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## **THE IMPLEMENTATION OF THE LABOUR RIGHTS OF EMPLOYEES IN NON-STANDARD FORMS OF EMPLOYMENT**

The article proves that the question of the rights and freedoms of man and citizen has a significant place in all sectors of government, because it is their most important constitutional duty. Gross violations of economic and social rights are among the main causes of conflict and the lack of a systematic struggle against discrimination and inequality in the enjoyment of those rights may undermine the process of post-conflict reconstruction. The article emphasizes that the use of non-standard forms of employment leads to increased inequality and insecurity that undermines prospects for economic development, causing a steady decline in the living standards of employees. This article analyzes the problem of legislative regulation of relations between employers and employees, and private employment agencies.

All categories of private employment agencies offering different types of job placement services have in common placement as their main activity. Despite differentiations in their functioning and modes of operation, private employment agencies could be defined generally as service enterprises under private law carrying out, under contract, and in exchange for financial compensation, operations on behalf of individuals (or enterprises) whose aim is to ease or speed up access to employment or career progression by filling a vacancy.

Employment through private agencies should respect the international and national principles of non-discrimination on all issues linked to working conditions.

Legislation should be designed to meet the requirements and standards set out in ILO Convention № 181. The legislation on private employment agencies needs to be harmonized with laws and policies on general commercial practices, labour, migration and the public employment service.

**Key words:** non-standard forms of employment, outsourcing, outstaffing, private employment agencies, employee, labour rights.

Outsourcing, outstaffing, temporary agency work, staff leasing, along with some other forms are united by one concept – non-standard forms of employment – phenomena that are becoming more widespread in both developed and developing countries.

Topical issues of legal regulation of non-standard forms of employment in a market economy is the subject of study of Ukrainian and foreign scientists, such as: F. Andersson, A.P. Bizyukov, A.K. Bhandari, I. Brinkley, P.H. Cappelli, S. Clauwaert, G.I. Chanyшева, P. Fadeuilhe, C. Gather, E.S. Gerasimova, V.E. Gimpelson, S.Y. Golovina, M. Hall, T. Hartmann, A. Heshmati, R.I. Kapelyushnikov, J.R. Keller, I.J. Kiselev, T.Y. Korshunova, M. Kurzina, I.A. Kostyan, C. Lang, I. Motorna, A. Muller, A.F. Nurtdinova, S.A. Prilipko, A.P. Rymkevich, J. Thompson, S.A. Saurin, I. Schömann, G. Vakhitova, H. Wilson, S. Wölfing, G. Wünsche, I.I. Zavodovsky, etc.

Non-standard forms of employment contracts cover diverse forms of employment relationships. The most common forms are fixed-term contracts and part-time contracts. This forms of employment is particularly affected by the impact of the economic crisis, putting employees in a very insecure and precarious position. Rising structural unemployment and global competition in the 1980s led to demands for greater flexibility in labour markets, which resulted in reforms of employment protection legislation. This in turn gave rise to an increasing use of temporary employment contracts in the 1980s and 1990s in many European countries. In the past decade, this trend has continued in a number of countries. Transitions out of employment are becoming more common while those into permanent employment are becoming

more difficult in recent years, which raises questions about the extent to which temporary contracts facilitate career progression<sup>1</sup>.

A two-phase process has been observed during the crisis when looking at non-standard or atypical forms of employment. To start with, atypical employees were the first to lose their jobs as it is easier to get rid of employees not enjoying as much employment protection as standard employees. Then, when it came to dealing with fluctuations in labour demand, new jobs were created on a temporary basis, rendering them highly adaptable. Fixed-term and part-time contracts were used for their flexibility compared to standard contracts, existing regulations on fixed-term and part-time work were adapted and loosened to facilitate recourse to more flexible forms of work contracts, and even more flexible forms of employment were introduced by creating new types of contract. As a result, it appears that during the crisis, the objectives of the EU Directives on fixed-term and part-time work have been somehow forgotten. These Directives were adopted with the specific goal of integrating atypical workers into the labour market and preventing them from falling into precariousness by trying to place them on the same footing as standard workers<sup>2</sup>.

It should be noted that, precarious work is frequently associated with, but cannot be considered identical to the following types of employment: “part-time employment, self-employment, fixed-term work, temporary work, on-call work, home working, and telecommuting.” All of these forms of employment are related in that they depart from the standard employment relationship (full-time, continuous work with one employer), but they are not in all cases to be considered precarious, since a good legislation and/or good collective agreements can secure these contract forms<sup>3</sup>.

Over the past decade part-time work has increased across much of the EU, from 16.7% to 19.6% of total employment between 2004 and 2014. Part-time employment has traditionally been more common among women and is the means by which they combine paid employment and childcare. However, recent research conducted in Spain and other countries highlights the growth of men’s part-time employment since the economic crisis. Such findings are reinforced by a recent EU Eurofound report on the emergence and growth of new forms of employment in Europe, which highlights the growth of casual work across Europe and emphasises the fact that while for some workers the high level of flexibility might be of benefit, most would prefer continuity and security. An Eurofound report on the emergence and growth of new forms of employment highlights casual work as one of the growing types of employment across Europe. Casual work is characterised by low incomes, job insecurity, little or no social protection or access to HR benefits, and employment uncertainty. The Eurofound report also points to the ways in which the growth of casual employment is producing growing labour market segmentation and division within European countries. These findings have also been confirmed throughout the recent 2014 debate on zero hour contracts in the UK. Zero hour contracts specify no minimum number of working hours and the employer is not obliged to call in the worker<sup>4</sup>.

The increased use of zero-hours contracts and agency workers by employers is preventing young people from obtaining permanent jobs, according to new analysis published by the TUC. The TUC report highlights some of the particular problems that being employed on a casual or precarious basis may mean for women, particularly the use of casual contracts to undermine rights such as maternity pay and leave, the problem of organising childcare around non-set working patterns and the impact of low and fluctuating pay on in-work benefits such as tax credits. Employers argue that agency working and zero-hours contracts offer young employees valuable job experience and a stepping stone into more permanent employment. However, analysis suggests that younger employees are increasingly trapped in insecure work, when they

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<sup>1</sup> Recent developments in temporary employment: Employment growth, wages and transitions. *European Observatory of Working Life* <[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1557en1.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1557en1.pdf)> (2016, January, 8)

<sup>2</sup> Lang, C., Schömann, I. Clauwaert, S. (2013). *Atypica forms of employment contracts in times of crisis*. Brussels: ETUI aisbl, 25, 27.

<sup>3</sup> What is precarious work? *The European and International Metalworkers Federations* <<http://www.precariouswork.eu>> (2016, January, 08).

<sup>4</sup> Developments in working life in Europe: EurWORK annual review (2014). *European Observatory of Working Life*. <[https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1551en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1551en.pdf)>(2016, January, 08).

would really prefer permanent employment which is more likely to provide access to training and workplace benefits, such as pensions and leave entitlements<sup>1</sup>.

There has been growing public interest in the growth of zero hours contracts, where people are placed on a contract under which the employer is not obliged to offer regular work.

Zero hour contracts are where an individual is not guaranteed work and is paid only for the actual hours of work offered by the employer and carried out. Employees have to be available as and when an employer needs them. Under the National Minimum Wage and Working Time legislation (UK), the practice of employers asking employees to “clock off” in quiet periods but remain on the premises is illegal. There are three primary reasons why zero hours contracts might be used: a) demands of the job: where work is erratic and highly unpredictable, varying from day-to-day and week-to-week, they can be the most effective and cost-efficient way of matching labour demand and supply; b) evading employment rights: firms may designate individuals as workers rather than employees: workers are not entitled to protection against unfair dismissal, maternity rights, redundancy rights; c) meeting individual flexibility: for some employees, a zero hours contract may be attractive in that they chose when and where they work, or it is a supplement to a main job, or the potential insecurity of income is not a major concern – for example, a retired person who wants to do some occasional work<sup>2</sup>.

The issue of zero hours contracts has become one of the hottest political topics in the UK. Zero hours contracts allow companies to keep staff on standby while offering no guaranteed work. During August 2013, pressure grew on the UK government to make changes to legislation.

Namely, on 28 August 2013, workers at a Hovis bread factory in Wigan began a week-long strike over the introduction of agency staff reportedly on zero hours contracts. The move by Premier Foods, the owners of the Hovis brand, follows around 30 redundancies among the bakery’s permanent staff and a reduction in working hours. According to the Bakers, Food and Allied Workers Union (BFAWU), the company sought to ‘make up the ensuing staff shortfall with agency labour, with many being utilised on an “as and when” basis, in other words [on] zero hours contracts’. The union is seeking ‘the withdrawal of agency labour from the site’<sup>3</sup>.

Zero-hours contracts seem to have been widely used in industries such as tourism and retail for some time. However, they are being used increasingly across a wider range of sectors. Many teachers, journalists and lawyers are also on zero-hours contracts. Certain groups of people are more likely to be on zero-hours contracts, such as people under 25 or over 65 years of age<sup>4</sup>.

Nevertheless, views are divided on the issue of non-standard forms of employment.

The Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16–19 February 2015) sets out a typology of non-standard employment, and presents a general overview of the prevalence and growth of different forms of non-standard employment around the world, the reason for its use, and its effects on workers, firms and the labour market, with special attention paid to fundamental principles and rights at work. It also reviews ILO standards, regional and national regulation of the different types of non-standard employment, and recent reforms.

Work under non-standard forms of employment contracts can affect employees in a variety of ways. Empirical evidence suggests that de facto earnings of workers in non-standard forms of employment may differ from those of regular workers. Workers employed under non-standard forms of employment contracts frequently have inadequate employment-based social security coverage, either because they are explicitly excluded from receiving coverage by law or because their short tenure, short contribution periods or low earnings may limit access to such entitlements. Although they are faced with many of the same risks as other workers, because multiple parties are involved, with the contracting agency paying the wages but

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<sup>1</sup> More than two-thirds of agency workers aged under 30 are looking for permanent jobs, says TUC (2014). *The Trades Union Congress* <<https://www.tuc.org.uk/node/121727>> (2016, January, 08).

<sup>2</sup> Brinkley, I. Flexibility or insecurity? Exploring the rise in zero hours contracts. *The Work Foundation*. <[http://www.theworkfoundation.com/DownloadPublication/Report/339\\_Flexibility%20or%20Insecurity%20-%20final.pdf](http://www.theworkfoundation.com/DownloadPublication/Report/339_Flexibility%20or%20Insecurity%20-%20final.pdf)> (2016, January, 08).

<sup>3</sup> Hall, M. (2013). Zero hours contracts in the spotlight. *European Observatory of Working Life*. <<http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations-working-conditions/zero-hours-contracts-in-the-spotlight>> (2016, January, 08).

<sup>4</sup> Wilson, H. Zero Hours Contracts & Understanding Your Legal Rights. *Slater & Gordon Lawyers*. <<http://www.slatergordon.co.uk/media-centre/blog/2014/05/understanding-zero-hours-contracts-and-your-legal-rights/>> (2016, January, 08).

the user firm giving the instructions, there is greater potential for accidents, even if responsibility for safety and health at the workplace lies with the user firm. Workers in non-standard forms of employment may experience difficulty in joining trade unions or in being covered by collective bargaining agreements<sup>1</sup>.

Non-standard forms of employment contracts are being widely used also in Ukraine.

Ukraine is the largest Eastern European country supplying IT outsourcing services all over the world. Over 5 years, its outsourcing sector has been constantly evolving striving to be among top outsourcing destinations<sup>2</sup>.

Ukrainian outsourcing companies are becoming more experienced in the business continuity. Some bigger companies have opened new locations in CEE or Western Europe, and relocated there some teams. Furthermore, Ukraine keeps its 4th place in the world by the number of IT professionals (230,000 according to the government). The annual number of technical graduates is still around 15,000. This number does not include junior specialists using non-formal education like online courses, webinars and schools for developers, which is becoming enormous (in 2014 we have counted up to 20 course/training providers only in Kyiv).

IT Ukraine Association and Ukrainian Hi-Tech Initiative are the two biggest and the oldest associations of IT outsourcing companies in Ukraine<sup>3</sup>.

Private employment agencies are becoming stronger actors in the labour market of many countries.

Historically, there have been three main approaches to the regulation of private employment agencies: first, strict prohibition of any placement or other services offered by private agencies; second, strict regulation of private employment agencies that were allowed to operate alongside public employment service; and, third, minimum regulation of private employment agencies that were accepted as private players in the labour market. Whereas the first policy option has been abandoned by most ILO Member States, differences, as regards the scope and density of regulation, are significant. The starting point for all regulation is the determination of the legal status and conditions governing the operation of private employment agencies. As set out in Article 3 of ILO Convention No. 181, the private employment agencies legal status shall be determined according to national law and practice and its operation, according to a system of licensing or certification. However, such licensing or certification system should be properly enforced, be objective, transparent and able to assist agencies in delivering their services appropriately and adequately. As options to licensing, registration and certification systems can also be implemented<sup>4</sup>.

The Annual Report of the Ukrainian Parliament Commissioner for Human Rights on the state of human rights and freedoms in 2014 indicated that the modern features of the labour market is threatening the pace of conversion to non-standard forms of employment (outsourcing, outstaffing, staff leasing, homeworking, teleworking) the so-called borrowed work, also related to the violation of labour rights, in particular the failure to ensure employees even minimum state guarantees.

Very little is known about actual practices of private employment agencies in Ukraine. Their services are not frequently used by unemployed workers seeking a job. The most popular job search methods in Ukraine involve public employment service.

While the average Ukrainian agency has typically started operating in the period 2005–2009, there is a whole variety of firms in this sector. On the other side, a licensed private employment agency is predominantly small and owned by a Ukrainian private entrepreneur. The sector of licensed private employment agencies consists of two distinguished subsectors. Almost half of firms recruit mariners and slightly less than – recruit for international companies (migration). This dichotomy is observed in many aspects of actual operations. Firms use their existing database to build up a pool of potential candidates and mostly recruit mariners (71 percent)<sup>5</sup>. Agencies that prefer to proceed on an ad-hoc basis are more likely to

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<sup>1</sup> *Non-standard forms of employment*. Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16–19 February 2015). International Labour Office, Conditions of Work and Equality Department, Geneva, 2015.

<sup>2</sup> IT Outsourcing Services: Why Ukraine? – Infographic. *IT Outsourcing News from Central and Eastern Europe*. <<http://itonews.eu/outsourcing-why-ukraine/>> (2016, January, 08).

<sup>3</sup> How to find a good IT outsourcing services provider in Ukraine? *U.S.-Ukraine Business Council (USUBC)*. <<http://www.usubc.org/site/member-news/how-to-find-a-good-it-outsourcing-services-provider-in-ukraine>> (2016, January, 08).

<sup>4</sup> *ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement* (2007). Geneva, International Labour Office, 5, 116.

<sup>5</sup> Vakhitova, G. (2013). *Private employment agencies in Ukraine*. ILO Decent Work Technical Support Team and

recruit migrants. Companies in the first group advertise in the media significantly less often when compared to agencies from the second group.

These are also indicative of the positive role of social dialogue in regulating and monitoring private employment agencies implementing forms of social dialogue. The Law of Ukraine “On Social Dialogue in Ukraine”<sup>1</sup> determines the legal principles of organizing and the procedure for holding social dialogue in Ukraine with the purpose of developing and implementing the state social and economic policy, regulating labor, social and economic relations, and ensuring improvement of the living standard and the quality of life, as well as social stability in the society. Article 8 of the Law envisages that social dialogue is conducted between the parties of social dialogue in the following forms: exchange of information; consultation; reconciliatory procedures; collective negotiations on conclusion of collective agreements.

Ukraine should ratify ILO Convention № 181 on private employment agencies, one of the objectives of which is that private employment agencies should have an opportunity to act, and the employees who use their services, should be protected. Ukrainian legislation that regulate the work of business entities that provide mediation services in employment and business entities that provide mediation services in employment in Ukraine, provide mediation services in employment abroad or hire employees to subsequently direct them to work for other employers in Ukraine, should include a provision stating that the employees have the same individual and collective labour rights as other categories of employees, including personal non-property labour rights.

Furthermore, Ukraine should make necessary changes in legislation. For instance, in France, a new scheme for permanent contracts for temporary agency workers (CDI intérimaire) took effect on 6 March 2014. Concluded between temporary workers and temporary employment agencies, the CDI intérimaire contract covers two defined periods: periods when the temporary worker is engaged on an assignment – when they receive remuneration at the rate equivalent to that normally paid by the user company; periods of non-assignment, during which they receive a guaranteed minimum monthly salary that must not be lower than the French national minimum wage. During both these periods, the temporary employment agency can ask the worker to attend training courses<sup>2</sup>.

It is important to pay attention to the need for detailed regulation in the Labour Code of Ukraine conditions of activity of business entities. Labour relations between an employee and several employers simultaneously require the establishment of reliable guarantees of the rights of employees to prevent abuse by employers.

## References

1. Recent developments in temporary employment: Employment growth, wages and transitions. *European Observatory of Working Life*. <[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1557en1.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1557en1.pdf)> (2016, January, 8)
2. Lang, C., Schömann, I. Clauwaert, S. (2013). *Atypica forms of employment contracts in times of crisis*. Brussels: ETUI aisbl.
3. What is precarious work? *The European and International Metalworkers Federations* <<http://www.precariouswork.eu>> (2016, January, 8)
4. Developments in working life in Europe: EurWORK annual review (2014). *European Observatory of Working Life*. <[https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1551en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1551en.pdf)>(2016, January, 8)
5. More than two-thirds of agency workers aged under 30 are looking for permanent jobs, says TUC (2014). *The Trades Union Congress* <<https://www.tuc.org.uk/node/121727>> (2016, January, 8)
6. Brinkley, I. Flexibility or insecurity? Exploring the rise in zero hours contracts. *The Work Foundation* / <[http://www.theworkfoundation.com/DownloadPublication/Report/339\\_Flexibility%20or%20Insecurity%20-%20final.pdf](http://www.theworkfoundation.com/DownloadPublication/Report/339_Flexibility%20or%20Insecurity%20-%20final.pdf)> (2016, January, 8)
7. Hall, M. Zero hours contracts in the spotlight (2013). *European Observatory of Working Life*. <<http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations-working-conditions/zero-hours-contracts-in-the-spotlight>> (2016, January, 8)

*Country Office for Central and Eastern Europe*. Budapest: ILO, 49, 62.

<sup>1</sup> Закон про соціальний діалог в Україні 2010 (Верховна Рада України). *Офіційний вісник України*, 3, 168.

<sup>2</sup> Individual employment relations - Q1 2014 (EurWORK topical update). *European Observatory of Working Life*. <<http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-labour-market-industrial-relations-law-and-regulation/individual-employment-relations-q1-2014-eurwork-topical-update>> (2016, January, 08).

8. Wilson, H. Zero Hours Contracts & Understanding Your Legal Rights. *Slater & Gordon Lawyers*. <<http://www.slatergordon.co.uk/media-centre/blog/2014/05/understanding-zero-hours-contracts-and-your-legal-rights/>> (2016, January, 8).
9. *Non-standard forms of employment*. Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16–19 February 2015). International Labour Office, Conditions of Work and Equality Department, Geneva, 2015.
10. IT Outsourcing Services: Why Ukraine? – Infographic. *IT Outsourcing News from Central and Eastern Europe*. <<http://itonews.eu/outsourcing-why-ukraine/>> (2016, January, 8)
11. How to find a good IT outsourcing services provider in Ukraine? *U.S.-Ukraine Business Council (USUBC)*. <<http://www.usubc.org/site/member-news/how-to-find-a-good-it-outsourcing-services-provider-in-ukraine>> (2016, January, 8)
12. *ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement* (2007). Geneva, International Labour Office, 5, 116.
13. Vakhitova, G. (2013). *Private employment agencies in Ukraine*. ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe. Budapest: ILO, 49, 62.
14. *Zakon pro social'nij dialog v Ukraini* <<http://zakon.rada.gov.ua/go/2862-17>> 2010 (Verkhovna Rada Ukraini). *Oficijnij visnik Ukraini*, 3, 168.
15. Individual employment relations - Q1 2014 (EurWORK topical update). *European Observatory of Working Life*. <<http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-labour-market-industrial-relations-law-and-regulation/individual-employment-relations-q1-2014-eurwork-topical-update>> (2016, January, 8).