, to provide its intellectual or manual activity to another, under his direction, supervision, control and authority;**

2) **To refrain from establishing that an employment relationship only exists where there is a formal written labour contract;**

3) **To ensure that legislation provides that although the existence of a formal written labour contract is an evidence of the existence of an employment relationship, the latter can exist whenever a natural person provides its intellectual or manual activity to another, by way of remuneration, under his direction, supervision, control and authority even without a formal written labour contract and when there is a contrary arrangement (contractual or otherwise) between the parties;**

4) **To provide that the rights and obligations conferred in labour relations legislation and Occupational Safety and Health (OSH) regulations to employers and employees shall apply to both whenever they have an employment relationship, regardless of the absence of a formal written labour contract and regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between them.**

Concepts of employee and employer

The definitions of employee and employer vary considerably between countries.

Nevertheless, according to the 2003 ILC Conclusions, “employee” is a person who is a party to a certain kind of legal relationship, which is normally called an employment relationship, whereas the broader term “worker” refers to any person who works.

In Germany, for example, according to section 611a of the Civil Code, 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, whereas the right to give instructions can concern the content, performance, time, duration and place of the activity. An employee is any person who cannot essentially determine freely his/her activities and his/her working hours (ILO, 2020).

As for the term “employer”, it is used, in most cases, to define the natural or legal person for whom an employee performs work or provides services within an employment relationship.

The legal definitions of “employee” and “employer” should therefore be consistent with the notion of employment relationship presented above and should not depend on the existence of a formal written labour contract but, instead, on the existence of an employment relationship.

As such, when legislating, it is advisable to consider the following:

1) **To define employee as: a natural person who undertakes, by way of remuneration, to provide its intellectual or manual activity to other natural or legal person, under his direction, supervision, control and authority.**
2) **To define employer as a natural or legal person who has an employment relationship with a worker.**

Legal presumption of the existence of an employment relationship and inversion of the burden of proof

Considering the difficulties of establishing whether or not an employment relationship exists, especially in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, its interpretation or application (as noted in ILO Recommendation No. 198);

Taking into account, as noted in point 39 of Directive (EU) 2019/1152, that employees rarely seek redress during the employment relationship, which jeopardizes the goal of the provision of the written statement, which is to ensure that workers are informed about the essential features of the employment relationship;

Considering also, as sustained in the above point of the mentioned EU Directive, that redress systems based solely on claims for damages are less effective than systems that also provide for penalties, such as lump sums or loss of permits, for employers who fail to issue written statements and the consequent need to introduce enforcement provisions which ensure the use of favourable presumptions (including, for example, a presumption that the worker has an open-ended employment relationship), where information about the employment relationship is not provided, or of a procedure under which the employer may be required to provide the missing information and may be subject to a penalty if the employer does not do so, or both;

It should be considered, as recommended by both the ILO Recommendation 198 and Directive (EU) 2019/1152, the institution of a legal presumption foreseeing that it is presumed to exist an employment relationship whenever on or more relevant indicators of the existence of an employment relationship (that should be also provided for in the legislation) are present, regardless of the absence of a formal written labour contract and regardless

of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between the person providing an activity and the one benefiting from it.

In addition, legislation should also foresee the inversion to the employers of the burden of the proof regarding the existence of an employment relationship.

As ILO (2020) highlights, paragraph 11(b) of the Recommendation 198 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. 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 (ILO, 2020).

In this context, it should be considered the introduction of legal mechanisms aimed at facilitating the determination of the existence of an employment relationship, for example, providing for:

1) **A legal provision, establishing that: it is presumed to exist an employment relationship between a natural person that provides an activity and the natural or legal person that benefits from it whenever, regardless of the absence of a formal written labour contract and regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between the person providing the activity and the one benefiting from it, one or more relevant indicators are present;**

2) **The transfer of the burden of the proof regarding the existence of an employment relationship to the natural or legal person benefiting from the activity provided.**

Indicators of the existence of an employment relationship

Considering the already mentioned difficulties in establishing the existence of an employment relationship when the parties' rights and obligations are not clear and especially when there is an attempt to disguise the employment relationship;

Taking into account that the determination of the existence of an employment relationship, according to the ILO R198, 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, i.e., should be based on the substantive nature of the relationship and not on its formal aspects,

And considering also that, in face of the abuse of the status of self-employed persons (in order to avoid certain legal or fiscal obligations — which is a form of falsely declared work that is frequently associated with undeclared work), the determination of the existence of an employment relationship should be guided, according to point 8 of Directive (EU) 2019/1152, by the facts relating to the actual performance of the work and not by the parties' description of the relationship;

It is convenient, according to ILO R198, to define in the legislation the conditions that should be applied for determining the existence of an employment relationship, for example, the existence of subordination or dependence of the activity provider towards its beneficiary.

Point 8 of Directive (EU) 2019/1152 also suggests that the criteria for qualifying the status of a worker established by the case law[5] of the

[5] Judgments of the Court of Justice of 3 July 1986, Deborah Lawrie-Blum v Land Baden-Württemberg, C-66/85, ECLI:EU:C:1986:284; 14 October 2010, Union Syndicale Solidaires Isère v Premier ministre and Others, C-428/09, ECLI:EU:C:2010:612; 9 July 2015, Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH, C-229/14, ECLI:EU:C:2015:455; 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411; and 17 November 2016, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH, C-216/15, ECLI:EU:C:2016:883.

Court of Justice of the European Union should be taken into account in determining the existence of an employment relationship.

In this context, the legal presumption mentioned in point 7 of the previous section, should be complemented by the specification of the relevant indicators it refers to. In addition, it is also important to highlight, in such legal provision, that the indicators of the existence of an employment relationship should not be restricted to the ones provided and may include others then the ones specified.

ILO (2020) 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.

In face of the above, when legislating, it should be considered to complement the legal presumption foreseen in point 7, with the specification of the relevant indicators of the existence of an employment relationship. It should also be considered not to include all of the indicators proposed below (they are all presented here only for exemplification purposes). Instead, it could be point out that the indicators of the existence of an employment relationship are not restricted to the ones specified and that they may include others. One example of doing it could be the following:

1) **It is presumed to exist an employment relationship between a natural person that provides an activity and the natural or legal person that benefits from it whenever, regardless of the absence of a formal written labour contract and regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between the person providing the activity and the one benefiting from it, one or more of the following indicators of the existence of an employment relationship are present:**

a) **Regarding the work activity:**

i. **The activity provider personally performs the work and cannot substitute himself on its performance or subcontract it to someone else;**

ii. **The activity provider performs work similar in content and nature to the work performed by the beneficiary's employees;**

iii. **The activity provided have a certain duration and have a certain continuity, or require the availability of the worker;**

iv. **The activity is held in the place of its beneficiary or in a place determined by him;**

v. **The work equipment and instruments used belong to the beneficiary of the activity;**

vi. **The activity provider performs management or leadership roles in the organizational structure of the beneficiary of the activity;**

vii. **The activity provider does not assume the financial risks of the execution of the activity;**

viii. **The activity provider has more an obligation of providing work or being available to do so, than of providing a result.**

b) **Regarding remuneration and other benefits:**

ix. **A right amount is paid to the activity provider, with determined periodicity, in return for its activity provision;**

x. **The activity provider receives effective payments in kind (e.g., food, accommodation, transport and others);**

xi. **The activity beneficiary pays to the activity provider the travel undertaken by the activity provider in order to carry out the work;**

xii. The activity provider enjoys paid holidays and other benefits (e.g., Christmas bonus);

xiii. The activity provider benefits from rights such as weekly rest and annual leave.

c) Regarding subordination:

xiv. The activity provider has to obey the orders of the respective beneficiary;

xv. The activity provider is subject to the disciplinary authority of the beneficiary of the activity;

xvi. The activity provider follows instructions of the beneficiary of the activity or his authorized representative and works under his control and supervision;

xvii. The activity provider has to comply with the start and end hours of the activity provision determined by the activity beneficiary;

xviii. The activity provider is subject to the absences' regime of the beneficiary of the activity.

d) Regarding economic dependency:

xix. The activity provider depends economically on the beneficiary of the activity;

xix. The activity provider develops his activities exclusively or mostly to the beneficiary of the activity (for example, the remuneration paid by the beneficiary of the activity represents more than 75% of the income of the activity provider);

xix. The activity provider does not have the power to determine the price of the activity provided.

2) The indicators whose presence lead to the presumption of the existence of an employment relationship are not restricted to the ones foreseen above and may include others.

Effects of the supervening establishment of the existence of an employment relationship

To guarantee that workers which employment relationship has been recognized are not deprived form the rights they are entitled to during the period within which their employee status was not recognized and, at the same time, to avoid creating a financial incentive for employers to disguise employment relationships, it is important to ensure that, once a employment relationship is established, the employer should, where still possible, reconstruct the employment relationship from the moment the worker started working for him (and not just from the date in which that relationship was established). Otherwise, the employer would have benefited from disguising the employment relationship from its start until it has been formally established.

In face of the above, employers should be responsible for complying ab initio (i.e., from the date that workers started to work for them) with their typical labour obligations towards workers that saw their employment relationship recognized. Those includes, among others: seniority; due promotions and corresponding salary increments; payment of all due social protection systems contributions and taxes; payment of any unused annual leave days and respective subsidy (where applicable); payment of any unused training credits (if applicable); payment of any other subsidy, benefit or remuneration component afforded to equivalent workers during the mentioned period; etc.

It is therefore convenient, when legislating, to ensure the introduction of a legal provision that foresees the following:

> **In case of supervening establishment of the existence of an employment relationship, the employer shall, if still possible, reconstruct the employment relationship since the date the employee started to work, recognizing, ab initio, all the employee rights, including in terms of seniority, promotions, salary increments, paid annual leaves and mandatory contributions to social protection systems.**

Early settlement, redress and enforcement mechanisms

Besides the introduction of the legal presumption of the existence of an employment relationship, mentioned earlier, it is also important to introduce early settlement mechanisms, according to which workers that have not received from the employer, in due time, all or part of the information that they are entitled to, regarding the main aspects of their labour contract or employment relationship, should have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.

This redress could be subject to a procedure by which the employer is notified by the worker or by a third party such as a worker's representative or other competent authority or body that information is missing and to supply complete and correct information in a timely manner.

Workers whose employment relationship have not yet been recognized (including those which employment relationship has ended) should also have access to effective and impartial dispute resolution, as noted in Directive (EU) 2019/1152.

Moreover, and according to the same Directive, workers (including those who are workers' representatives) should be protect from any adverse treatment by the employer and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of recognizing the existence of an employment relationship, including the prohibition of their dismissal (or its equivalent) and all preparations for their dismissal on the grounds that they have exercised these rights and the corresponding inversion of the burden of the proof.

In addition, and considering that redress systems based solely on claims for damages are less effective than systems that also provide for penalties, such as lump sums or loss of permits, and that employees rarely seek redress during the employment relationship, which jeopardizes the goal

of the above provisions, which is to ensure that workers are informed about the essential features of the employment relationship, it is also necessary to introduce enforcement provisions which ensure the use of the mentioned favourable presumptions and the introduction of effective, proportionate and dissuasive penalties for violations, as foreseen in Directive (EU) 2019/1152.

In this context, when legislating, it is advisable to consider the introduction of legal provisions foreseeing that:

1) **Whenever a labour inspector verifies a situation legally presumed as being an employment relationship, notifies the employer to recognize the employment relationship with the employee and to recognize, ab initio, all the worker's rights (including the ones mentioned in the preceding point 11) since the beginning of the employment relationship and to formalize it with the employee, within the following 15 days, through a formal written labour contract.**

2) **The notification mentioned in the previous point is without prejudice to the right of the concerned employer or employee to judicially contest the administrative decision.**

3) **The judicial appeal mentioned on the previous point does not have suspensive effect.**

EXAMPLES FROM SOME COUNTRIES

Albania

The employment contract is concluded and amended in writing and it should stipulate a minimum of essential elements, such as the identity of contracting parties, the place of work, general job description, start date, the specified duration if it is a fixed-term contract, paid leave, notice period, wage components and modalities of wage payment, weekly normal working time, reference to applicable collective labour contract, probation period, and if there is no collective contract the type and procedures of disciplinary measures. Under special and justified circumstances, if the contract is not concluded in compliance with the above requirements, the employer must conclude it within 7 days from employment, otherwise the employer is sanctioned by the labour inspector with a fine up to 30 times the minimum wage [LC, Arts. 21(1) (4), 202 (2)].

The written form requirement of the employment contract has been introduced with the 2015 Labour Code amendments. Until then, the employment contract could be concluded either in writing or orally. However, in case of a contract concluded orally, the employer had the obligation to conclude it in writing within 30 days from the start of employment. Furthermore, the Code clearly provided that the lack of the written document did not affect the validity of the contract and made the employer liable under the Code.

Argentina

There shall be an employment contract, whatever its form or name, whenever a physical person is obliged to do something, carry out labour or provide services for the other person and dependent on them, for a deter-

mined or undetermined period of time, by the payment of remuneration. Its clauses with regard to the form and conditions of provision shall submit to the provisions of public order, statutes, collective agreements or rulings with like power, and habits and customs [Employment Contract Act, Art. 21].

Belgium

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 (e.g., construction; surveillance; transport; cleaning; agriculture; and horticulture). 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 (ILO, 2020).

Bosnia and Herzegovina

If an employer fails to conclude a written employment contract with an employee, who performs work for remuneration, an employment relationship for an indefinite period is deemed to have been established, unless the employer proves otherwise [LC, Art. 24(3)].

Côte d'Ivoire

Employment relationship is one in which there is a relationship of subordination, remuneration and the provision of services [LC of 2015].

Croatia

(1) The employment contract shall be concluded in writing.

(2) The existence and validity of the contract shall not be affected by the failure of contracting parties to enter into a written contract.

(3) Where an employment contract is not concluded in writing, the employer shall be obliged to deliver to the worker a letter of engagement prior to the start of employment.

(4) Where the employer fails to conclude a written employment contract with the worker or fails to deliver to the worker the letter of engagement prior to the start of employment, it shall be deemed that he entered into the employment contract of indefinite duration with the worker.

(5) The employer shall be obliged to deliver to the worker a copy of the application for mandatory pension and health insurances within eight days after the expiry of the time limit for the application for mandatory insurances under specific laws and regulations.

(6) The employment contracts for seafarers and workers on board seagoing fishing vessels shall be registered with the county public administration office or the City of Zagreb office responsible for labour.

(7) The Minister shall by virtue of an ordinance stipulate the registration procedure and the contents of the registry of employment contracts for seafarers and workers on board seagoing fishing vessels [Labour Act, Article 14].

Cuba

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 [LC, Sect. 23].

Dominican Republic

The employment contract does not reside in documents but in facts. Any contract is void if it was concluded on the basis of fraud, whether by simulating contractual terms that do not pertain to an employment contract, through the use of intermediaries or by any other means. In such cases, this Code shall continue to regulate the employment relationship [LC of 1992, Principle IX].

Germany

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 organize 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 [Section 611a of the Civil Code].

Montenegro

Employment contracts must be in writing and must be concluded prior to the commencement of work. If an employer fails to ensure this, it is considered that the employee has entered into an employment relationship for an indefinite period of time.

If an employee continues to work after the expiry of the fixed-term of the employment contract, it is considered that an employment contract for an indefinite period of time has been concluded [LA, Arts. 22 and 26].

Panama

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 [LC Sect. 65].

Poland

By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration. Employment under the conditions specified above is considered employment on the basis of an employment relationship, regardless of the name of the contract concluded between the parties [LC, Art. 22].

Portugal

Notion of labour contract:

Labour contract is one by which a natural person undertakes, for remuneration, to provide his activity to another person or other persons, within their organization and under their authority [LC, Art. 11].

Presumption of the existence of a labour contract:

1 — The existence of a labour contract shall be presumed when, in the relationship between the person providing an activity and another or others who benefit from it, some of the following characteristics are present:

a. The activity is carried out in a place belonging to or determined by the beneficiary;

b. The work equipment and instruments used belong to the beneficiary of the activity;

c. The activity provider observes start and end times of the activity provided, determined by its beneficiary;

d. A certain amount is periodically paid to the activity provider, in return for its provision;

e. The activity provider performs management or supervisory functions in the beneficiary's organic structure.

2 — It constitutes a very serious offence attributable to the employer the provision of activity, in an apparently autonomous manner, under conditions characteristic of a labour contract, which may cause damages to the worker or the State.

3 — In case of recidivism, the ancillary penalty of deprivation of the right to subsidy or benefit granted by an entity or public service is applied for a period of up to two years.

4 — For the payment of the fine, are jointly liable the employer, the companies that with him are in a relation of reciprocal participations, domain or of holding group, as well as the manager, administrator or director [LC, Art. 12].

Permanent employment contract

1 – It is considered to be without term the labour contract:

a. Where the term stipulation is intended to evade the provisions governing the contract without a term;

b. Concluded outside the cases provided for in Article 140(1), (3) or (4) [where the fixed-term labour contract is concluded outside the admissibility requirements laid down therein];

c. In which is missing the written form, the identification or signature of the parties, or, at the same time, the dates of conclusion of the contract and of the commencement of work, as well as the one in which references to the term and the justification are omitted or insufficient;

d. Concluded in breach of Article 143(1) [where the duration of the fixed-term labour contract is longer than 2 years].

2 – Is converted into a permanent labour contract:

a. The one whose renewal has been made in breach of Article 149 [when renewal does not check the admissibility requirements, when it is renewed more than 3 times or when the total duration of renewals exceeds that of its initial period];

b. The one in which the duration or number of renewals referred to in the following Article is exceeded;

c. The concluded on an uncertain term, where the worker remains in operation after the expiry date indicated in the employer's notice or, failing that, 15 days after the verification of the term.

3 — In a situation referred to in paragraph 1 or 2, the seniority of the worker is counted from the beginning of the work, except in the situation referred to in paragraph 1 (d), which includes the working time provided in compliance of successive contracts [LC, Art. 147].

Republic of Moldova

An individual employment contract not concluded in writing is deemed to have been concluded for an indefinite term and to be effective form the first day the employee has been admitted to work. The employer is obliged to draft the contract, following the control of the labour inspectorate [LC, Art. 58(3-4)].

Romania

The employment contract is consensual and legally enforceable even if not concluded in written form. In case of oral contract, the parties may be penalized for undeclared work, but the existence of the contract can be recognized and can be proved by any means of evidence.

If the parties label the contract as a contract of service or collaboration when it is, de facto, an employment relationship, tax inspection may re-classify the contract [LC Art. 16(1); Fiscal Code L 227/2015].

Independent work is classified as work carried out by a person to obtain revenue: when the person is free to choose the place and the work schedule; the person is free to carry out activities for several clients; the person carries the risks inherent in the business (this is a decisive factor as employees do not assume financial risks); the activity is financed through the assets of the person performing the work; performance of work is personal or by a hired third-party; the person is a member of a professional body or association.

Serbia

Employment contracts must be concluded in writing before the employee starts working. If the employer fails to conclude a contract, it is deemed that the employee has entered into an employment relationship for an indefinite term on the day work is assumed [LC, Art. 32].

Slovenia

Assumption of the Existence of Employment Relationship:

In case of dispute on the existence of the employment relationship between the worker and the employer, it shall be assumed that employment relationship exists, if the elements of employment relationship exist [Employment Relationship Act, Art. 165, §16].

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