

► Employment Relationship

Online training series
International and EU Labour Standards

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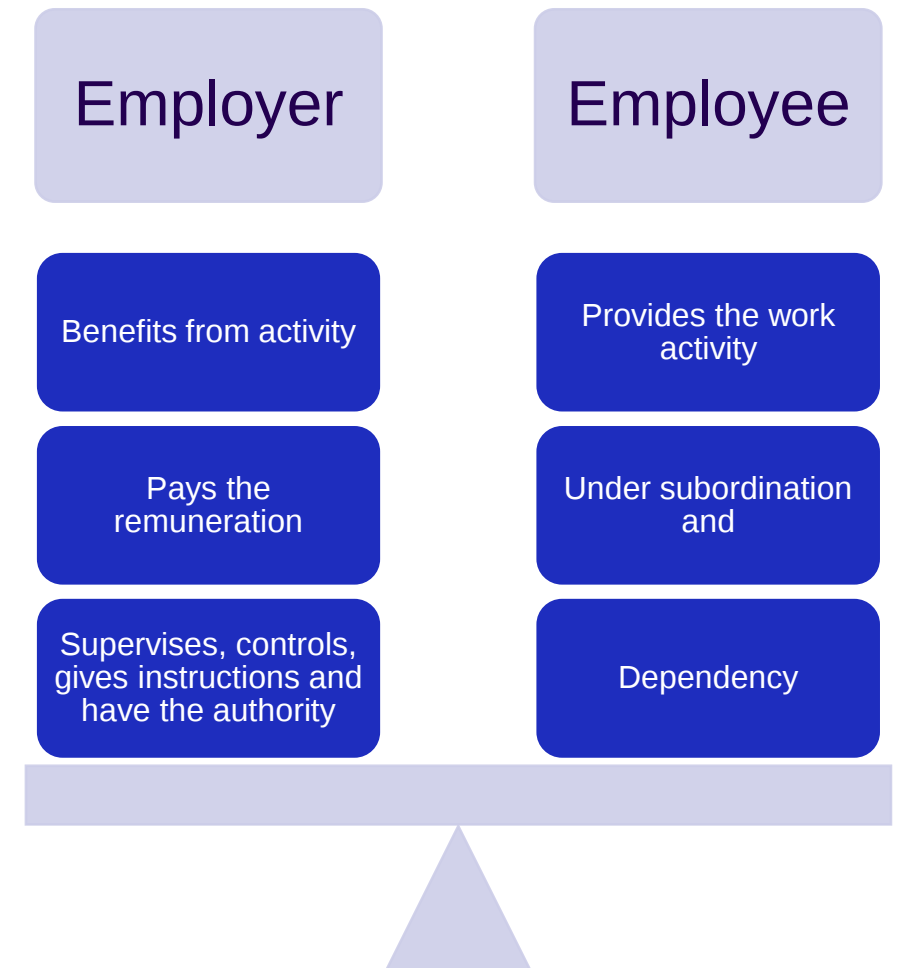
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- ▶ Relevance of its determination;
- ▶ Main International and EU Labour Standards on ER:
 - ILO Employment Relationship Recommendation, 2006 (No. 198);
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- ▶ Implications for policy decision-makers and legal acts' drafting experts:
 - Definition of concepts (e.g., labour contract, ER, employee and employer) and their implications;
 - Legal presumption of the existence of an ER & inversion of the burden of proof;
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 - Effects of the supervening establishment of the existence of an ER;
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- ▶ Examples from some countries;
- ▶ Cases for discussion;
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► Employment Relationship (ER)

The one by which a natural person (employee) undertakes, by way of remuneration, to provide an intellectual or manual activity to other natural or legal person (employer), under his direction, supervision, control and authority.



Why to determine its existence?

For workers:

- ▶ Employment & income security;
- ▶ Salary guarantees (including M.W.);
- ▶ Maximum weekly working time, minimum daily & weekly rest, minimum period of paid annual leave & rest breaks;
- ▶ Fair treatment, equality and non-discrimination;
- ▶ Training & career advancement;
- ▶ Safe & healthy working conditions;
- ▶ Be consulted, informed and participate;
- ▶ To represent & being represented;
- ▶ Legal mechanisms to exercise rights;
- ▶ Certify work experience;
- ▶ Adequate social protection;
- ▶ Access to credit (loans).

► Why to determine its existence?

For Employers:

- More motivated, loyal & committed workforce;
- Less HR turnover;
- Retain workers , expertise & knowledge;
- Lower selection, recruitment & training costs;
- Increased workforce experience, efficiency & productivity (experience curve);
- Lower risk of:
 - Business discontinuity;
 - Legal liability & financial penalties;
 - Compensate workers' for damages arising from work accidents & diseases.

► Why to determine its existence?

For State:

- Reduction of undeclared work;
 - Improved public finance balance;
 - Sustainability of social security (increase on contributions);
 - More effective economic & social policies;
 - Increased economic and social stability and cohesion.
- Increase on the ability to provide services to citizens (health, education, security, defence, social protection, etc.);
 - Increased ability to provide services to businesses (dematerialization, lowering administrative burdens, economic stimulus, foreign invest, internationalization, etc.)

► Main International and EU Labour Standards on ER

- **ILO Employment Relationship Recommendation, 2006 (No. 198)**
- **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**

► Employment Relationship Recommendation, 2006 (No. 198)

Formulation and implementation of a national policy aimed at:

- Guiding workers and employers on how to determine the existence of an ER;
- Fighting against disguised ERs;
- Ensuring that standards apply to all forms of contractual arrangements;
- Facilitating access of workers and employers to appropriate, speedy, inexpensive, fair and efficient mechanisms to settle disputes on the existence and terms of an ER;
- Ensuring that laws and regulations on ER are effectively applied and complied with;
- Providing adequate training in relevant international labour standards;
- Removing incentives to disguise ERs;
- Promoting collective bargaining and social dialogue as means of finding solutions.

► Employment Relationship Recommendation, 2006 (No. 198)

Determination of the existence of an ER:

- Should be based primarily on facts relating to the provision of work and the remuneration, regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between the parties (principle of substance over the form);
- Main factors: subordination and dependence;
- Provision of a legal presumption of the existence of an ER, whenever one or more relevant indicators are present and inversion of the burden of the proof to the employer;
- Legal definition of a set of relevant indicators to determine the existence of an ER.

► Employment Relationship Recommendation, 2006 (No. 198)

Indicators of the existence of an ER:

Relating to the performance of work:

- Is carried out according to the instructions and under the control of another party;
- Involves the integration of the worker in the organization of the enterprise;
- Is performed solely or mainly for the benefit of another person;
- Must be carried out personally by the worker;
- Is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work;
- Is of a particular duration and has a certain continuity;
- Requires the worker's availability;
- Involves the provision of tools, materials and machinery by the party requesting the work.

► Employment Relationship Recommendation, 2006 (No. 198)

Indicators of the existence of an ER:

Regarding the remuneration of the worker:

- Involves the periodic payment of remuneration to the worker;
- Such remuneration constitutes the worker's sole or principal source of income;
- Provision of payment in kind (e.g., food, lodging or transport);
- Recognition of entitlements (e.g., 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;
- Absence of financial risk for the worker.

► Directive (EU) 2019/1152

Principles:

- Determination of the existence of an ER 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 established by the case law of the Court of Justice of the EU for qualifying the status of a worker should be taken into account in determining the existence of an ER;
- Need for the institution of legal presumptions and early settlement mechanisms for the determination and recognition of the existence of an ER.

► Directive (EU) 2019/1152

Early settlement, redress and enforcement mechanisms:

- Favourable presumptions for workers (which employers shall have the possibility to rebut);
- Worker's possibility to submit a complaint to a competent authority and receive adequate redress in a timely and effective manner;
- Worker's access to effective and impartial dispute resolution and a right to redress;
- Measures to protect workers from any adverse treatment and consequences resulting from a complaint lodged with the employer or due to proceedings with the aim of enforcing compliance with legal provisions;
- Prohibition of the dismissal of workers (or its equivalent) and all preparations for it, on the grounds that they have exercised their rights;
- Introduction of effective, proportionate and dissuasive penalties for the violations of legal provisions.

► Implications for policy decision-makers and legal acts' drafting experts

Aspects that should be considered:

- Definition of concepts (e.g., labour contract, ER, employee and employer) and their implications;
- Institution of a legal presumption of the existence of an ER and inversion of the burden of proof;
- Definition of relevant indicators of the existence of an ER;
- Legally foreseen the effects of the supervening establishment of the existence of an ER;
- Provision of early settlement, redress and enforcement mechanisms.

► Definition of concepts and its implications

Labor contract (or employment contract/employment agreement):

- Can be understood as a formal written employment contract between two parties (employer and employee), which defines the main aspects of the ER, proves its existence and regulates the relation between the parties.

Implications:

- It is advisable that legislation stipulates that before the commencement of the work, employer and employee should sign a labour contract, defining the main aspects of the ER and the main rights and obligations of the parties;
- It should also be considered to provide in legislation that although the labour contract proves the existence of an ER, the absence of a formal written labour contract (even when mandatory) does not mean that there is no ER (as the latter can exist without the former).

► Definition of concepts and its implications

Employment relationship (ER):

- Can be defined as the relationship within which a natural person undertakes, by way of remuneration, to provide its intellectual or manual activity to other natural or legal person, under his/her direction, supervision, control and authority.

Implications:

- It should be provided in legislation that the rights/obligations of employers/employees in labour relations and OSH legislation shall apply whenever they have an ER, 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 parties.

► Definition of concepts and its implications

Worker:

- Broader concept that refers to any person who works (i.e., provides work activities), either within an employment relationship or within other type of relation (e.g., services provision).

Employee:

- May be defined as a natural person who undertakes, by way of remuneration, to provide its intellectual or manual activity to another, under his direction, supervision, control and authority.

Employer:

- Can be defined as the natural or legal person for whom an employee performs work or provides services within an employment relationship; or, more simply, as
- The natural or legal person who has an employment relationship with a worker.

► Legal presumption of the existence of an ER & inversion of the burden of proof

- It is presumed to exist an employment relationship between a natural person that provides an activity to other natural or legal person whenever, regardless of the absence of a formal written labour contract between the parties and regardless of how the relationship is characterized in any contrary arrangement (contractual or otherwise) that may have been agreed between them, one or more relevant indicators are present;
- The burden of the proof regarding the existence of an employment relationship is transferred to the natural or legal person benefiting from the work activity.

Implications:

- To facilitate the determination and recognition of the existence of an ER, legislation should provide for: (1) A legal presumption of its existence, whenever one or more indicators are present; (2) The indicators of an ER to be taken into account; and (3) Invert the burden of the proof, as regards to the existence of an ER, to the person benefitting from the work activity.

► Examples of relevant indicators of the existence of an ER

Regarding the performance of the work:

► Activity provider:

- personally performs the work. Cannot substitute himself or subcontract it to someone else;
- performs work similar to the one performed by the beneficiary's employees;
- uses the work equipment and instruments of the beneficiary of the activity;
- performs management/leadership roles in the organizational structure of the beneficiary;
- does not assume the financial risks of the execution of the activity;
- has more an obligation to provide work or being available, than to provide a result.

► Activity provided:

- has a certain duration and continuity, or requires the availability of the worker;
- is held in a beneficiary's place or one determined by him/her;

► Examples of relevant indicators of the existence of an ER

Regarding remuneration and other benefits:

► Activity provider:

- is paid a right amount, with determined periodicity, in return for activity provision;
- receives effective payments in kind (e.g., food, accommodation, transport and others);
- is paid the costs of the travel undertaken in order to carry out the work;
- enjoys paid holidays and other benefits (e.g., Christmas bonus, occupational risk's compensation, etc.);
- benefits from rights such as weekly rest or paid annual leave.

► Examples of relevant indicators of the existence of an ER

Regarding subordination:

► Activity provider:

- has to obey the orders of the respective beneficiary;
- is subjected to the disciplinary authority of the beneficiary of the activity;
- follows instructions of the beneficiary of the activity or an authorized representative and works under his/her control and supervision;
- has to comply with the start and end hours of the activity provision determined by the activity beneficiary;
- is subjected to the absences' regime of the beneficiary of the activity.

► Examples of relevant indicators of the existence of an ER

Regarding dependence:

► Activity provider:

- depends economically on the beneficiary of the activity (e.g., the remuneration received from the beneficiary represents more than 75% of total income);
- provides his/her activities exclusively or mostly to the beneficiary of the activity;
- does not have the power to determine the price of the activity provided.

► Effects of the supervening establishment of an ER

It is advisable to introduce a legal provision foreseeing that:

- In case of the 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 for him/her, recognizing, *ab initio*, all the employee's 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

It is important to consider the convenience of legally providing that:

- Whenever a labour inspector verifies a situation legally presumed as being an ER, notifies the employer to recognize it *ab initio*, since the beginning of the employment relationship, along with all the connected worker's rights and to formalize it with the employee, within the following 15 days, through a formal written labour contract;
- The mentioned notification is without prejudice to the right of the concerned employer or employee to judicially contest the administrative decision;
- The mentioned judicial appeal does not have suspensive effect;
- Penalties for disguising ERs are effective, proportionate and dissuasive.

► Examples from some countries

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.

[Labour Act, Article 14].

► Examples from some countries

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]

► Examples from some countries

Portugal:

- 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].

► Examples from some countries

Portugal:

- 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 [LC, Art. 12].

► Examples from some countries

Portugal:

- It is considered to be without term the labour contract:
 - Where the term is intended to evade the provisions governing the contract without a term;
 - Concluded outside the cases admitted for fixed-term labour contracts;
 - 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;
 - Where the duration of the fixed-term labour contract is longer than 2 years.
- Is converted into a permanent labour contract:
 - The fixed-term contract renewed: without observing the admissibility requirements; more than 3 times; in a way that the total duration of renewals exceeds that of its initial period;
 - The uncertain term contract, whose worker remains after employer's notice or 15 days after its term [LC, Art. 147].

► Examples from some countries

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 & 26]

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 from 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)].

► Examples from some countries

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:

- 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]

Cases for discussion



Receives 2.000\$/month
(his only source of income)
and invoices the company



His absences and vacations
have to be prior authorized
by his supervisor



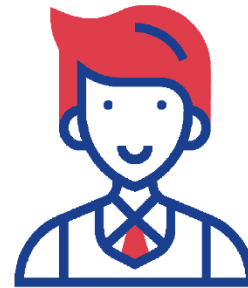
His entry and attendance
hours are controlled by
a biometric access control
system



Observes the same start
and end hours as all other
workers, determined by
“Accountant Я Us” Mon-Fri,
9:00-13:00, 14:00-18:00



Has an obligation to provide
work rather than a result



Oleksandr

Quid juris?

chartered accountant registered as self-employed,
signed a service contract with “Accountant Я Us”



Receives orders
and instructions from
the Operation Manager



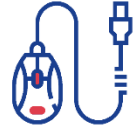
He appears in company’s
organizational chart
as reporting to the
Operation Manager



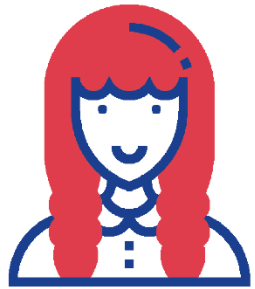
Has a company’s business
card, with his name and
professional category
“Accountant”



Works in company’s
premises. He has full access
to the premises, at any time



The equipment, tools and
products he uses belong
to the company



Marusya

an IT specialist



Takes care of 2 children and her mother who is bedridden at home



Was looking for a teleworking part-time work to better balance work-life responsibilities

She had the following offer from an IT company:



Service contract for 1 year, to develop a software: remuneration of 1.000\$/month (+bonus, depending on achievements)



Work will be monitored through company's software (she has to install and use it)



Software will be provided by the company



Working time: Monday-Friday, 9:00-13:00 (coordination online meeting every Monday at 9:00)



She has to log in and be available during agreed working time



She has to undergo a training on company's procedures and software



She reports and receives orders from Sergiy (business unit manager)

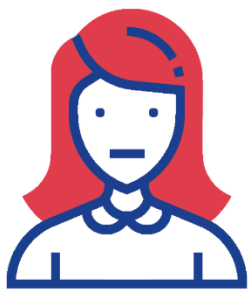


Work equipment required is provided by Marusya



She has to be available periodically for face-to-face meetings

Quid juris?



Lusya

was desperate... She was unemployed for 3 months



with 2 kids



any income besides her mother's pension (no unemployed benefit, because she had only undeclared jobs for the last 5 years)

She had the following offer from a restaurant:



A service contract for 1 year to serve restaurant tables; remuneration 500\$/month + tips



She has to obey Toninho's (supervisor) orders and ask him authorization for any absence or leave days



A weekly working time (of 60 hours): Monday-Saturday: 11:00-16:00 and 19:00-24:00



She has to wear the restaurant's uniform



Any non-authorized absence or lack of punctuality will be discounted from the remuneration



As she will be the last one to leave the restaurant, she will be in charge of closing it and switching on the alarm

Quid juris?

Q&A



Resources on the EU-ILO Project site

ilo.org/shd4Ukraine

Background paper

Infographics

And more...



- Power Point Presentation
- ILO Recommendation, 2006 (No. 198)
- Directive (EU) 2019/1152

Contacts

Дякую за увагу!

Thank you for your attention!



EU-ILO Project
“Towards safe, healthy and declared work in Ukraine”

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