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A stylized world map in a vibrant yellow color, centered on the Atlantic Ocean, set against a dark background with faint, repeating text from the ILO's mission statement.

**Meeting the challenge  
of precarious work:  
A workers' agenda**

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of precarious work:  
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# Foreword

## Dan Cunniah

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Last year, the Bureau for Workers' activities held its biannual symposium<sup>1</sup> on an ever-growing preoccupation for workers around the world: the growth and spread of precarious work. This issue of the IJLR presents some of the contributions to this event and, more importantly, tries to provide guidance on possible trade union strategies to counter the expansion of forms of precarious work.

Throughout history work has always been precarious to one degree or another; much of the efforts by trade unions were precisely aimed at structuring the "employment relationship" and improving the conditions attached to it via collective bargaining or legislation. In fact, it can be said that the first half-century following the creation of the ILO saw the success of that action in that most employment came increasingly through the form of a "standard" employment contract, subject to collective bargaining, social benefits and the protection of the law.

Indeed, the unstated premise behind most ILO Conventions is a direct and stable employment relationship. Not so long ago, the historical task at hand, so it seemed, was to bring within its ambit those who remained at the margins of this standard employment relationship, notably the self-employed in the informal economy. It is worth mentioning here the Part-Time Work Convention, 1994 (No. 175), and the Home Work Convention, 1996 (No. 177).

The recent explosion in the spread of precarious forms of employment is challenging this notion.

In a world of globalized supply chains where employers seek to do away with their responsibilities in the name of "flexibility" and "competitiveness" and where governments have all but given up on the objective of full and

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1. See [http://www.ilo.org/wcmsp5/groups/public/--ed\\_dialogue/--actrav/documents/meetingdocument/wcms\\_179787.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/--actrav/documents/meetingdocument/wcms_179787.pdf).

decent employment, workers have found themselves increasingly reduced to accepting forms of work arrangements that afford lower pay, less security, less favourable working conditions and make it ever more difficult to access the right to collective bargaining.

Temporary contracts are becoming the norm, agency work is spreading, casual or day labour as well as forms of “dependent” self-employment are thriving and are even cannibalizing the core of the “formal” economy.

As demonstrated in this issue of the *Journal* by Peter Rossman and Janet Holdcroft, far from being developments impelled by marginal employers, these precarious forms of employment are the result of deliberate strategies on the part of multinationals, who through savage forms of subcontracting managed to evade their social responsibilities and de facto deprive workers from the right to collective bargaining. While the authors provide inspiring examples of union battles to stop the casualization of labour, they both stress the fact that the fight must also be waged in the political arena and at the international level.

Clearly the development of an ever-increasing mass of precarious workers poses a growing problem for trade unions to ensure their coverage under collective bargaining. In his contribution, Maarten Keune discusses the various strategies used by trade unions in trying to address this challenge. A couple of observations come to mind from his findings. First, and not surprisingly, there is no “golden path” in this area and strategies must adapt to each national context. But, more importantly, unions need to devote more focus and resources to this issue or they may make themselves redundant in the eyes of an increasing segment of the workforce, particularly young workers.

Indeed, there are already some, in conservative policy circles, who are seizing upon this increasing dichotomy to decry the alleged “privileges” held by labour market “insiders” as compared to “outsiders”, those who cannot get or even dream of getting the “privileges” attached to regular standard jobs.

Susan Hayter and Manawa Ebisui also document ongoing efforts by trade unions to better represent precarious workers. They observe that while problems relative to precarious work exist under all collective bargaining systems, “trade unions are more likely to advance parity if they negotiate within a multi-employer bargaining arrangement. The extension of collective bargaining agreements to non-negotiating parties in an industry is also an effective method for closing the pay gap and can support the portability of entitlements.” Given the efforts in many countries to decentralize collective bargaining in the name of flexibility and efficiency, this finding should be kept in mind.

International labour standards clearly have a key role to play in this endeavour to protect the rights of precarious workers. Beatriz Vacotto and Camilo Rubiano provide useful reviews of some of the jurisprudence regarding the right to freedom of association and collective bargaining as it affects workers in non-standard employment arrangements. Their respective

articles highlight how workers' organizations can use the ILO complaint mechanisms to advantage, and how some countries' laws help better protect the rights of precarious workers.

While all contributors stress the importance of standards, they also raise the question of significant gaps in the standards system. This creates a surrealistic situation where a quasi-universal endorsement of fundamental labour standards coexists with an ever-increasing proportion of workers who are denied de facto equal treatment, never mind their basic right to freedom of association and collective bargaining.

Luc Demaret lays out in his contribution some possible ways forward when it comes to filling the gaps. His suggestions are inspired in large part from the conclusions of last year's symposium which should act, hopefully, as a guide to future trade union action in this area.

As Enrique Marín observes in his comments, "precarious employment at the service of corporate entities, the kind generated by the multinationals, as well as the unprotected services provided at the transnational level, are serious phenomena of such size and complexity that they seem impossible for States to control on their own, through purely domestic policies". His call for a major international policy initiative by the ILO on this theme is certainly well founded and should figure high among the policy priorities of the Workers' Group at the ILO.

We sincerely hope that this issue of the *Journal* will prove useful to all concerned by the growth of precarious work, and serve as a stepping stone to further reflection and better action to eliminate it.



# Editorial

## *ILO standards and precarious work: Strengths, weaknesses and potential*

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**KEYWORDS** precarious employment, workers rights, ILO Convention, ILO Recommendation, comment, international labour standards, supervisory machinery, trade union attitude

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**D**o ILO standards provide for the protection of workers who are in precarious work? Is this protection effective? If not, can it be made more effective? Are there any lacunas? How should these be addressed? These are some of the questions addressed in this article.

In this, consideration is given to the contents of various ILO instruments, their relevance and application to particular situations related to precarious work and the jurisprudence of the ILO supervisory mechanisms. However, an additional question needs to be raised, and it is essential. Can precariousness be reduced or limited, or should the ILO restrict itself to protecting workers in precarious situations? The article therefore seeks to address both ends of the equation: protecting workers *in* precariousness and protecting workers *from* precariousness. The final section offers recommendations and identifies possible courses of normative action.

### ILO standards and the protection of precarious workers

When analysing the relevance of ILO standards in addressing issues related to the protection of workers in precarious situations it may be useful to recall the legal nature of these standards. International labour standards take the form of Conventions and Recommendations adopted by the International Labour Conference. Conventions are treaties in the sense of the Vienna Convention on the Law of Treaties (Art. 2(1)(a))<sup>1</sup> and, as such, are binding upon ratifying Members of the ILO. It should therefore be stressed that ILO member States are legally bound to implement ratified Conventions (Art. 26) and this obligation should be performed in good faith (*pacta sunt servanda*), including the effective implementation in practice of provisions in the instrument. It might be added that some of the ILO standards may also be binding upon States as international customary law or general principles of law (Thomas, Oelz and Beaudonnet, 2004). This may particularly be the case of Conventions referred to in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. These are known as ILO "core labour standards" and include Conventions on freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.<sup>2</sup>

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1. Vienna Convention on the Law of Treaties, 1969. Available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

2. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 1951 (No. 100);

## The use of international labour standards in national jurisdictions

While violations of ratified Conventions – or, in cases of freedom of association and the right to collective bargaining, even unratified Conventions – can be reported to the ILO supervisory bodies (see below), it is also important to note from the outset that national courts are often called upon to deal with alleged infringements of labour rights derived from applicable ILO Conventions. Indeed, courts frequently apply the provisions of a ratified Convention directly in resolving a dispute, or else they draw on ILO standards, whether binding or not, as a source of interpretation and inspiration when applying domestic law.

A recent example of such a reference by national courts is that of the *Contrat Nouvelles Embauches (CNE)* in France. The CNE, established by executive order in France in 2005 (Ordinance No. 2005893), provided that medium-sized businesses with 20 or fewer employees could hire employees subject to a two-year “consolidation period”, during which the employees could be dismissed without assigning reasons. The law was challenged in the French courts on the grounds that the CNE violated international law binding on France, namely the ILO’s Termination of Employment Convention, 1982 (No. 158). In particular, the courts considered that the two-year “probationary” period provided for under the CNE exceeded the “reasonable duration” prescribed in Article 2. It should be noted that the CNE gave rise to over 800 cases of litigation within two years, many of which resulted in the transformation of the CNE contracts into open-ended contracts, sometimes involving damages paid to the workers.

This case – which illustrates how an ILO Convention can protect workers against precariousness and how national jurisdictions can have an impact – also led to a recommendation by the ILO following a representation made by a French trade union centre which brought CNE’s case to the attention of the ILO supervisory mechanisms (see Gravel and Delpéch, 2008).

## The role of the ILO supervisory bodies

The ILO supervisory system has two kinds of supervisory mechanisms:

- the regular system of supervision: examination of periodic reports submitted by member States on the measures they have taken to implement the provisions of the ratified Conventions, involving mainly the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR); and

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and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). All ILO Conventions and Recommendations are available online at: <http://www.ilo.org/ilolex/english/>.

- special procedures: a representations procedure and a complaints procedure of general application, together with a special procedure for freedom of association, the latter being dealt with by the tripartite Committee on Freedom of Association (CFA).

Many new forms of employment relationships have emerged over the last two to three decades, enabling employers to undermine workers' rights. These new forms of relationship did not yet exist when ILO instruments such as the Part-Time Work Convention, 1994 (No. 175), were adopted. However, the preamble to the latest of the ILO Conventions (the Domestic Workers Convention, 2011 (No. 189)) recalls that "international labour Conventions and Recommendations apply to all workers". Indeed, while a number of ILO instruments specify that they apply to all categories of workers,<sup>3</sup> the CEACR has repeatedly insisted that the Conventions and Recommendations adopted by the International Labour Conference are of general application, that is, they cover all workers, unless specified otherwise (see for example ILO, 1999, para. 37). In spite of this, relatively few cases involving non-observance of ratified Conventions as may have directly affected precarious workers in particular have been brought to the attention of the ILO supervisory bodies, with the notable exception of a number of complaints alleging violation of freedom of association lodged and dealt with by the CFA. However, it should be pointed out that reports provided by trade unions under relevant articles of the ILO Constitution<sup>4</sup> have enabled the ILO Committee of Experts to repeatedly draw attention of a number of governments to the increased precariousness faced by workers and have called for measures to address this issue.

This is particularly the case with reports concerning the Employment Policy Convention, 1964 (No. 122),<sup>5</sup> which has been ratified by 106 countries

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3. For instance: the Protection of Wages Convention, 1945 (No. 95); the Occupational Safety and Health Convention, 1981 (No. 155); the Workers with Family Responsibilities Convention, 1981 (No. 156); the Termination of Employment Convention, 1982 (No. 158); the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159); the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173); the Part-Time Work Convention, 1994 (No. 175); the Private Employment Agencies Convention, 1992 (No. 181); and others.

4. Available online at: <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>. In the countries that have ratified the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), governments are obliged to consult employers' and workers' organizations in preparing their reports. But even in those countries that have not ratified this Convention, governments are required, under article 23(2) of the Constitution, to submit a copy of their reports to representative trade union organizations, thus enabling them to make their own comments.

5. Convention No. 122 is a "priority" Convention of the ILO and reports by ratifying Members are due every two years. There are four Conventions described as priority Conventions: the Labour Inspection Convention, 1947 (No. 81); the Employment Policy Convention, 1964 (No. 122); the Labour Inspection (Agriculture) Convention, 1969 (No. 129); and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

(as at 13 December 2012). Convention No. 122 requires ratifying States to declare and pursue an active policy designed to promote full, productive, and freely chosen employment. Such a policy should aim to ensure that there is work for all who are available for, and are seeking work; that such work is as productive as possible; and that there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his or her skills and endowments in, a job for which he or she is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. The Convention also requires member States to take measures to apply an employment policy and to consult workers' and employers' representatives. From 1991 to 2011, the Convention has led the Committee of Experts to issue more than 20 observations to individual governments questioning their application of the instrument as a means of addressing the problems of precarious work. Such observations often related to concerns expressed by trade unions (see for example ILO, 1991).

Other ILO Conventions have been used by trade unions in their reports to the Committee of Experts to sound an alarm at rampant precariousness. In a communication of October 2007, the Japanese Trade Union Confederation (RENGO) raised the difficulties in trade union organizing due to an increase in precarious forms of employment and subcontracting in relation to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), prompting an observation to the Japanese Government. Similarly, in 2010, the French national trade union centre (CGTFO) – in relation to the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106) – emphasized the dangers arising from the generalization of Sunday work in terms primarily of the family and social life of workers, but also the frequently precarious nature of jobs involving Sunday work. Also in 2010, the Greek General Confederation of Labour (GSEE) expressed, in a report to the Committee on the application of the Equal Remuneration Convention, 1951 (No. 100), its particular concern over “the combined effect of the financial crisis, the growing informal economy and the implementation of austerity measures ... on the negotiating power of women, particular older and migrant women with respect to their terms of employment and type of work contract, and the over-representation of women and workers with family responsibilities in precarious low-paid jobs” (ILO, 2011).

### **Specific protection of precarious workers under existing international labour Conventions**

As explained above, ILO standards apply to *all* workers, unless specified otherwise (see ILO, 2004). This is particularly the case for ILO core labour standards on freedom of association (see related articles in this issue by Beatriz Vacotto and Camilo Rubiano), the right to collective bargaining,

non-discrimination, equal pay for men and women workers, the abolition of forced labour, and the elimination of child labour.

By definition, precarious workers are more vulnerable than other categories of workers and often face inequality and difficulties in exercising their rights. But while precariousness is increasingly threatening all types of workers, some categories of workers are more frequently affected by precarious working conditions: involuntary part-time (many women workers), temporary and “Mcjobs” (young workers, first employment), low-pay work (youth, persons with disabilities), seasonal and domestic work (migrant workers), etc. New arrangements of unprotected work are often first imposed on these groups of workers and may often then be enlarged to other groups. In Portugal, for instance, the International Monetary Fund in 2010 recommended reducing employment protection for regular workers to put them on a more “equal footing” with temporary workers (Wise, 2010).

Such developments underscore the argument that account should be taken of specific ILO instruments that do address problems confronting individual groups of workers. Without claiming exhaustiveness, efforts to protect precarious workers can be strengthened through the promotion, monitoring, and implementation of the following specific Conventions (in addition to the other core and priority labour Conventions mentioned above):

- the Migration for Employment Convention (Revised), 1949 (No. 97); and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (ratifications: 49 and 23, respectively);
- the Workers with Family Responsibilities Convention, 1981 (No. 156) (ratifications: 43);
- the Termination of Employment Convention, 1982 (No. 158) (ratifications: 36);
- the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) (ratifications: 82);
- the Part-Time Work Convention, 1994 (No. 175) (ratifications: 14);
- the Private Employment Agencies Convention, 1997 (No. 181) (ratifications: 27); and
- the Maternity Protection Convention, 2000 (No. 183) (ratifications: 28).

Besides their relatively low level of ratification (with the exception of Convention No. 159), these Conventions have in common the dealing with various key aspects of precarious work. For instance, both Conventions No. 97 and No. 143 protect the rights of temporary migrant workers, who according to the CEACR, “by definition, occupy precarious positions” (ILO, 1999, para. 16).

The Private Employment Agencies Convention, 1997 (No. 181), specifically calls for measures to be taken to ensure that workers recruited by

agencies are not denied the right to freedom of association and the right to bargain collectively (Art. 4). In an attempt to address the tricky issue of “dual employment relationship” or “triangular relationship”, it calls on ratifying States to determine and allocate the respective responsibilities of the private employment agencies and the user enterprises. The question of private employment agencies is directly related to precarious work (Art. 12).

In June 2010, the Council of Global Unions issued a set of principles to protect agency workers’ rights, addressing exploitation and abuse of workers provided by agencies, and damage to regular employment relationships caused by misuse of such agencies.

Article 2, paragraph 3 of the Termination of Employment Convention, 1982 (No. 158), is particularly relevant, as it calls on ratifying States to provide adequate safeguards against the recourse to contracts of employment for a specified period of time “the aim of which is to avoid the protection resulting from the Convention”.

The other common feature of the above mentioned Conventions is that they are all based on the principle of equal treatment. This principle applies in two ways: first, in ensuring that the categories of workers covered by the instrument are not discriminated against on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice; secondly, that the category of workers referred to in a particular Convention enjoys treatment that is no less favourable than that of workers generally in respect of a number of identified matters. There is also a third way to ensure the principle of equal treatment. In both Conventions No. 143 and No. 159 (concerning migrants and persons with disabilities, respectively) there is a recognition that the mere requirement of equal treatment may not suffice to ensure that the workers concerned enjoy conditions that are not less favourable. Hence the two instruments provide for additional measures aiming at effective equality of treatment.

As indicated in this article, all ILO Conventions, unless specified otherwise, would apply to workers in precarious situations. The principle of equal treatment is central to ensure that workers in precarious situations enjoy no less favourable conditions than workers generally.

The fact that workers such as temporary workers, migrant workers, part-time workers or agency workers are, in principle, afforded some protection under the existing ILO Conventions raises two concerns, however: the need for the ILO (and for trade unions) to consider ways of improving their ratification rates and effective implementation, and the need to examine whether the protection they offer is sufficient.

## The need for new standards

On this latter point, effective equality of treatment will definitely require adjustments that take full account of the particular situations. Addressing the issue of protecting precarious workers also requires normative action to limit and reduce the spread of precariousness. And indeed, reports suggest that much remains to be done to effectively protect precarious workers, if the objective is also to prevent and combat precariousness in the first place. In a recent statement the International Metalworkers' Federation (2010) summarized the situation in the following terms:

Precarious work is rapidly becoming the biggest obstacle to the respect of workers' rights. Every day, more and more workers find themselves in precarious jobs where they have no right even to join a union, let alone to bargain collectively with their employer. Some are formally excluded because basic rights are denied in law. Others have rights on paper, but no rights in fact because laws are not enforced. And others are too afraid to exercise their rights because they could lose their jobs at any minute.

As a result, millions of workers throughout the world and whole categories of employment are effectively being excluded from the reach of ILO Conventions 87 and 98, as well as a whole host of other employment rights. According to our affiliates, employers also use precarious work to evade their obligations to provide social security and pensions, maternity and family leave, overtime payments, vacation and holidays, and occupational health and safety. Wages of precarious workers are much less than for permanent workers – our affiliates report that in many cases wages of precarious workers are more than 50% less than those of the permanent workforce.

Obviously, international labour standards seem to have had little impact on the expansion of precariousness and on the problems it is creating for workers. This failure can be attributed to a number of factors, including that the Conventions fail to address aspects of the specific nature of precarious work and that their usefulness is therefore limited, and that similarly they fail to regulate and prohibit the abusive use of precarious contracts by employers.

Addressing the Governing Body back in March 1995, the then spokesperson for the Workers' group, Mr Bill Brett, said he saw a consensus among governments that, if standard setting were to continue, it should concentrate on standards which were relevant, needed, affected many people in various parts of the world and provided protection where it was currently lacking (ILO, 1995). According to Mr Brett, the new economic order and the changing world of employment were characterized by a decline in full-time employment opportunities and the flourishing of short-term contracts. The largest single employer in the United States at the time was already an employment agency, Manpower.



The increase in precarious work is in particular related to attempts by employers to escape their obligations vis-à-vis workers, and to opportunities given to them related to the current push for flexibility in the labour markets. Liberal regulations, or the absence thereof, have enabled temporary recruitment agencies to mushroom with little or no control over the scope of their activities and the conditions for resorting to them. The erosion of labour protection and the failure of legislators to react to changes in industrial practices so as to ensure the protection of the weaker party in the employment relationship have led to a multitude of situations where the real responsibilities of employers have been diluted. B bogus self-employment, disguised employment relations through abusive subcontracting, pay-rolling agencies and other arrangements have contributed to leave increasing numbers of workers unprotected.

A worker in precarious employment is, by definition, in an even weaker position than workers generally with regard to individual contract arrangements and access to collective protection. In that sense, provisions for equal treatment in existing ILO Conventions also applicable to workers in precarious employment may not necessarily lead to provision of “no less favourable” conditions. Equal treatment may fail to take account of the potential abusive use of successive short-term contracts and other uses by employers of precarious work as a means of circumventing existing legislation and escaping obligations.

A worker in precarious employment will typically at best be entitled to “equal treatment” for the minimum salary offered to a permanent worker, regardless of his or her experience, and will be denied advancement, as his or her tenure in the job will never be sufficient to be granted increments provided by the enterprise.

A worker in precarious employment will be more exposed to work-related injuries and diseases.

And his or her participation in trade union activities, including in choosing representatives for the purpose of collective bargaining, or eligibility for trade union functions, will be hampered by reduced presence in the workplace.

In countries where thresholds have been established to allow access to some form of representation by workers or for the purpose of union recognition and collective bargaining, the use of precarious contracts can be used by employers to avoid reaching such thresholds, often calculated on the basis of the permanent workforce.

### Drawing on protection in existing national or regional legislation

A number of countries have put in place some form of protection for workers against abuse by employers (see Davidov, 2004). First, there are regulations that attempt to directly restrict the use of short-term contracts and prohibit

the inappropriate use of private employment agencies. These are often restrictions on the *length* of short-term employment contracts directly or through agencies (in France, for example, the use of such workers is limited to 18 months; see Ray, 2010). The possibility of renewing contracts can also be limited by legislation.

There are also restrictions on the *reasons* for employing workers on fixed-term contracts; in France, for example, the use of such workers is allowed only when needed to replace a permanent employee in case of prolonged absence; to respond to a temporary increase in activity; or to perform exceptional work.

The second group of regulations is designed to protect affected workers more directly, and at the same time to minimize the *incentive* for abuse, by making precarious work more expensive. This includes, in particular, the right of fixed-term workers to parity of wages, and sometimes parity with the user firm's employees with regard to other working conditions and benefits from a collective agreement.

There are also some guarantees for the ability of fixed-term or agency workers to participate in union and works council activities in the user firm, although these guarantees tend to be rather minimal. In France, precarious workers are entitled to a 10 per cent bonus on paid salaries.

Sometimes the law places specific employer responsibilities on the user firm, even though it is not formally considered to be the employer. This is common with regard to safety and health, but in some countries it goes further to include overall responsibility for working conditions (including working hours, rests, holidays, etc.).

More generally, in most countries the private employment agencies must have a licence, which often involves the deposit of financial guarantees – this is expected to minimize occurrences of insolvency and fraudulent operations. In addition, many legal systems have restrictions designed to protect the regular employees of the user firm. Thus, for example, it is commonly prohibited to use agency workers as replacements for striking employees.

There can also be restrictions on the employment of agency workers to replace employees who have been collectively dismissed. In some countries the representatives of the user enterprise even have a right to veto the use of temporary work agencies.

The third and final line of defence in many European countries is to declare the user firm the legal employer when the employment of agency workers has deviated from the legislation's requirements. Thus, for example, according to the French Labour Code, a worker is deemed to be working for the user firm under an indefinite employment contract from the first day of his/her assignment, if he/she was employed through an agency for longer than the maximum period allowed or for reasons other than those stipulated in the Code.

## Inspiration from provisions in existing ILO standards

Several ILO standards provide some ideas for dealing with precariousness; the suggestions below may not be exhaustive.

A most useful ILO instrument, despite its non-binding nature, is the Employment Relationship Recommendation, 2006 (No. 198) (see the article by Enrique Marín in this issue). While it reaffirms that the function of employment or labour law is to seek to address the unequal bargaining position in an employment relationship, it describes the criteria under which such employment relationship can be determined and provides for the legal presumption that an employment relationship exists where one or more such criteria are present.

Convention No. 181 constitutes a commendable effort to address abuses by private employment agencies, in particular in seeking to provide agency workers with access to their fundamental rights at work and to adequate protection of their working conditions. The references to certification and to the allocation of the respective responsibilities of the agency and user enterprises vis-à-vis the workers are important elements in dealing with potential unscrupulous agencies. However, one of the lacunas of Convention No. 181 is that it does not clearly address the conditions under which resort can be made to agency workers. This gap is filled somehow in Convention No. 158 concerning the termination of employment at the initiative of the employer. Article 2, paragraph 3 of Convention No. 158 states: “Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention”. The European Council Directive on fixed-term contracts (EC, 1999), similarly calls on Member States to prevent abuses arising from the use of successive fixed-term employment contracts or relationships.

### The way forward

As suggested in this article, a number of ILO standards would prove extremely useful to trade unions to enhance protection for workers in precarious situations. While standards cannot be a substitute for trade union actions (including at global level, through International Framework Agreements (IFAs)) and organizing, they can contribute to achieving the objective of decent work for all workers. Urging the ILO to promote the relevant instruments to ensure their ratification and implementation would be a strong signal and a legitimate demand by trade unions.

Similarly, trade unions could send a strong signal to precarious workers themselves if they engaged in campaigns for the ratification of the appropriate Conventions and were seen to be making full use of the ILO supervisory machinery to draw attention to abuses and failure to implement.

Global union federations (GUFs) could also integrate relevant ILO standards into the negotiation of IFAs.

Emphasis should also be placed on the specific nature of precarious work and the extent to which this warrants additional international labour standards. Approaches to combating precariousness through regulations have been varied in national and regional contexts. The following axes might be considered in the elaboration of a new Convention:

- reaffirming the principle that open-ended contracts should be the rule;
- developing criteria for the determination of the employment relationship, including the notion of “joint employer” responsibilities in the case of triangular relationships;
- establishing a legal presumption of the existence of an employment relationship;
- regulating the use of fixed-term contracts or resort to agency work through:
  - the establishment of objective reasons to be respected for resorting to precarious work;
  - fixing the maximum total duration of successive fixed-term contracts (or agency contracts);
  - fixing the number of renewals of such contracts;
- establishing the principle of equal treatment with workers in permanent jobs, taking into account the particular nature of precarious work (in particular with regard to safety and health, training, participation in trade union activities, eligibility for trade union functions);
- prohibiting the resorting to fixed-term contracts or agency work for particularly dangerous occupations;
- establishing a special salary bonus for precarious workers as a percentage of their remuneration;
- allowing workers to choose where they want to exercise their collective bargaining rights at any given time;
- extending the scope of collective agreements through legislation, so as to ensure that all workers at the user enterprise, including those in precarious situations, are covered;
- establishing systems of licensing and certification for employment agencies and subcontracting companies; and
- prohibiting the resorting to fixed-term contracts, subcontracting or agency work to replace permanent jobs or workers on strike.

These are simply proposals intended to provide food for thought and for discussion within the international trade union movement and the ILO. Indeed, while existing international labour standards do offer some protection to all workers, including those in precarious situations, they fail to sufficiently protect workers against precariousness as such. The time has come to fill that gap.

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# Establishing rights in the disposable jobs regime

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How elastic is the concept of precarious work? Elastic enough in some hands for the Employer spokesperson at the ILO's October 2011 Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors to introduce his presentation by asserting that agency work "was neither precarious nor atypical".<sup>1</sup>

Unions, for whom combating the spread of precarious work has emerged as a major priority, would strongly reject the first of these assertions and insist on probing the meaning of the second. Agency work is precarious by nature. And its rapid expansion and invasive presence in virtually all economic sectors have overturned received notions of what is "typical".

The ILO's core Conventions defining trade union organizing, representation and bargaining rights are built on the assumption of direct, open-ended employment – the "standard employment relationship" against which all other contractual relations are "atypical". It is of course true that at no time in history has even close to a majority of the world's workers enjoyed permanent employment status. Agriculture, with the world's largest labour force, has always been dominated by precarious work. Work in the rapidly expanding hotel and tourism sectors remains predominantly precarious. In manufacturing, even high union-density sectors often sit atop a wider pyramid built on long chains of outsourced, precarious labour. Now even these nodules of permanent direct employment are succumbing to growing casualization.

The labour movement has historically been based on organized workers in a standard employment relationship. In the public and private sectors, in wealthy countries and in poor ones, trade union organization among these workers has been a driving force for social progress, including the elaboration of the rights set out in ILO Conventions and their development through ILO jurisprudence. These rights have in turn served as a lever for further union advances. It is precisely these rights, along with living standards and social security, which are being corroded by the growth of precarious work.

In today's disposable jobs regime, the assumption of direct, open-ended employment has been undermined by the expansion of all forms of precarious work relationships, including agency staffing, in all sectors of economic activity. Precarious work can no longer be seen as a deviation from the norm as it (again) becomes increasingly widespread, even *typical*, leaving workers again searching for a platform of rights for protecting workplace organizing and bargaining.

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1. See [http://www.ilo.org/wcmsp5/groups/public/--ed\\_dialogue/--sector/documents/meetingdocument/wcms\\_175125.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/--sector/documents/meetingdocument/wcms_175125.pdf).

## Do we all mean the same thing by “precarious work”?

We might begin to answer the Employer spokesperson at the ILO’s Global Dialogue Forum by enquiring whether we all mean the same thing by “precarious work”. For trade unionists, precarious work encompasses the range of employment relationships which deny workers essential job security, embody unequal treatment with respect to the wages and benefits of permanent workers and deny them the same protection permanent workers have through their collective bargaining agreements.

Precairous work relationships include direct “temporary” contracts (which can become “permanently” temporary), “seasonal” contracts (which can flourish year round), agency work and other forms of outsourced, indirect, third party or “triangular” relationships which obscure the relationship with the real employer; bogus self-employment as “independent contractors”, abusive “apprenticeships”, “internships” and “training” schemes; and the transformation of employment contracts into commercial contracts through, for example, the creation of “cooperatives”, as in the Brazilian and Colombian sugar, palm oil and banana sectors.

We can arrive at a definition of precarious work which unifies these diverse forms by defining it as the negation of the ILO’s definition of the “standard employment relationship”, described as full-time work, under a contract of employment for unlimited duration, with a single employer, and protected against unjustified dismissal. This gives a precarious work formula incorporating any or all of the following elements: work of no guaranteed/specified/regular hours, fixed, limited duration of contract, multiple or disguised employers and no protection against dismissal (which can take the form of a simple non-renewal of contract). Agency work fits comfortably within this definition.

Forms of precarious work intersect and combine; broad classification, not strict taxonomy is needed. Temporary contracts (short/fixed-term, seasonal, day labour), may be both direct or “triangular”, i.e. outsourced through a labour hire/temporary agency. In response to the European Union Directive on agency work, which in principle promises (but fails) to achieve equality of treatment and access to rights for agency workers, legal “derogations” allow for the creation of permanent employees of “temporary work agencies” who can be employed on terms inferior to those of permanent workers. *The impact of all of these contractual forms and legal regulations is to augment insecurity, entrench unequal treatment and undermine rights.*

The various forms of precarious work can inhabit the same industry, the same plant, the same production lines. In November 2011, members of the IUF-affiliated National Union of Workers (NUW) launched an indefinite strike at the Baiada Poultry plant in Laverton, Victoria over the company’s massive recourse to precarious labour and the refusal to pay comparable wages to non-permanent workers. Of the approximately 430 workers regularly



working at the plant, only 284 were directly employed by Baiada – Australia’s largest poultry producer, with 35 per cent market share. The rest were on various forms of precarious contracts: “contractors” in name only, workers allegedly dispatched by shadowy agencies and a group paid directly in cash.<sup>2</sup> The results of an NUW industry audit published in 2012 included poultry processors with a “non-standard” workforce of up to 48 per cent. What defines “typical” in this arrangement? The chicken de-boner with a permanent contract or the “independent contractor” on the same line working at a piece rate de-boning chickens for his own paper “enterprise”?

Temporary employment can be doubly and even triply outsourced, giving employers multiple legal buffers against responsibility for the employment relationship and engaging in collective bargaining. A prime example is the situation at US chocolate maker Hershey which was brought to light in 2011, where the destruction of union jobs was the result of a meticulously implemented management strategy built on a triple layer of employment outsourcing.<sup>3</sup>

In 2002, the unionized Hershey packaging facility in Palmyra, Pennsylvania was closed – and reopened with a non-union workforce. The union launched an organizing effort to recapture the formerly union jobs. Hershey contracted operation of the warehousing and co-packing facility to Exel, a wholly owned subsidiary of Deutsche Post/DHL (a company we meet throughout this paper). To ensure that the site would remain non-union, Exel contracted SHS Staffing Solutions to provide it with “leased” employees. SHS, in turn, subcontracted recruitment to the Council for Educational Travel, USA (CETUSA). CETUSA in turn provided a workforce made up entirely of J-1 visa holders. The J-1 visa is a two-month work-study visa allowing non-residents to work in the United States.

The students, from countries as diverse as China, the Republic of Moldova, Nigeria, Turkey and Ukraine, paid from US\$3,000 to US\$6,000 each for the privilege of working round-the-clock shifts lifting heavy packages on fast-moving lines packing Hershey-branded chocolates. They were paid \$8 per hour to perform what were formerly union jobs. Extortionate rent for substandard, crowded housing and compulsory fees for company transportation to and from the plant, personal protective equipment, mandatory drug tests and even time cards were automatically deducted from their paychecks, leaving many workers with less than \$100 for a 40-hour workweek.<sup>4</sup>

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2. See “Strike against brutal, precarious conditions at Australia’s largest poultry producer, supplier to one of Australia’s biggest supermarket chains”, available at: <http://cms.iuf.org/?q=node/1237>.

3. See “Strike by student exchange workers at US chocolate maker Hershey exposes sordid trail of outsourcing and exploitation”, available at: <http://cms.iuf.org/?q=node/1096>.

4. According to a *New York Times* article by Fordham University professor Jennifer Gordon, “[r]ecent exposés by journalists and advocates have found similar abuse of J-1 visa holders at fast food restaurants, amusement parks and even strip clubs”. Further: “The J-1 program is attractive to employers because it is uncapped and virtually unregulated; companies avoid

The scheme only came to light when workers angered by the extortionate rents walked off the job – leaving US government officials investigating wages and hours violations with a desperate search to determine the employer. Hershey successfully evaded all legal responsibility, as did Exel/DHL, which was the whole point of the scheme.

The Hershey case only stands out in the sordid nature of the details of what amounts to trafficking; the general phenomenon – diluting the employment relationship through intermediaries – is increasingly commonplace. The doctrine of “dual employer responsibility” current at the US National Labor Relations Board – which requires the agreement of both the agency *and* the user enterprise to secure union recognition – effectively ensures that workers in this situation will not succeed in winning union recognition (already a difficult enough task in the United States today with a *single* employer!).

The expansion of agrofood transnational corporations (TNCs) into developing markets has relied heavily on outsourcing production *and* employment. US-based Kraft Foods, for example, entered production for Indian market with its famous Oreo biscuits and wafers produced through three layers of precarious employment: outsourced production (or third-party manufacturing); casual employment; and no employment contracts. Oreos were previously imported into India and sold at a high price; after the 2010 acquisition of Cadbury, Kraft shifted distribution of Oreo brands to Cadbury India and initiated local manufacturing to compete with local brands by now producing Oreos at less than half their earlier import price. Kraft Foods’ Oreo is now a major brand in India, aggressively increasing its market share. Growth has been built on brand recognition, but Kraft itself has no manufacturing operations in India, and no Indian workers on its payroll. The biscuits are produced by 720 workers at Bector Food Specialties’ plant in Punjab. Of these 720 workers 625 are directly employed casual workers (500 women and 125 men), 60 are contract workers and only 35 are permanent. The 625 casual workers have no employment contracts and work a minimum 12-hour shift.<sup>5</sup>

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paying Medicare, Social Security and, in many states, unemployment taxes for workers hired through the program. One sponsor authorized by the State Department even offers a ‘payroll taxes savings calculator’ on its Web site, so potential employers can see how much they would save by hiring J-1 visa holders rather than American workers. Visa holders can be deported if they so much as complain, and cannot easily switch employers.” See “America’s Sweatshop Diplomacy”, published 24 August 2011, available at: [http://www.nytimes.com/2011/08/25/opinion/americas-sweatshop-diplomacy.html?\\_r=1&scp=4&sq=hershey&st=cse](http://www.nytimes.com/2011/08/25/opinion/americas-sweatshop-diplomacy.html?_r=1&scp=4&sq=hershey&st=cse). The previously cited union survey of the Australian poultry industry found a high preponderance of immigrant student workers in the plants.

5. See “Precarious x 3: The layers of precarious employment beneath Kraft’s Oreo biscuits and wafers”, available at: <http://cms.iuf.org/?q=node/1033>.

## Box 1. The changing core

Companies defending their use of precarious labour typically invoke the “core vs non-core” defence. In manufacturing, earlier waves of outsourcing were implemented in the name of shedding “ancillary” services like cleaning, security, canteens, packaging and logistics in order to concentrate on the “core”. As we have seen, this can result in the erection of multiple layers of outsourcing, as companies providing products as well as services in turn resort to indirect, precarious forms of employment. In the case of Hershey and DHL/Exel described here, the end result of the process was the elimination of *all* direct employment – the workforce was permanently “leased”. Hotel chains have become little more than branding operations even in their dwindling number of directly owned and operated properties. Cleaning, kitchen services, booking, even the front desk have virtually eliminated the direct workforce. These developments explode the risible claims of the agency lobby to be “creating jobs which otherwise would not exist”.

The real difficulty for the “core vs non-core” defence is the infinitely malleable nature of the core, which is continuously redefined. Precarious work is rampant at all levels of manufacturing, including final assembly. The core becomes increasingly elusive, and then vanishes. Some leading food and beverage manufacturers include in their definition of the core manufacture based on proprietary technology, or stringent product quality and/or safety requirements. How far this diverges from actual practice can be seen in the self-description of DHL/Exel, which continues to describe itself as a logistics company. “What we do” on their website\* informs the visitor that

Exel offers customers a helping hand with manufacturing a broad spectrum of food and beverage products. Our Power Packaging operation is the largest contract manufacturer of food and beverage products in North America. We produce everything from aseptic beverages to cake mixes for some of the largest consumer brands in the world. And we deliver it in highly popular forms of packaging, ranging from rigid containers to handy, single-serving beverage flavor packs.

Entrust us with your formula and raw materials and we'll leverage our facilities, equipment, people, and processes to blend, fill, carton and case pack your products in one of our dedicated or multi-customer operations. With on-site quality assurance labs in each of our seven North American facilities, we continually test products to make sure every run meets your high standards.

The cycle has run full circle. Set up to free manufacturers from “non-core” activities like logistics, Exel's activities have mutated back into the core: manufacturing proprietary products and assuring quality control!

\* See [http://www.exel.com/exel/exel\\_manufacturing\\_services.jsp](http://www.exel.com/exel/exel_manufacturing_services.jsp) (consulted 28 April 2012).

## The scope and dynamic of the problem

The reality of the growth in precarious employment is beyond dispute, although official statistics under-report the extent of the phenomenon. The global figure of 10 million employees of global agencies cited by the Employer spokesperson at the Global Dialogue Forum<sup>6</sup> cannot be taken seriously, even if one assumes it excludes China and India. More crucial still is the *dynamic* of that expansion.

The number of temporary workers in Japan, where part-time and temporary workers now make up over 30 per cent of the workforce, more than tripled between 1999 and 2007, from 1.07 million to 3.8 million, with staffing agencies supplying a steadily rising proportion of these workers. The use of contract labour in Indian manufacturing increased from 13 to 30 per cent between 1994 and 2006. In South Africa, labour brokers now supply over half the workers in many major unionized manufacturing companies, including those in the IUF sectors, where they typically receive one-half or less of the wages and benefits of permanent workers but work alongside them performing the same jobs.<sup>7</sup>

According to an article published in *BloombergBusinessweek*, the number of dispatched agency workers in China has doubled since 2008 – *from 30 million to 60 million workers*.<sup>8</sup>

In the OECD countries, from 1985 to 2007 permanent waged employment grew by 21 per cent, but temporary jobs grew more than twice as fast, increasing by 55 per cent. The growth of precarious jobs in the European Union was even more pronounced, increasing by 115 per cent compared with a 26 per cent growth in overall employment. Disposable jobs, including both fixed-term direct employment and agency work, represented just under one-third of all jobs created during this period.

In Latin America during this period, the proportion of workers on temporary contracts increased from 19 to 26.5 per cent.

Agency labour on a massive scale has been *relatively* slow to take off in the United States, because loose enforcement of labour legislation and the doctrine of “employment at will” impose few restrictions on employer hiring and firing. Nonetheless, according to the US American Staffing Association (ASA), “[s]taffing firms hired a total of 12.9 million workers

6. See note 1 above.

7. The above figures are taken from *Policies and regulations to combat precarious employment*, the background paper produced by ILO ACTRAV for the ACTRAV Symposium on Precarious Work, 4–7 October 2011, available at: [http://www.ilo.org/wcmsp5/groups/public/-ed\\_dialogue/-actrav/documents/meetingdocument/wcms\\_164286.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-actrav/documents/meetingdocument/wcms_164286.pdf).

8. “Why China’s factories are turning to temp workers”, 8 March, 2012, available at: <http://www.businessweek.com/printer/articles/12340-why-chinas-factories-are-turning-to-temp-workersChina>.

in 2011, *equivalent to about one of every 10 workers on nonfarm payrolls*” [author’s emphasis].<sup>9</sup> The same source reported that *temporary and contract employment in the first quarter of 2012 had grown by 22 per cent*.<sup>10</sup> Temporary and contract employment in the first quarter of 2012, according to the ASA, averaged 2.8 million workers per day, an increase over the previous year’s average of 2.6 million.

While both government and private statistics tend to jumble together precarious employment of all types – part time, agency, directly employed temporary, etc. – the dynamic is clear. The Chinese source cited in the Bloomberg article estimates that agency labour could expand by 30–50 per cent again in 2012, as employers attempt to combat the higher wages won by Chinese workers through the recent wave of mass strikes.

The casualization of work (conversion of permanent to precarious jobs, failure to create permanent jobs even as employment is growing) can take place by shock – as with legislative coups from Belarus to New Zealand which have abolished at a stroke collective bargaining and employment rights – or it can take place by stealth, through the steady erosion of workplace rights. In all its forms, precarious work draws disproportionately on the most vulnerable groups of workers, including women, minorities and migrants. It deepens poverty and insecurity, undermines solidarity and entrenches inequality. It weakens union membership and saps bargaining power. Rolling back precarious work is therefore a union priority.

### Rebuilding membership, rebuilding power

Unions have in many cases achieved significant successes in rolling back precarious work – and found that in so doing they generate a powerful dynamic in which the organizing of precarious workers builds new membership mobilizing capacity which in turn leads to still more recruitment and bargaining power.

In the United Kingdom, for example, when IUF affiliate Unite began organizing to rebuild union strength in the poultry processing industry, agency workers accounted for some 70 per cent of employment. In 2008, the union launched a campaign with strong support from the IUF and affiliates around the world to win equal treatment for agency workers employed at meat producers supplying the UK-based retailer Marks & Spencer. As a result of the campaign, by year’s end thousands of UK agency workers were employed on permanent contracts – giving employment security to many newly

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9. See “Staffing employment grew 8 per cent in 2011”, available at: [http://www.american-staffing.net/newsroom/newsreleases/march\\_06\\_12.cfm](http://www.american-staffing.net/newsroom/newsreleases/march_06_12.cfm).

10. See “April staffing up 6.9 per cent from a year ago”, available at: [http://www.american-staffing.net/statistics/staffing\\_index.cfm](http://www.american-staffing.net/statistics/staffing_index.cfm).

arrived migrant workers for the first time. The union added 13,000 new members and 300 new shop stewards; the proportion of precarious to permanent workers was reversed and union density in the poultry sector increased dramatically. Building on these gains, the union targeted poultry companies supplying other major retailers. Membership in the sector continues to grow, boosting recruitment in the red meat sector.

In May 2010 the Milk Food Factory Workers Union at the Horlicks factory in Nabha, India, owned by the pharmaceutical, health and personal care products giant GlaxoSmithKline (GSK), won its fight for the right of casual workers to direct, permanent employment. Under the agreement, 452 casual workers employed on a “temporary” basis for more than a decade were made permanent. Building on this, with the support of the IUF, the union at the company’s Rajmundry plant mobilized around the same demand in their January 2011 bargaining proposals. In July 2011, the union negotiated an agreement which created permanent positions for 205 casual workers, who after two decades of precarious employment could now access their fundamental trade union rights: joining the permanent workers’ union and securing the protection and benefits of the collective agreement, rights they had been denied on the basis of their employment status.

The same organizing/recognition/organizing dynamic has been achieved in the IUF’s global company work, helping win international recognition of the IUF (or strengthening existing relationships within global companies) and stimulating further organizing – a cascade of positive synergies.

In 2009, the IUF initiated a campaign to support the fight for permanent employment at Unilever’s Lipton/Brooke Bond tea factory in Khanewal, Pakistan. Direct employment at the factory, and with it union membership, had shrunk over the course of a decade to a mere 22 workers, out of a workforce of around 780. The 22 permanent workers were the only workers at the factory eligible for union membership and a collective bargaining relationship with Unilever. The remaining workers were employed through a number of labour contractors, at a fraction of the wages and benefits of permanent workers, on a “no work, no pay” system. The successful CASUAL-T campaign mobilized global support and led to recognition of the IUF by Unilever, a company whose stated policy had always been to deny recognition to the IUF or indeed to any union organization above the national level. Comprehensive agreements were reached between the IUF and Unilever at global level. These agreements created hundreds of permanent jobs for contract and casual workers at the Khanewal and Rahim Yar Khan personal products factories, revitalizing union membership and bargaining power. Union membership at Khanewal increased ten-fold. The IUF and Unilever now have a structured relationship and meet regularly to review progress on rights issues. Ongoing engagement provides for an international dispute resolution mechanism. This process supported the successful 2011 fight for permanent employment at the Lipton tea facility in Pune, India, where

hundreds of casual workers had been on revolving three-month contracts for up to ten years.

The successful experience at Unilever encouraged the Pakistan National Federation of Food, Beverages and Tobacco Workers (NFFBTW) in its struggle for permanent jobs and trade union rights and recognition at Coca-Cola. The IUF 2010 Red Card Penalty Campaign in support of contract workers at Coca-Cola resulted in an agreement establishing a joint review committee at national level to deal with union rights issues at all the company's six plants. Through its Pakistan Office, the IUF supported the NFFBTW's successful drive to organize and register unions at two unorganized plants; all Coca-Cola plants in Pakistan are now unionized and members of the IUF. The conversion of temporary to permanent jobs is a permanent item on the collective bargaining agenda. This in turn has boosted successful fights for permanent jobs at Coca-Cola globally.

These struggles, and many other struggles by the IUF and its affiliates as well as other unions around the world, show that precarious work can be confronted and successfully rolled back by negotiating restrictions on its introduction into the workplace, bringing precarious workers into the bargaining unit and into union membership and negotiating the conversion of precarious to permanent jobs. In many cases, it can be accomplished with the traditional tools of trade union organizing.

Organizing alone, however, has limits. None of these successes, significant as they are, altered the legal/regulatory framework which facilitates and promotes the expansion of disposable jobs. Restrictions on indirect employees' right to join a union of permanent workers and inclusion in a bargaining unit of permanent workers were only overcome by making casual workers permanent. The restrictions remain in force for the huge majority of precarious workers who cannot make use of international support in a fight with a transnational company. Regulation is ultimately necessary if rights are to be secured for *all* workers.

### **Precarious work – what are our rights?**

In the conflicts with Unilever and other transnational companies, the IUF has effectively made use of the OECD Guidelines complaint procedure as a component of precisely calibrated international campaigning to bring additional pressure on the companies to come to the table. Furthermore, the Guidelines were revised in 2011 in ways which offer additional potential through the expanded employment and the new human rights chapters. The struggles discussed here take on a wider significance when they are seen as building blocks in the process of constructing a platform of rights to combat precarious work, a platform which is essential to both organizing in the workplace and organizing for legislative and regulatory change.

How do international human rights instruments, including the Conventions and jurisprudence of the ILO, define the rights of precarious workers?

## Precarious work and the ILO

The ILO's eight core Conventions<sup>11</sup> say nothing about precarious work *as such*. In fact, with the exception of Convention No. 181 on temporary work agencies and Recommendation No. 198 on the employment relationship, ILO instruments *generally* assume direct open-ended employment to be the norm (the “standard employment relationship”).

Unequal treatment of precarious workers and the systematic denial of their rights do not constitute “discrimination” as currently defined by Convention No. 100 and Convention No. 111, because these Conventions define discrimination (in the form of unequal remuneration) as based on sex (Convention No. 100) or as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin” (Convention No. 111). These qualifications for the determination that unequal treatment = discrimination are based on what are often called “inherent characteristics” – gender, nationality, etc. Unequal treatment resulting from *social practices* – e.g., employing workers on two different types of employment contract to perform the same work but with different pay and benefits – does not conform to this understanding of discrimination. Discrimination and unequal treatment remain conceptually distinct – as so defined, there can be unequal treatment without discrimination, and thus no violation of rights.

The definition of discrimination in Convention No. 111 does appear to offer a basis for widening the grounds for discrimination when it adds to the “inherent characteristics” “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies”. This could include, for example, employment status, but it is up to the “Member concerned”.

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11. Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).



The ILO's 2012 Report of the Committee of Experts on the Application of Conventions and Recommendations<sup>12</sup> in its discussion of the Republic of Korea and Convention No. 111 reflects the tension between recognizing the blatantly unequal treatment accorded to "irregular" workers (fixed-term, part-time and agency workers) and the language of discrimination. The report

... notes that the Conference Committee also expressed concern that the large majority of non-regular workers were women. In this regard, the KCTU states that measures to eliminate discrimination based on gender and employment status have been insufficient and that discrimination on the basis of employment status is particularly severe for women resulting from the fact that 70 per cent of women in the labour force are non-regular workers; the quality of women's employment has also deteriorated as jobs were created by expanding part-time work after the current economic crisis.

It is the *government* in this case which argues that the purpose of the 2006 Act on the protection of irregular workers "is not so much to achieve gender equality but to reduce undue discrimination against fixed-term and part-time workers." It is presumably admissible to speak of discrimination against irregular workers in this case because the Member has in its legislation found "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment", although the report shows just how thoroughly the government of the Republic of Korea has failed in its task.

The Committee makes a number of excellent recommendations, but in its conclusions continues to grapple with the constraining definition of discrimination and the effective application of a law which is about unequal treatment on the basis of contractual status and not gender: "The Committee urges the Government to make special efforts to address direct and indirect discrimination based on sex of fixed-term and part-time workers, and to ensure the effective enforcement of the Act on the protection, etc. of fixed-term and part-time employees of 2006, particularly in industries and occupations in which women are predominantly employed." The Committee cannot transcend the narrow interpretation of Convention No. 111; government practice is reviewed with reference to its own legislation, not to Convention No. 111, because the Committee appears unsure of how to apply the potentially broader sense of the Convention. In this recommendation, discrimination and unequal treatment still display characteristics of both affinity and mutual exclusion. Their occasional congruence is uneasy.

The non-discrimination Conventions of the ILO clearly need to be expanded through the careful use of the complaints mechanism to apply to

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12. See [http://www.ilo.org/global/standards/WCMS\\_175675/lang-en/index.htm](http://www.ilo.org/global/standards/WCMS_175675/lang-en/index.htm).

contractual relationships which allow for unequal treatment. Widening the jurisprudence is a process of struggle and mobilization.

On the other hand, Conventions Nos 87 and 98, which establish workers' rights to come together in unions (freedom of association) for the purposes of negotiating the terms and conditions of their employment (collective bargaining) are wide-ranging, powerful instruments whose implications and applications as tools for challenging precarious work have begun to be applied.<sup>13</sup>

ILO Conventions are considered to guarantee rights not only on paper, but to make possible in practice the effective exercise of these rights. Key decisions of the ILO's Committee on Freedom of Association involving agency workers in the Republic of Korea (Case No. 2602, a case involving Hyundai Motors) and in Colombia (Case No. 2556) make it clear that employment schemes employing agency workers to frustrate union membership and collective bargaining rights violate Conventions Nos 87 and 98. The former states explicitly that subcontracting at Hyundai was used for the purposes of frustrating the effective exercise of basic rights. The same reasoning was echoed in the ILO's 2008 report on industrial relations at Coca-Cola's Colombia bottlers, which shows how by outsourcing many activities which are central to the operations of the bottlers the companies systematically deny and restrict the ability of those workers to exercise their rights to join a union of their choice.<sup>14</sup>

The 2008 Colombia decision (Case No. 2556) concerned the government's refusal to register a union of workers at a chemical company on the grounds that its membership application included employees of temporary agencies. The government contended that the agency workers were service, not chemical workers, because of their status as agency employees, and thus not eligible for membership in a chemical workers' union. The Committee affirmed that "the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities... that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing". This is a determination based solely on contractual status; the Committee did not have to search for a preponderance of women, migrants, etc. to condemn this as a violation of basic rights.

It follows from this that the many laws and regulations in force around the world which prevent workers on temporary contracts, and/or workers formally employed by agencies, from joining a union of permanent workers, violate Conventions Nos 87 and 98 and are therefore illegal under international

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13. See, for example, IUF, March 2010 submission to the UN Special Representative on business and Human Rights *Precairous Work: Undermining Human Rights*, available at: <http://www.reports-and-materials.org/IUF-submission-to-Ruggie-re-precairous-employment-Mar-2010.pdf>.

14. See <http://www.ilo.org/public/english/dialogue/sector/papers/food/mission.pdf>.

law. Unions should make greater use of this in confronting both governments – and companies (more below). In matters of labour law, the ILO is the ultimate reference.

The potential application of Conventions Nos 87 and 98 can be further widened. The Colombia decision cited above states that workers – regardless of their formal employment status – have the right to join the union of their choice, without restriction, and to participate in its activities. For a union, what activity is more fundamental than collective bargaining?

What is not yet explicit in the jurisprudence of the ILO is the right of temporary/agency workers to be represented by a union of permanent workers for collective bargaining purposes. Many unions do, in fact, negotiate the terms and conditions of those on temporary and/or agency contracts employed in their workplaces. But in many countries and situations they are denied this right. It must be made explicit.

The rights set out in Conventions Nos 87 and 98 are rooted in recognition of the unequal bargaining relationship between the worker and the employer. To rectify this imbalance, workers must have the right to resist coercion by joining together to negotiate the terms and conditions of their employment. Since the right can only be exercised collectively, it follows that employment practices which dilute that right by fragmenting collective bargaining coverage by inserting a third party – the agency – between the worker and the real employer which organizes the collective labour of the enterprise violate the human rights foundations of collective bargaining. The agency employee may be “free”, in principle, to pursue her/his collective bargaining rights with the agency which is their formal, legal employer. But the real bargaining in this relationship takes place between the “user enterprise” and the agency. Since collective bargaining is understood to be the exercise of a collective right to bargain the terms and conditions of employment, this right is real only to the extent that it can be exercised with respect to the power which ultimately sets those terms and conditions. Agency work undermines that fundamental right.

### **Imposing a human rights framework on companies: The OECD Guidelines**

The OECD Guidelines, which were revised in 2011, previously contained only vague references to employees’ human rights. They now explicitly reference the ILO core Conventions as well as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ESCR), opening up new possibilities for their use in organizing to combat precarious employment.

While human rights treaties are developed by States, for States, the revised Guidelines incorporate the UN Guiding Principles on Business and Human Rights (the “Ruggie Principles”), which establish these human rights

commitments as a standard to which corporations as well as States must adhere. The rights set out in these instruments are not negotiable – they constitute a standard against which all practices must be measured. While these international human rights instruments, like ILO Conventions Nos 87 and 98, say nothing about precarious employment as such, they say a great deal about the human rights obligations of companies with respect to worker and trade union rights in the light of the expansion of employment practices which can violate basic rights. They can help us elaborate a framework for establishing strict criteria for the employment of precarious workers and benchmarks for reversing it.

Article 7 of the ESCR sets out the right of all workers “to the enjoyment of just and favourable conditions of work.” Article 7a(i) establishes the right to “[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”. Unlike the non-discrimination Conventions of the ILO, this is a definition of unequal treatment which goes beyond discrimination rooted in “inherent characteristics” (“without distinction” is arguably broad enough to include the distinction between, for example, permanent and agency staff). Article 7(c) sets out the right to “[e]qual opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”.

On the basis of Article 7, inequality of treatment between permanent and non-permanent employees violates international human rights commitments, and Article 7(c) suggests that it is a violation to maintain temporary and agency workers working alongside permanent workers in a situation of permanent precariousness.

This incorporation of the Ruggie Principles into the Guidelines includes the requirement for companies to engage in “human rights due diligence”. This process applies equally to their supply chains as well as to their own operations. Human rights due diligence in supply chains means that companies are responsible for the human rights impact of their business partners, contractors, licensees and franchisees. It imposes on them the requirement to minimize the risk of potential rights violations and to take appropriate corrective action when violations occur. Contract manufacturers and agencies supplying labour are clearly part of this expanded definition of the supply chain, and heighten the risk of real or potential human rights violations. The expansion of precarious work would constitute a violation of the corporate obligation to minimize human rights risks. Failure to reduce precarious work would mean complicity in rights abuses.

There is additional reinforcement for this approach in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). The MNE Declaration itself has no implementation mechanism, but it is referenced in the revised Guidelines as a tool “in

## Box 2. Inequality of treatment from day one: How companies are exploiting “derogations” from the European Union Directive on agency work

Transposition into national law of the EU Directive on temporary agency work allows for “derogations” from the principle of equality of treatment which subvert the Directive’s intended content. In Germany, for example, derogation which permits negotiated agreements which formalize unequal treatment of agency workers with respect to permanent employees engendered a rash of agreements negotiated by hastily assembled “unions” almost as soon as the Directive came into effect, posing a major challenge to the DGB and its affiliates.

In the United Kingdom, companies were fast off the mark to profit from a so-called “Swedish derogation” (actually a UK/Danish/Swedish hybrid).

To circumvent the requirement that after 12 weeks of continuous employment agency workers should enjoy equal access to pay and some, but not all, benefits (there is no equality of treatment when it comes to redundancy notice, redundancy pay or pension benefits) companies and agencies swiftly collaborated to make these workers permanent employees of the agency.

Overnight, derogation became widespread in the retail and other sectors. A spokesperson for supermarket giant Tesco told the *Financial Times* shortly after the Directive came into effect that “[t]he derogation is being used very widely across the economy by the agencies as a way of ensuring that agency work remains competitive and flexible. The approach has been recognized by the government, the British Retail Consortium and the CBI.”<sup>a</sup> What is missing in this statement is the role of the agencies’ clients in encouraging and implementing the practice.

Two days later, the *Financial Times* reported that one agency was moving 8,000 of its 25,000 temporary workers on to permanent contracts – including those working at a DHL operation supplying parts to a Jaguar Land Rover car assembly factory, where Unite members were being pressured to sign contracts giving them up to GBP 200 less *per week!*<sup>b</sup>

And on 31 October, a spokesperson for the Morrisons supermarket chain told the JustFood internet food industry publication: “The recruitment agencies we work with have been considering how they will comply with this legislation for some time. They have proactively considered using this model or are already employing their workers. Through our network of agency suppliers, Morrisons will be offered temporary workers who may be employed by the recruitment agencies with contracts of employment referred to as Swedish Derogation.”<sup>c</sup> The Morrisons workers slated for “derogation” are employed in both logistics and food manufacturing.

understanding the Guidelines to the extent that it is of a greater degree of elaboration”.

Paragraph 16 of the MNE Declaration states that companies “should endeavour to increase employment opportunities and standards, taking into account the employment policies and objectives of the governments, as well as security of employment and the long-term development of the enterprise”. Paragraph 25 states: “Multinational enterprises equally with national

In company speak, the operation brings “synergies” to the demand for “flexibility”. The real synergy provides the user enterprise with generous cost savings and allows the agencies to expand their colonization of the labour market.

In the United Kingdom, Unite had had an understanding with the transnational brewer Carlsberg that agency work in logistics would be limited to around 15 per cent of the workforce. The union requested discussions when that percentage was exceeded, but when the Directive came into effect the company instructed all its agencies to convert temporary workers into permanent employees. At the same time, Carlsberg entrenched CBA language which starts new hires at 80 per cent of the pay of longer-serving employees, moving to 90 per cent after a year – and stopping there. Under the current agreement, these workers will never achieve 100 per cent pay parity. The “synergy” here is low pay rates for an increasing portion of the directly employed workforce and the institutionalized denial of equal terms and conditions for the growing army of agency workers.

With the growing tendency for companies to lock in two-tier agreements, agency workers who escape “derogation” now find the comparison against which equal treatment is measured is starter pay at or barely above the legal minimum, with few or no benefits.

These applications of the Directive demonstrate the patent absurdity of the claims by the agency lobby CIETT that “appropriate regulation” of agency employment promotes decent work and the “creation of jobs which otherwise would not exist”.<sup>d</sup>

Viewed within the human rights-based framework outlined here, these and similar “derogations” from the principle of equal treatment violate international human rights commitments, and can be challenged on this basis. No one has yet proposed a derogation from the principle of non-discrimination which in practice might allow employers to discriminate in employment or remuneration on the basis of national origin, or to exclude such workers from a bargaining unit of permanent employees – yet a contract with an agency confers on employers this power.

<sup>a</sup> See *Employers are exploiting temps, claim unions*, available at: <http://www.ft.com/cms/s/0/76f5fec4-fe4e-11e0-a1eb-00144feabdc0.html#axzz1tzkDxC6T>.

<sup>b</sup> See *DHL to use temps get-out clause*, available at: <http://www.ft.com/cms/s/0/1ea278fa-ffe9-11e0-ba79-00144feabdc0.html#axzz1tzkDxC6T>.

<sup>c</sup> See *Unions blast Morrisons over temporary workers*, available at: [http://www.just-food.com/news/unions-blast-morrisons-over-temporary-workers\\_id117194.aspx](http://www.just-food.com/news/unions-blast-morrisons-over-temporary-workers_id117194.aspx).

<sup>d</sup> This assertion is a consistent leitmotiv in the record of the ILO Global Dialogue Forum cited earlier, and throughout Ciett’s lobbying and publicity work.

enterprises, through active manpower planning, should endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability and social security. In view of the flexibility which multinational enterprises may have, they should strive to assume a leading role in promoting security of employment.”

Paragraphs 16 and 25 of the Declaration on Multinational Enterprises, then, establish the responsibility of companies to act to ensure the progressive

realization of secure employment which provides adequate and fair remuneration and access to social security benefits. Companies must demonstrate that they are moving away from precarious employment to promoting more stable and secure jobs. Paragraph 25 clearly suggests that they should be negotiating agreements on employment security. Full disclosure of the use of precarious employment contracts, at contract manufacturers as well as in directly owned and operated enterprises, is consistent with the employer obligation to provide the information necessary for meaningful collective bargaining to take place which is established in the jurisprudence of the ILO (and specifically stated also in the OECD Guidelines Chapter V on Employment and Industrial Relations).

In short, the use of precarious employment above and beyond what can be established to be necessary for legitimate, demonstrable purposes (and this determination itself has to be negotiated through collective bargaining!) violates fundamental human and trade union rights. The exercise of fundamental rights is not subject to qualification in the name of “flexibility” or “seasonality”, which are claims but not rights grounded in international human rights law; rights cannot be “seasonally adjusted”, and rights as such are not flexible. Compliance with international human rights obligations requires companies to work together with trade unions to negotiate the progressive reduction of precarious employment as part of “human rights due diligence”; failure or refusal to do so violates the UN Guiding Principles and makes a company liable to a complaint under the OECD Guidelines. The IUF has shown that such complaints may, under the right circumstances, be an important lever in winning organizing and bargaining rights for precarious workers.

Beyond the possibilities for challenging precarious work using the OECD Guidelines, whose scope of application is limited, the rights framework outlined here can be a tool in organizing and campaigning to win new members, new bargaining rights and new regulation to restrict and ultimately eliminate precarious work. Because the basic international human rights instruments discussed here have been almost universally ratified, their importance for attacking legal barriers to genuine equality of treatment and for eliminating restrictions on trade union rights derived from employment status is potentially enormous. The framework provides an organizing and bargaining platform and the rights-based foundation for a set of political demands to defend worker rights under a regime of disposable jobs. It will have to be elaborated and continuously developed through a process of continuous organizing.

# Implications for union work of the trend towards precarization of work<sup>\*</sup>

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IndustriALL

\* This paper draws on materials developed for the Freie Universität Berlin based on a presentation made at a workshop of the Global Labour University on globalization, multinational enterprises, and labour in May 2011.

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**P**recarious work is rapidly becoming one of the biggest obstacles to the respect of workers' rights worldwide. Every day, more and more workers find themselves in precarious jobs where they have no right even to join a union, let alone to bargain collectively with their employer. Precarious work is one of the most serious challenges facing the global trade union movement. Unless unions are able to find ways to confront precarious work, to reduce its prevalence as a form of employment and to overcome the restrictions on labour rights that it entails, the strength of organized labour to protect and advance wages and working conditions will be severely, if not critically weakened.

There is no doubt that permanent jobs are in decline the world over, being replaced with temporary, casual, part-time and contract jobs. In highly industrialized countries, traditional full-time jobs are rapidly being replaced by precarious forms of employment. In developing countries, ongoing, full-time jobs have always been rare, but rather than moving towards more stable employment, the trend is towards precarious work continuing as the norm. While the current economic crisis has certainly escalated the erosion of stable employment, unions were expressing concern about the increasing reliance on temporary work contracts to fill permanent vacancies well before the crisis hit.

This paper draws on the experience of the International Metalworkers' Federation (IMF), its affiliates and other global unions to present some of the responses that unions at local, national and global level are making to the challenge and points to the more promising avenues for further work to drive back precarious employment and secure workers' rights. First it offers an overview of the nature and drivers of the global spread of precarious work.

### **Denial of trade union rights**

Precarious workers typically miss out on many of the benefits associated with full-time, ongoing work with a single employer, and may have reduced or no rights to social security protection. But it is the effective denial of precarious workers' rights to join a union and bargain collectively with their employer that leaves such workers most vulnerable to exploitation. Some precarious workers are formally excluded from the coverage of national labour legislation that guarantees those rights, while others have rights on paper, but no rights in fact because laws are not enforced. And others are too afraid to exercise their rights because they could lose their jobs at any minute.

As a result, millions of workers throughout the world and whole categories of employment are effectively being excluded from the reach of International Labour Organization (ILO) Conventions Nos 87 and 98 on freedom of association and the right to bargain collectively, as well as a whole host of other employment rights.

There are various employment arrangements used which ensure that precarious workers are effectively excluded from union membership, collective bargaining and social protection. Many precarious workers find themselves in triangular employment relationships, whereby workers are technically employed by a temporary employment agency, subcontractor, labour dispatcher or other third party but actually perform work for another company. Typically in this situation, although their rights to join a union and bargain collectively may exist on paper, there is no practical way to actually exercise these rights. It is the user company that controls their day-to-day conditions of work and in most cases sets the wage rates for the job (which are usually lower than those for permanent workers performing the same work), yet workers in triangular relationships are told that they cannot bargain collectively with this company as it is not technically their employer. Neither does it make any sense for them to bargain with their legally recognized employer, as this company has no actual control over their work. In some cases it may be possible for workers in triangular employment relationships to join the same trade union as members working directly for the user company, but this is rare. In any case, this gives them no right to be covered by the same collective agreement as these workers since their employer is different.

In many countries there are still legal barriers that prevent precarious workers from joining the same unions and being party to the same collective agreements as permanent workers. For example, legislation places restrictions on categories of workers, such as migrant workers and dispatch workers, that can be covered under existing agreements, or restricts the categories of worker that can join the relevant union. In Bangladesh, as in many other countries, an agency worker is not allowed to join the same union as the directly employed worker next to them.

For an individual precarious worker, there is often no motivation to join the union or get involved in bargaining when their connection to the workplace is weak, their employment is short term or sporadic, and they have no guarantee of continuing with the same company. However, without a doubt, the most important reason for precarious workers not joining trade unions stems from a legitimate fear of losing their job. Whenever unions conduct surveys to discover why such workers do not join unions, this is the principal reason given. And there are too many examples of precarious workers trying to get organized, only to be immediately dismissed, for this fear to be anything other than genuine and justified.

## Precarious work in the metal sector

In an increasing number of workplaces in the metal sector, precarious workers now make up more than half the total workforce. The electronics industry and the automotive industry are currently the most affected, but precarious work is rampant across all metal industries, including steel and aerospace.

In 2007 the IMF conducted a survey<sup>1</sup> of its affiliates' experiences of precarious work and 90 per cent of the unions that responded said that precarious work in the metal sector had increased during the previous five years. Two-thirds of respondents said that companies in their country were shifting from directly employing temporary workers to hiring them through agencies or brokers. The survey clearly showed that employers are using myriad employment relationships in order to evade their obligations to precarious workers in the areas of social security and pensions, maternity and family leave, overtime payments, vacation and holidays, and occupational health and safety. Two-thirds of affiliates reported in the survey that wages of precarious workers are much lower than those of permanent workers. Of these, one-third said that wages are more than 50 per cent less than those of permanent workers.

Overall, 90 per cent of unions that responded to the survey said that workers in their country feel less secure as a result of changing employment relationships.

Outsourcing of production has been a major phenomenon in the electronics industry and today very little manufacturing is carried out directly by the major brand name companies themselves. Many brands, including Dell and Apple, have contracted out all their manufacturing. Part of the strategy for such extensive outsourcing has been to lower wage costs. Indeed, one of the largest contract manufacturers, Flextronics, claims to save its client brands up to 75 per cent in labour costs.

Not surprisingly, the imperative to drive down labour costs has led to extremely high rates of precarious employment in the electronics industry. It is not uncommon to find factories where 90 per cent or more of the workers are employed on temporary contracts of one form or another. Employing workers on such contracts enables companies to dramatically reduce their labour costs, not only by offering below subsistence wages, but through excessive working hours, forced overtime and avoiding severance payments. A report on labour practices in the industry in Mexico conducted by local labour rights organization Centro de Reflexión y Acción Laboral (CEREAL)<sup>2</sup> cites the excessive use of employment agencies, indiscriminate temporary hiring,

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1. See *IMF survey on changing employment practices and precarious work*, available at: <http://www.imfmetal.org/index.cfm?c=16693>.

2. *Labour rights in a time of crisis*, available at: <http://www.cafod.org.uk/news/international-news/electronics-2009-11-20>.

and the effective abandonment of historically established social benefits such as annual leave, severance payment, maternity benefits and profit sharing as practices expressly designed to lower labour costs.

## Women and precarious work

The gender dimension of precarious work was clearly brought out in the IMF survey, which showed that women, as well as migrants and young workers, are disproportionately affected.

In the Republic of Korea more than two-thirds of women workers are precariously employed while in Japan about 30 per cent of metal workers are atypical or contract workers and women form a high proportion of such workers. In the United States, there is widespread contracting out of female-dominated areas such as office support services, health-care and pension administration, payroll services and customer support and cleaning services. In Canada, 40 per cent of women's jobs are considered non-standard, or precarious, employment, while in Australia a full third of women workers are casually employed and paid 21 per cent less than permanent workers, with no access to holiday leave, sick leave or public holidays. According to Sharan Burrow, at the time President of the Australian Council of Trade Unions (ACTU) and currently General Secretary of the International Trade Union Confederation (ITUC), "the proliferation of casual and insecure employment is one of the most important issues of gender equity in the Australian workforce".<sup>3</sup>

IMF affiliates from countries as diverse as Brazil, Canada, Chile, Colombia, Dominican Republic, Hong Kong (China), Indonesia, Japan, the Republic of Korea, Panama, Peru, Singapore, Thailand, United States and Uruguay have all confirmed that women are more likely to be forced into precarious employment and are the first to lose their jobs. As a result, they are less likely than their male colleagues to be covered by social insurances such as healthcare and retirement benefits, and receive lower wages.

Indeed, precarious work makes a large contribution to the gender pay gap. In Japan, female part-time workers earn a mere 54.3 per cent of the hourly wage of regular female workers, a gap which has widened in the last decade. In the Republic of Korea, 69.5 per cent of women workers are precariously employed, earning only 43 per cent of the salaries of regular male workers. At the Kiryung Electronics factory, which was the subject of an ILO complaint (see below), only 5 per cent of the workers are permanent employees and they are all male. Nearly all the precarious workers are women, earning 47 per cent less than their male colleagues.

3. Speech delivered to ACTU, The Age & RMIT Casual & Insecure Employment Conference, 2 August 2004.

The argument is sometimes made that precarious employment for women is better than no employment at all. In the electronics industry, the production workforce in countries such as China, Thailand and Indonesia is primarily composed of young women between the ages of 18 and 23 who have migrated from rural areas within the same country to find employment in electronics factories in industrial areas. While it is true that without these jobs, these young women would be unlikely to find any other formal employment, in the long term the precarious jobs on offer do not contribute to raising their standard of living or those of their families. Women on temporary contracts typically do not have their contracts renewed if they get married or pregnant and are therefore forced to return to their villages. Precarious work in the electronics factories only lasts for a few years and the young women find that they are no longer offered work once they reach their mid-twenties.

It is not a coincidence that the electronics industry has the highest proportion of women workers in the metal sector, and also the highest proportion of precarious workers. Exploitation and denial of labour rights in the electronics industry are endemic and are exacerbated when manufacturing is located in export processing zones (EPZs). EPZs make a significant contribution to women's over-representation in precarious work. Women dominate the EPZ workforce throughout the world and precarious work is just about the only type of employment available in EPZs. EPZs either operate beyond the reach of labour legislation or the legislation is not enforced. Unions are virtually non-existent in EPZs.

### The forces driving precarious employment

The rapid increase in precarious work is being driven both by corporations and governments. Across the world, national labour laws are being amended to better enable employers to create yet more precarious jobs at the expense of stable employment. By continuing to advocate flexibilization of labour markets as the route to economic growth, despite all evidence to the contrary, global institutions such as the World Bank and the International Monetary Fund help create a favourable climate for these reforms. Employers embrace precarious work because it enables them to limit or reduce their permanent workforce to a minimum in order to maximize profits and flexibility. The result is that the risks associated with employment are shifted from the employer on to workers.

Thanks to the predominance of low-cost precarious jobs, employers have the upper hand in demanding reductions in their labour costs. These are being driven further and further down at the same time that profit expectations are at an unprecedented high. Under these conditions, it is easy to see why employers behave as if it is just not viable to retain full-time jobs with

decent pay and conditions. In fact, the global forces that drive the agenda for labour “flexibility” are often beyond the control of individual employers, particularly when these are small companies located far down the supply chains of multinational corporations.

Increasingly, entire workforces are being replaced by workers on precarious employment contracts. In many cases, these are the same workers, made redundant as permanent workers only to be rehired as precarious workers with lower pay, conditions and, of course, job security. Outsourcing or leasing their workforce enables companies to distance themselves from all responsibility for those workers who are in fact performing work on their behalf.

From a company perspective, a side benefit of precarious employment is that it eliminates the need to deal with a unionized workforce. For some, this objective is the driving force behind employment relationships that deny workers any effective chance of joining a union and bargaining collectively with their employer. Driving a wedge between the permanent workforce and precarious workers in the same workplace is used as a deliberate employer strategy to prevent the two groups from finding a commonality of interest and taking a collective approach, the risk being that such worker solidarity might be able to prevent the employer from benefiting from the increased flexibility and lower wage costs that the move to precarious employment was designed to deliver.

There are a range of employment practices associated with precarious work commonly in use by companies to resist unionization and collective bargaining. Some avoid having a permanent workforce altogether and hire workers exclusively by way of agencies, brokers or contractors. Others threaten workers with dismissal, which in practice simply means not renewing their fixed-term contracts, thus avoiding any consequences due to unfair dismissal legislation. These threats are all the more effective if combined with dangling promises of possible permanent work if workers “behave”. And the by-product of inferior pay and employment conditions for precarious workers is that constant high turnover of the workforce means that organizing is simply not possible.

Of course, in many countries where these practices abound, workers are in theory protected by labour legislation which gives them the right to join a union and bargain collectively. However in practice governments have assisted in encouraging the spread of precarious work and thus lowering employment standards both by failing to legislate strong legal protections for the rights of precarious workers, and failing to enforce them where they do exist. In short, the actions (or inaction) of governments all over the world are enabling employers to establish employment relationships that systematically deny workers their rights.

## Union action against precarious work

The IMF has been actively campaigning against precarious work since 2007. The campaign's basic premise is that all workers are affected by precarious work. For workers whose jobs are not precarious today, those ongoing, full-time jobs are under intense pressure.

The growth of precarious employment is a concern that affects all unions in all countries, whether industrialized, emerging or developing. The IMF has adopted a strategy that focuses on stopping the massive expansion of precarious work, securing wages and conditions for precarious workers that are equal to those of regular workers, pushing for workers to be directly hired and discouraging indirect employment, and limiting precarious employment to cases of legitimate need. It is acknowledged that there is a legitimate role for temporary employment, but not in order to perform work that is ongoing in nature, as is increasingly the case.

IMF action on precarious work is principally driven by the threat that it poses to organizing and collective bargaining and addresses the role played by the global economy in the rise of precarious work. IMF affiliates have repeatedly mobilized against precarious work around the World Day for Decent Work on 7 October. As a reflection of the impact that precarious employment is having on the ability of unions to defend the labour rights of workers and the urgent need for unions to respond, the level of mobilization by IMF affiliates in these actions has gone beyond that usually seen in globally coordinated campaigns.

Cooperation and joint action with other Global Union Federations (GUFs) are essential to tackling an issue that is affecting more and more occupations across more and more industries. The rapid rise of precarious work is the biggest threat to organizing and collective bargaining faced by unions throughout the world and the strongest response will come from global unions acting in concert. Global unions continue to cooperate closely in work to identify strategic points of intervention and to organize joint actions in specific countries. The Council of Global Unions has an active working group on work relationships, through which global union actions against precarious work are coordinated.

Union action against precarious work is targeted in three different areas. Industrial strategies are pursued by trade unions at national level to limit or ameliorate the conditions of precarious work. Particular emphasis is put on the key role of organizing and collective bargaining strategies. Other strategies are used to target the legal and political framework that is allowing precarious employment to flourish. Unions are actively intervening at the political level for legislative reform both to deal with precarious work and to strengthen the organizing and bargaining capacity of trade unions. Thirdly, union actions at the international level address the global forces that are driving precarious work.

## Organizing precarious workers

The obstacles to precarious workers joining trade unions are numerous and substantial. Labour regulations deny such workers the opportunity to join a union, or to join the union of the place in which they work. For example, in Thailand, agency workers are classed as service sector workers even when they are dispatched to work in manufacturing, and thus are not entitled to join any manufacturing unions. Employers use precarious employment to resist unionization, and summary dismissal of precarious workers for attempting to form or join a union is prevalent as a means of controlling workers and avoiding unions. Temporary workers who have no guarantee of remaining in the workplace for an extended period have less incentive to join a trade union, although many do in fact end up staying in the same workplace for years.

Even if precarious workers do manage to join trade unions, they face significant problems when they attempt to exercise their rights to bargain collectively. Identifying the employer with whom to bargain for many precarious workers is an insurmountable hurdle to negotiating on their pay and working conditions. In the Korean automotive sector it is commonplace for subcontracted workers from a number of different companies to be working on production lines alongside directly employed workers, distinguishable only by the different coloured jackets that they wear, and equally excluded from bargaining collectively with the company for whom they work.

Again, employers are able to capitalize on the artificial divisions they create between workers, by playing one group off against another. Permanent workers may be able to reach collective agreements with the employer, but they are forced to negotiate in a climate in which it is made clear that their job security and working conditions are vulnerable and that their jobs too can become precarious. As precarious employment continues to make inroads into permanent employment, the bargaining unit shrinks, with detrimental effects on bargaining outcomes. The net effect is for workers to become divided and to try to protect their own interests above those of the group.

Despite this hostile environment, unions are organizing precarious workers alongside permanent workers, recognizing that the only way to challenge precarious employment and working conditions is through united action. Collective agreements that put caps on precarious employment and require precarious workers to be converted to permanent status protect conditions and job security for all workers.

Unions are also having to look to their own structures and working methods to remove barriers to precarious workers joining the union. In some cases unions' statutes have needed to be changed to allow temporary or agency workers to join. Unions have also had to confront hostility from existing members, who have been working in an environment in which precarious workers are viewed as a buffer between them and redundancy.



But such obstacles can be overcome. In the face of all the barriers mounted by the government and employers to precarious workers being able to unionize, the Korean Metalworkers Federation (KMWF) took steps to reform itself in order to be able to represent precarious workers. After an education process conducted with its membership, the union secured the agreement of its members to transform itself from a federation of enterprise unions, the KMWF, to an industrial union, the KMWU, expressly so that it could represent both regular and agency (dispatch) workers.

Assisting unions to transform themselves into organizations capable of convincingly addressing issues faced by precarious workers is a key strategy to increasing their membership of trade unions. Given the over-representation of women among precarious workers, targeting women workers is vital. IMF affiliate Federasi Serikat Pekerja Metal Indonesia (FSPMI) is an example of a union that, despite the often overwhelming obstacles, has organized significant numbers of outsourced and contract workers, the majority of whom are women working in the electronics industry in EPZs.

To be able to do this, FSPMI first took steps towards changing its structures and culture to improve representation of women and increase their membership in the union. The union has made considerable progress: where once there was no form of women's organization and women had no access to training, now there is a fully functioning Women's Directorate operating at all levels of the union, able to plan, conduct and evaluate its own activities. The union statutes have also been changed to guarantee 30 per cent representation of women at all levels of the organization and women now serve on its Executive. This increased profile and level of involvement of women has greatly improved FSPMI's organizing capacity and women's membership of the union has increased by 42 per cent. With its new-found strength, the FSPMI is able to negotiate successfully for the conversion of temporary contracts into permanent ones.

Organizing precarious workers is an imperative for trade unions. It is only with the combined strength of all workers that it will be possible to reverse the tide.

### Using collective bargaining to tackle precarious work

Collective bargaining has long been recognized as the only mechanism through which workers can obtain a genuine voice in their working conditions, by redressing to some extent the power imbalance that is inherent between workers and their employer. Yet companies ensure that the vast majority of precarious workers are excluded from collective agreements.

Collective bargaining also holds the key to both determining the circumstances under which non-permanent or outsourced employment is justified, and ensuring that wages and conditions of precarious workers are equal

to those of regular workers. Collective agreements can ensure equal treatment for all workers, whatever their legal status. This not only protects precarious workers but, by ensuring that precarious work cannot be used to undercut established conditions, regular jobs are also protected. Precariously employed workers, including agency staff, must receive the same pay and benefits as regular employees, so that employers have no incentive to use them as cheap, disposable labour. The best prospect for achieving this is through reaching collective agreements at industry level. But this is not the only way that collective bargaining can be effective. Increasingly, unions are advocating and achieving collective agreements that set limits on precarious categories of employment such as temporary and agency labour. Most would agree that there are genuine cases where temporary labour is justified, but agreements should be made that differentiate legitimate need from abusive use.

IMF affiliates are pursuing a range of collective bargaining goals, among them ensuring non-discrimination and equal pay between permanent and precarious workers, guaranteeing trade union rights for precarious workers, converting precarious jobs into permanent ones, reducing or limiting allowable time periods for temporary employment, protecting precarious workers against dismissal and promoting industry-wide bargaining to ensure coverage of precarious workers, no matter who is their legal employer. In Indonesia, IMF affiliates are assisting agency workers to become contract workers and contract workers to become permanent workers, covered by the collective agreement. Spanish affiliates are calling for ways to limit temporary work to be included in collective agreements. IMF affiliate AOMA of Argentina has signed a National Framework Agreement for the cement sector that equalizes wages and benefits for all workers doing essentially the same work, regardless of their employment status. And in the United Kingdom unions have reached agreement with employers and the government to assure agency workers the same pay and conditions as regular employees after a qualifying period. The IG Metall in Germany has a campaign called “Gleiche Arbeit – Gleiches Geld” (equal work, equal pay), the aim of which is to ensure that temporary workers receive the same pay as “normally” employed workers from day one. There are many more examples, but such collective bargaining efforts alone will not be sufficient to neutralize the global forces that are driving precarious employment.

### The legislative battleground

In many countries, the battle against precarious work is being played out in parliaments, where bills have been introduced both to restrict it as well as to remove restrictions on it, thus facilitating access by companies to precarious employment. Fierce lobbying in a range of countries by employer bodies including CIETT, the global representative of employment agencies, and the

American Chamber of Commerce, has contributed to the introduction of legislation aimed at removing barriers to the introduction or extension of agency work, temporary work and outsourcing.

Through concerted action, unions are having some success in resisting further deregulation of the labour market and in some cases have been able to support legislation introduced to protect precarious workers. In Malaysia in 2010, the government proposed to amend the Employment Act to legalize labour suppliers as bona fide employers and to entrench the contract system which was until then not provided for by law. The unions took action to strongly oppose the amendments and presented a petition to the government. The government proposals were withdrawn due to the pressure exerted by the trade unions. However, in 2011 the government reintroduced the same bill and on 6 October it was passed in the Lower House. In Turkey, proposed legislation to flexibilize employment and working conditions through, among other measures, legalizing subcontracting in core work and legalizing temporary work agencies has been blocked for the time being, thanks to union action.

In the Russian Federation, two members of the Russian parliament and prominent trade unionists, Andrey Isaev, head of the State Duma Committee on Labour and Social Policy and deputy chairman of the Federation of Independent Trade Unions of Russia (FNPR) and Mikhail Tarasenko, chairman of the IMF-affiliated Miners' and Metallurgical Workers' Union (MMWU), introduced a bill to the State Duma to effectively ban employers from transferring their workers to a third party, and thus avoiding their responsibilities, when there is a reasonable basis for regular employment relations. Known as the "agency labour banning bill", the proposed legislation includes amendments to the Russian Labour Code to rule out triangular employment relationships. This would mean that if a contract is not signed with a direct employer but with an agency, the real employer would be considered to be the company which directly benefits from the work of an employee, and not the agency. While the bill has gained the support of the government, employers strongly object to any kind of limitation on agency labour mechanisms. Nonetheless, the bill successfully passed its first reading in the State Duma in May 2011. Second and third readings will follow.

Unions in South Africa made a concerted push for legislation that would ban agency employment, in line with similar legislation which had previously been enacted in neighbouring Namibia (and subsequently overturned by the High Court of that country following frantic lobbying by agencies and employers). Unable to succeed through legislative means, South African unions have taken their struggle against labour brokers to the bargaining table. After four months of negotiations and a two-week nationwide strike, motor industry workers represented by the National Union of Metalworkers of South Africa (Numsa) achieved an agreement to phase out labour brokers in the industry. The union is now spreading the agreement to other sectors.

Further legislative reforms will be necessary, not only to limit precarious employment but to ensure the rights of precarious workers to join a union and bargain collectively and to guarantee the same protections that the State confers on regular workers.

## Global-level remedies

In 2006, the Korean Metalworkers' Union (KMWU) and the IMF lodged a complaint with the ILO Committee on Freedom of Association against the government of the Republic of Korea for neglecting to protect and facilitating violations by companies of subcontracted workers' rights to freedom of association and collective bargaining.

Subcontracted workers at a number of metal plants had not been regularized as required by the law after two years of continuous service. When these workers tried to form a union to assert their rights, they were dismissed by the company in which they worked, either through the non-renewal of their contracts or the non-renewal of the company's own contract with the subcontracting company. This is a clear example of subcontracting being used to disguise employment relationships and deny workers their rights. Anti-union discrimination is disguised as termination of contracts with the result that employee freedom of association and bargaining rights are not protected. Workers are effectively put in a Catch-22 situation: the principal employer refuses to negotiate, claiming there is no employment relationship; the subcontractor refuses to negotiate claiming it has no control of the terms and conditions of employment. The only place where the workers were able to take industrial action in support of their claims was at the principal employer's plant (where they worked). However, when they did take action, they were penalized for taking illegal action against a third party.

As a result of this complaint, the ILO Committee on Freedom of Association issued a series of strongly worded recommendations to the Korean government. These included the recommendation that the government should develop mechanisms to strengthen the protection of dispatch (or subcontracted) workers' rights to freedom of association and collective bargaining. Unfortunately the Korean government has made no response to the ILO recommendations and has not implemented them. The climate of violence and intimidation towards precarious workers has worsened. Thousands more precarious workers in the country lost their jobs as a result of the economic crisis and the government is proposing to amend its legislation to extend the period within which temporary workers must be made permanent from two years to four, and to remove all restrictions on the categories of work in which precarious employment is allowed.

Despite the difficulties of ensuring that recommendations by the Committee on Freedom of Association are acted upon, taking complaints

through this ILO procedure remains an effective way of bringing international attention to the barriers faced by precarious workers in attempting to assert their rights under ILO Conventions Nos 87 and 98. Similarly, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises contain a complaint mechanism that allows unions to raise issues relating to the conduct of MNEs. Unlike the ILO process, under which complaints can be made only against governments, the MNE Guidelines procedure enables unions to complain directly about companies. In 2009, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) successfully used the complaint mechanism under the Guidelines to reach a settlement with Unilever over the level of precarious employment at its Lipton tea factory in Khanewal, Pakistan. The factory employed only 22 workers directly, while the many hundreds of casual workers were legally excluded from joining the same union as Unilever workers and reaching a collective agreement with Unilever. A concerted global corporate campaign gave the IUF the upper hand in mediation under the MNE Guidelines which resulted in Unilever agreeing to create an additional 200 permanent, direct jobs.

Recently updated, the OECD Guidelines for Multinational Enterprises now make clear that they apply to all those in an employment relationship with the enterprise, including temporary, casual and indirect employees. New supply chain provisions extend the scope of the Guidelines to workers in the supply chain and other business relationships. The full scope of the new provisions has yet to be tested and trade unions now have an opportunity to do this by bringing cases against the worst global offenders for slashing worker rights by imposing precarious employment.

The IMF, like other Global Union Federations, has signed a number of International Framework Agreements (IFAs) with multinational companies which commit the company to ensuring respect for freedom of association and the right to bargain collectively throughout their operations and those of their suppliers. IFAs are an important tool for establishing a relationship between global companies and workers internationally that can lead to a better understanding of workers' needs and how to address them. Some agreements are also beginning to address the question of the employment relationship, precisely because of its impact on rights. For example, the IFA signed in 2010 between several Global Union Federations (GUFs) and GDF SUEZ states that the company "recognizes the importance of secure employment for both the individual and for society through a preference for permanent, open-ended and direct employment. GDF SUEZ and all subcontractors shall take full responsibility for all work being performed under the appropriate legal framework and, in particular, shall not seek to avoid obligations of the employer to dependent workers by disguising what would otherwise be an employment relationship or through the excessive use

of temporary or agency labour.”<sup>4</sup> Certainly there is more scope for exploring how IFAs can be effectively used to regulate the use of precarious work in multinational companies and their supply chains.

## The role of the ILO

The ILO has a vital role to play in ensuring that rights under the fundamental Conventions Nos 87 and 98 on freedom of association and the right to bargain collectively are fully recognized in respect of precarious workers. However, the global unions have been of the view that the ILO has not yet fully acknowledged the extent of the problem, nor done enough to identify the myriad ways in which precarious workers are denied their rights and to propose policy solutions.

The ILO’s Declaration on Social Justice for a Fair Globalization of 2008 is an important tool for addressing the injustices of precarious work. It calls for a fair globalization based on decent work and notes the inter-relatedness of employment, social protection, social dialogue, and rights at work as well as the role of international labour standards as a means of achieving them. The Declaration acknowledges that while, on the one hand, the process of economic cooperation and integration has helped a number of countries to benefit from high rates of economic growth and employment creation, on the other hand, it has led to income inequality, continuing high levels of unemployment and poverty, and the growth of both precarious work and the informal economy, which impact on the employment relationship and the protections it can offer. Globalization of investment and trade has indeed brought jobs to countries that badly need them, but instead of spreading regular employment more fairly throughout the world, the impact has been to undermine full-time permanent work where it does exist.

Another important tool is the Employment Relationship Recommendation, 2006 (No. 198). Having information on all the different ways that precarious workers are prevented from joining trade unions and bargaining collectively is a prerequisite to developing policy or legislative solutions. Recommendation No. 198 calls on governments to monitor developments in the labour market and the organization of work, and to formulate advice on the adoption and implementation of measures concerning the employment relationship. Governments should collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels. Unfortunately, much work

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4. Global Agreement on Fundamental Rights, Social Dialogue and Sustainable Development between GDF Suez and Public Services International (PSI), Building and Wood Workers International (BWI) and International Federation of Chemical, Energy, Mine and General Workers’ Unions (ICEM).

remains to be done in this area. Armed with such information, the ILO would be in a better position to assess how precarious work impacts on the implementation of Conventions Nos 87 and 98. The employment relationship is the basis for labour law and its protection. As such, it is vital for the respect for ILO standards. The ILO could be playing a much more active role in working with governments at country level to revise or develop legislation to make sure that labour standards are applied equally to precarious workers.

More specifically, Convention No. 181 on private employment agencies requires governments to take measures to ensure that “workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively”. Furthermore, governments may prohibit private employment agencies from operating in respect of certain categories of workers or branches of economic activity. These two provisions alone give plenty of scope for governments to control the spread of agency employment and ensure that agency workers are able to exercise their fundamental labour rights. Much remains to be done in both of these areas.

Insecure employment and reduced wages will not lead to stable development, which is why the ILO needs to push for greater policy coherence among the institutions of global governance. The World Bank’s Employing Workers Indicator (EWI) that is used in its annual *Doing Business* report gives high marks to countries that deregulate their labour markets and the highest marks to those that deregulate the furthest, with no regard to the social consequences. This has resulted in the highest ranking on this indicator being given to countries such as Belarus, a country that has been criticized by the ILO for restricting workers’ rights and has forced all its workers into fixed-term contracts, effectively abolishing permanent employment. Until 2010, the EWI was used in numerous World Bank and International Monetary Fund country reports to advise countries to deregulate labour markets and in some cases featured in loan conditions. Widespread criticism by Global Unions, the ILO and several governments resulted in the World Bank suspending the use of the EWI in this way and the methodology is under review.<sup>5</sup>

The OECD produces its own indicators of “Employment Protection Strictness”.<sup>6</sup> These give marks to countries based on criteria including regulation of temporary forms of employment. Regulations that limit, for example, the number of contract renewals permitted, the types of work for which temporary agency work is legal or that ensure equal treatment between regular and agency workers are described as “stricter”. These indicators have

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5. World Bank: “Employing Workers Methodology”, available at: <http://www.doingbusiness.org/methodology/employing-workers>.

6. OECD: “Calculating Summary Indicators of Employment Protection Strictness”, available at: <http://www.oecd.org/dataoecd/24/40/42740190.pdf>.

been used by the IMF and the OECD, as well as governments, to support proposals for weakening employment protection legislation.

The ILO can help ensure that the policies of global institutions like the IMF, the World Bank and the OECD do not undermine its efforts to create a sustainable and fair globalization, by weakening labour protection and effectively promoting precarious work.

## Conclusion

Labour regulation and compliance systems have failed to keep pace with the extraordinary spread of precarious forms of employment throughout the world. As a result, workers' fundamental rights to join a trade union and bargain collectively with their employer are being systematically undermined at a frightening rate. For trade unions, the clear priority is to use all available tools and mechanisms not only to push back against the continuing encroachment of precarious work into areas of employment that until now have been direct, ongoing and secure, but to protect the rights of precarious workers, to demand equal treatment and to organize them into trade unions.



# Trade union responses to precarious work in seven European countries\*

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Precarious employment is a major concern today in Europe's labour markets. In recent years, the percentage of employees working under precarious conditions has increased across the continent, accompanied by processes of segmentation and exclusion. Precarious employment refers to employment that combines some of the following characteristics: low levels of income and income security, low job and employment security, bad working conditions, limited access to training, limited social security rights and/or limited voice. Precarious employment affects not only the working situation of the person in such employment but also his or her household through, for example, deficient and volatile income, problems in accessing loans or high levels of insecurity.

In very general terms, the growth of precarious employment is associated with several broad developments, including the rise of the service sector and the decline of industrial employment, changes in technology and work organization, changes in corporate governance and employers' strategies, declining trade union power, ongoing drives towards privatization and marketization and individualization.

More specifically, a number of labour market developments have led to increased precarious employment. Recent studies indicate a polarization trend in the labour market of many European countries, following the growth in employment in both the highest-skilled and higher-quality (professional and managerial) and lowest-skilled and lowest-quality (personal services) occupations, and with declining employment in the middle of the distribution (manufacturing and routine office jobs) (Goos, Manning and Salomons, 2009; Fernandez-Macias and Hurley, 2008). Most recently, as a result of the crisis this polarization trend has increased with a growing number of European Union (EU) countries experiencing a downgrading of the employment structure through job destruction in the higher sections of the labour market, no growth in the middle, and a growth or relatively minor decline of jobs in the lower sections (European Commission, 2011).

There is also a marked rise in various types of atypical, often flexible jobs, including fixed-term contracts, temporary agency work, (dependent) self-employment, project work, and (marginal) part-time contracts (Eichhorst, Feil and Marx, 2010). Such jobs, which first appeared in an expanding service sector, come with lower levels of job security, frequently provide only limited access to social security, may suffer from low rates of pay and worse working conditions, and generally offer only limited training opportunities (*ibid.*). As a result, work is no longer a guarantee against poverty, considering that in 2009, in-work poverty amounted to 8.5 per cent of the employed in the European Union (Frazer, Gutiérrez and Peña-Casas, 2011).

Finally, the quality of standard jobs is also under pressure in certain sectors, in particular in the service sectors that require little education and in the lower end of manufacturing, resulting in low wages and/or very high levels of flexibility. As a result of these developments, even though more people are in employment today than 20 or 30 years ago, for many workers the chances of

getting a good quality job are bleaker today than they were then. Studies based on the European Working Conditions Survey indicate that job quality has, at best, stagnated since the mid-1990s, that job precariousness is rising and that access to training and lifelong learning are worryingly limited (Peña-Casas and Pochet, 2009; Greenan, Kalugina and Walkowiak, 2010). Certain social groups (e.g. the young, women, the low-skilled and elderly workers) are over-represented and often trapped in the lower segments of the labour market.

The rise of precarious employment is not simply the outcome of inevitable economic and technological developments; it is also the result of conflicts and choices both in the political sphere and in labour relations. National and European political actors determine to an important extent in what institutional context (labour legislation, labour market policies, economic and social policy, etc.) employment is situated. Employers and managers make choices on their competitive strategies and the types of jobs they offer. And individual employees and trade unions negotiate with these employers on the terms of employment, types of contract, working conditions and other issues. The preferences of employers and employees and their unions, as well as the balance of power between them, have an important effect on precariousness. It is no coincidence that the growth of precarious employment coincides with the declining power of trade unions.

Reducing precariousness and segmentation and improving the social rights of workers in precarious employment has become a salient political issue across Europe. At the EU level, this is manifested by the prominent role of the EU Charter of Fundamental Rights, including a series of social rights. Also, a number of Directives (for example, concerning those on part-time and fixed-term employment) aim to improve the social rights of the employed, while the European Employment Strategy urges Member States to complement the increased flexibility in the labour market with decent social security and stable employment relationships.

At the same time, an important factor driving the growth of precarious employment is the dominant economic character of the European integration process, with its emphasis on marketization, privatization and internationalization (Scharpf, 2002; Keune, 2012). Although the EU argues (in very general terms) for the compensation of flexibilization and rising insecurity in the labour market with new types of security, it fails to effectively propose and promote such new security (Burroni and Keune, 2011). At national level, the drive towards flexible employment relationships has been ongoing for decades but has not led to the provision of new types of security for workers in flexible employment. Not surprisingly, concerns over precarious work have not yet translated into a decline of such employment.

Much of the prior research on precarious work has been concentrated on the analysis of labour market structures, vulnerable groups, the different dimensions of precariousness and state policies that affect the level of precariousness. The present paper rather focuses on the attempts by trade unions to

reduce precarious employment, the strategies they follow and the obstacles they face. It provides an overview of the results of seven country studies conducted under the “Bargaining for Social Rights” (BARSORI) project on trade union experiences with precarious employment in Denmark (Mailand and Larsen, 2011), Germany (Bispinck and Schulten, 2011), Italy (Burrone and Carrieri, 2011), the Netherlands (Boonstra, Keune and Verhulp, 2011), Slovakia (Kahancová and Martišková, 2011), Spain (Ramos Martin, 2012) and the United Kingdom (Simms, 2011).<sup>1</sup> In this paper, we will present the most important findings of this research initiative.

In the next section, we will set the context by briefly discussing labour market developments related to precariousness. We will then discuss trade union strategies towards precarious employment in each of the seven countries.

### Labour market developments

Before entering into the discussion of trade union strategies, it is important to provide some illustrations of the important differences in the state of the labour markets in the seven countries (for a more elaborate comparative analysis, see European Commission, 2011). First, there are major differences with regard to the employment rate (table 1). In the period 2002–11, the EU-27 employment rate moved between 62 and 66 per cent. Of the seven countries, Denmark, the Netherlands and the United Kingdom have been consistently above this average, and in more recent years Germany has clearly been an above-average performer. In fact, Germany is the only country that has consistently improved its employment rate in this period, not suffering from the crisis-induced setbacks we can observe in the other countries. In Italy and Slovakia, the employment rate has been consistently below the EU average, whereas in Spain it had caught up with this average in 2007 but then the effects of the crisis caused the Spanish employment rate to plummet in the subsequent years. The employment rate can be considered an indicator of employment security (i.e. of the likelihood of finding a new job once one has lost one), in part because it correlates negatively with the unemployment rate. Hence, it can be expected that precariousness caused by employment insecurity is lower in countries with a high employment rate.

A second indicator is the percentage of employees on a fixed-term contract, i.e. a temporary contract (table 2). Because of their fixed expiry date, fixed-term jobs are generally more prone to be precarious than jobs that come with an open-ended contract. They are also disadvantageous because, as the country studies show, persons on a fixed-term contract often have less access to training and face greater difficulties in accruing rights to social benefits, unemployment benefits, occupational pension schemes or paid leave. The

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1. For information on the BARSORI project, see <http://www.uva-aias.net/355>.

same is often true for temporary agency workers and for persons who work only a few hours per week.

In 2006 fixed-term employment was particularly high in Spain, at 34.4 per cent, although it declined to 25.6 per cent in 2011 following the crisis. This clearly shows that the declining employment rate in Spain is largely a result of the termination or non-renewal of temporary contracts and underlines the vulnerability of these types of contract. In the Netherlands, the rate of fixed-term contracts has consistently been above the EU average and the difference is widening, demonstrating both the rapid increase in the use of such contracts and the more limited impact of the crisis on the Dutch labour market. In Germany and Italy, in 2011 the percentage of fixed-term contracts was close to the average, but in both countries the percentage has been increasing over time, suggesting that they may find themselves above the average in a few years' time. Denmark, Slovakia and the United Kingdom have the lowest rates of temporary work, clearly below the EU average. However, they are also the three countries in the group that have the lowest employment protection levels as set by law, i.e. they are the countries where it is easiest for employers to dismiss workers that are on an open-ended contract. Hence, while they have fewer workers on temporary contracts, jobs are in general less secure because of lower dismissal protection.

A third indicator is the in-work at-risk-of-poverty rate (table 3), that is, the share of employed adults with an "equivalized" disposable income below

**Table 1. Employment rate, 2002–11**

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
EU-27	62.4	62.6	63.0	63.4	64.4	65.3	65.8	64.5	64.1	64.3
Denmark	75.9	75.1	75.7	75.9	77.4	77.0	77.9	75.3	73.3	73.1
Germany	65.4	65.0	65.0	65.5	67.2	69.0	70.1	70.3	71.1	72.5
Italy	55.5	56.1	57.6	57.6	58.4	58.7	58.7	57.5	56.9	56.9
Netherlands	74.4	73.6	73.1	73.2	74.3	76.0	77.2	77.0	74.7	74.9
Slovakia	56.8	57.7	57.0	57.7	59.4	60.7	62.3	60.2	58.8	59.5
Spain	58.5	59.8	61.1	63.3	64.8	65.6	64.3	59.8	58.6	57.7
United Kingdom	71.4	71.5	71.7	71.7	71.6	71.5	71.5	69.9	69.5	69.5

Source: Eurostat.

**Table 2. Employees on fixed-term contracts as a percentage of total number of employees, 2002–11**

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
EU-27	12.4	12.6	13.2	13.9	14.5	14.6	14.2	13.5	14.0	14.2
Denmark	8.9	9.5	9.8	9.9	9.6	9.5	8.8	9.0	8.5	9.2
Germany	12.0	12.2	12.5	13.9	14.2	14.3	14.7	14.3	14.6	14.7
Italy	9.9	9.5	11.9	12.4	13.0	13.4	13.9	12.8	12.9	13.7
Netherlands	14.2	14.4	14.4	15.1	16.1	17.9	18.0	17.9	18.5	18.0
Slovakia	4.6	4.7	5.3	4.9	5.0	5.3	4.0	4.1	5.7	6.6
Spain	32.1	31.8	32.1	33.3	34.4	31.9	29.4	25.3	24.9	25.6
United Kingdom	6.0	5.7	5.6	5.4	5.5	5.7	5.2	5.4	6.1	6.1

Source: Eurostat.

**Table 3. In-work at-risk-of-poverty rate, 2005–10**

	2005	2006	2007	2008	2009	2010
EU-27	8,2	8,2	8,5	8,6	8,4	8,5
Denmark	4,9	4,5	4,2	5,1	5,9	6,6
Germany	4,8	5,5	7,5	7,1	6,8	7,2
Italy	8,8	9,6	9,8	8,9	10,3	9,4
Netherlands	5,8	4,4	4,6	4,8	5,0	5,1
Slovakia	8,9	6,3	4,9	5,8	5,2	5,7
Spain	10,4	9,9	10,7	10,7	11,4	12,7
United Kingdom	8,3	7,8	8,0	8,5	6,7	6,8

Source: Eurostat.

the risk-of-poverty threshold, which is set at 60 per cent of the national median equivalized disposable income (after social transfers), or working adults who live in poor households. For these workers, having a job is no guarantee against poverty. This is often the case for single parents on low wages and/or with part-time jobs, whose wage is not sufficient to keep the family out of poverty and who have no additional income.

In-work poverty is highest in Spain and Italy, both scoring above the EU average, following from the relatively high incidence of marginal jobs and low wages. A remarkable feature is the increase of in-work poverty in Germany from 4.8 per cent in 2005 to 7.2 per cent in 2010, resulting from the growth of very small and low-paid jobs as well as the absence of a decent minimum wage for large numbers of the employed, as discussed in the German study. In Denmark working poverty is also on the rise, although not as rapidly as in Germany.

The account presented above shows that there are major differences between countries in terms of their labour market situations and how they perform in relation to various dimensions of precarious employment. Spain scores badly on all three indicators presented here: it has a low employment rate, a very high incidence of fixed-term contracts and a relatively high prevalence of in-work poverty. Italy is not far behind Spain, although it has a much lower rate of fixed-term contracts. Germany has improved its employment rate substantially but also sees the share of temporary contracts and especially in-work poverty rising, indicating that the new jobs created are, to a significant extent, precarious jobs. In the Netherlands, growing precarization is suggested by the high and increasing level of fixed-term contracts. In Denmark, Slovakia and the United Kingdom, general employment protection is low. In Denmark working poverty has been increasing substantially but still remains below the average. In the United Kingdom, working poverty fell below the average only with the onset of the crisis, suggesting that the working poor may now be unemployed. Slovakia suffers from a low employment rate but does well on the other two indicators. It should be noted, however, that the absolute level of wages and income in Slovakia is substantially below that of the other countries.

## Trade union strategies towards precarious employment

The country studies help us to understand what lies behind trade union approaches towards precarious employment and workers in such employment, not only from an empirical perspective but also from a more conceptual one. Kahancová and Martišková (2011) draw on Heery and Abbot (2000) to distinguish a number of basic trade union strategies towards workers in precarious employment. They summarize these strategies in the following way:

- *Inclusion*: union strategy to include/integrate employees in precarious situations into their constituency and serve as broad interest representation organizations without making specific differences between precarious and regular workers.
- *Exclusion*: union strategy to serve as interest representation organizations for “insiders” (regular employees) only and exclude workers in precarious employment from their constituency and from union interests.
- *Separation*: union strategy to separate workers in precarious employment from the rest of their constituency and to treat them as a particular group requiring special attention and instruments in interest representation.
- *Reduction*: union strategy that aims to bridge the divide between precarious and regular employees by reducing precariousness (e.g. through regulations that decrease the incentives to resort to precarious work). Unions strive to influence/implement changes in the employment conditions of workers in precarious employment in order to bring these closer and comparable to employment conditions of regular employees.
- *Elimination*: trade union strategy aiming at eliminating all forms of precarious work in the economy. This may encompass inclusion as well as separation, but these strategies are perceived to be temporary on the way towards a full elimination of precarious employment.

Complementary to this, Boonstra, Keune and Verhulp (2011) distinguish five main instruments at the disposal of unions to deal with precarious work:

- addressing precarious work in collective agreements to improve the terms and conditions of precarious workers;
- litigation, taking precarious employment cases to court;
- influencing the legislative process at the central level through social dialogue or industrial action to improve the legal rights of precarious workers;
- mobilizing and organizing precarious workers in trade unions; and
- media campaigns to influence public opinion.

The country studies show that in all cases unions use all these strategies and instruments to some extent and at some point in time, often combining two

or more of them. The emphasis varies strongly, however, depending on the combination of a number of factors. One is that of the scale of the problem: the number of workers affected by precarious employment and the extent to which unions see such employment as an important issue. A second factor is whether the problem at hand concerns a specific company, a sector or the labour market in general. A problem with a temporary work agency which does not respect the law requires different actions from a problem with the rights of temporary agency workers in general. A third factor is that of the source of the problem: does it emerge because of deficiencies in the law, because of employer strategies, or because of a lack of collective voice? And a fourth factor is that of the resources unions have available in terms of coverage of collective agreements, membership and bargaining power, mobilization power, institutional positions (e.g. seats on national bi- or tripartite councils), and financial resources.

We will review below the approaches of trade unions in the seven countries under study. But first a general observation is in order. The position of trade unions in relation to precarious employment and precarious workers is not without controversy. Often, trade unions are accused of representing only the so-called “insiders” in the labour market, i.e. workers with open-ended, secure, decently paid jobs, and not the so-called “outsiders”, those with the insecure, precarious, low-paid jobs. Considering that trade unions are to a significant extent interest-representation organizations and that the lion’s share of their membership consists of “insiders”, this is not an unreasonable view.

However, trade unions do not represent only their members; to some extent they also aim to represent the entire labour force as well as society at large (Hyman, 2001). They pursue social justice in general and have their own vision of what work should and should not be. In addition, they cannot ignore their often declining membership among the “insiders” and the rising number of “outsiders” in the labour market, which constitutes a growing potential source of membership. In fact, the growing importance of precarious jobs in the labour market also puts the labour standards of the “core” workforce under pressure, especially considering that standard jobs are often replaced by non-standard jobs. In line with this, the country studies show that the position of unions towards precarious employment has considerably evolved. Two or three decades ago unions would have largely rejected the then relatively new and infrequent non-standard and precarious types of employment as unacceptable and argued that they should be abolished, without showing much interest in the workers occupying these jobs. Over time, with the growth of “outsider” jobs, this position has changed substantially; unions have begun serious efforts to represent “outsiders”, recruit them as members and improve their employment conditions. This has proven to be a difficult task, however, and there have been both successes and failures in the endeavour. If the union discourse has indeed shifted towards a



representation of “outsiders”, this has not always translated into sufficient resources being dedicated to these activities.

Finally, it should be noted, as Simms (2011) shows for the United Kingdom, that a number of professions have been characterized by a high incidence of precarious jobs for many decades, such as performance artists, nurses and others. Unions have a long tradition of organizing and representing these workers and often have well-established agreements with the respective employers, regulating the terms and conditions of employment and reducing the levels of precariousness.

## Country cases

### Denmark

Until recently, the largest Danish union confederation, LO, had no overall strategy regarding precarious employment and its member organizations did not give it a high priority. As discussed by Mailand and Larsen (2011), over the past couple of decades the approach towards precarious work has changed from one of reducing these types of employment to one of trying to improve them, but this does not apply equally to all forms of precarious employment. For example, all Danish unions are actively trying to cover temporary agency workers through their collective agreements, while only a few of them show interest in organizing and covering freelancers and the self-employed. The limited attention to precarious employment in Denmark seems to be the result of the relatively low incidence of such types of employment, even though they have been on the rise in recent years. Indeed, of late, the issue has become more salient for Danish unions and they have been developing new strategies and activities.

One important instance of success has been the attempt to ensure that temporary agency workers receive the same hourly wage as regular workers of the hiring companies. Together with the employers, who share this objective, the position of temporary agency workers has been substantially improved. Another successful example has been that of the “Job Patrol”, dedicated to guaranteeing the compliance of employers with the rules regarding young workers; the conditions of thousands of young workers were improved through this campaign. Other attempts have been less successful, including efforts to organize Polish migrant workers in the construction industry and to improve the social rights of part-time workers at universities. The preferred instrument to address precarious employment seems to be collective bargaining, which is in line with the fact that collective agreements are the main form of labour market regulation in Denmark and that Danish unions have a high membership and strong bargaining power. But instruments such as organizing and public campaigning have also been used in conjunction with collective bargaining.

## Germany

German trade unions see precarious employment as inconsistent with the traditional German model of a social market economy and as leading to increased inequality and injustice (Bispinck and Schulten, 2011). They consequently call for a fundamental U-turn in labour market regulation in order to stem the rapid increase of precarious employment and return to open-ended jobs with full access to social and labour rights as the standard form of employment. In recent years, campaigns against different forms and dimensions of precarious employment have moved progressively to the centre of trade union activities, following four strategic approaches.

The first is collective bargaining, the traditional instrument of German unions which is used extensively to bargain for the limitation of low pay and marginal part-time jobs, to enforce equal pay for equal work for temporary agency workers and to improve access of disadvantaged groups to training. However, the coverage of collective agreements in Germany is declining; with its present coverage of some 60 per cent, many fall outside its protection, and many of these are workers in precarious employment.

A second strategy has been for German unions to campaign for changes in the legislation in order to limit, prevent or even forbid certain forms of precarious employment, including the abolition of mini-jobs, stricter limits on fixed-term jobs and temporary agency work and full access for the dependent self-employed to social security. In this respect, the most salient campaign of recent years has been on the minimum wage, which aims to get a statutory minimum wage accepted in Germany.

A third strategy concerns the organizing of workers in precarious employment. This has become one of the main challenges for trade unions since it now concerns about one-third of the workforce; because trade union membership is declining; and because improvement of the conditions of precarious workers requires not only better regulations but also the organizational power to enforce these regulations. Organizing precarious workers has proven a daunting task and traditional recruitment channels largely fail. Therefore, the unions have now developed special campaigns for specific groups of precarious workers whom they provide with practical help and assistance on an individual basis.

Fourth, the unions have been elaborating their own vision and discourse on the humanization of work under the heading "Good Work". This serves as a counter to the dominant view that precarious employment is necessary to make the labour market more flexible and thus increase competitiveness and employment. This new vision has been widely proposed and debated, and has been translated into a broad range of more specific activities, including the drawing up of a good work index, minimum wage initiatives, health promotion, the strengthening of training and knowledge transfer, and the better balancing of work and private life.

Bispinck and Schulten (2011) show that all these activities have had some noteworthy successes and have resulted in a set of best practices. Still, to this day, they argue, the reach of the union initiatives has been rather limited overall. For the German unions, the increase of precariousness in Germany is mainly the result of its deliberate political promotion through the deregulation of workers' protection. In their view it is, therefore, first and foremost the responsibility of the State to reintroduce much stricter labour regulation.

## Italy

The labour market in Italy is characterized by high uncertainty and precariousness (Burrioni and Carrieri, 2011). Over the past 15 years, the labour market has been thoroughly flexibilized through a rapidly expanding use of a variety of flexible contracts which have not been matched by new and adequate forms of (social) security. One reason for this is that at the national level, where social security is concerned the debate has long concentrated on the issue of pensions, obscuring the need for a strengthening of other types of social benefits. Another reason is that austerity has been playing an increasingly important role in government policy.

The Italian unions have followed three basic strategies to address precarious work. The first has been the participation in national and local tripartite negotiations, to influence the political agenda and directly have an impact on labour market reforms and the setting up of new social security tools. These types of negotiations have had ups and downs over time, depending on the issues at hand and on the political colour of the Government. In the 1990s, unions participated in a number of important national and local social pacts that had major implications for precarious workers, but in the 2000s this became more complicated as stronger differences emerged between the Government and employers on the one hand and unions on the other. In parallel, differences between the three major union confederations became more apparent, leading to a situation in which the Italian Federation of Workers' Trade Unions (CISL) and the Italian Labour Union (UIL) signed several agreements with the Government and employers, which were rejected by the largest union confederation, the Italian General Confederation of Labour (CGIL). An important exception was the 2007 social pact on the regulation of pensions and the labour market, which was signed by all unions. It was not a coincidence that this took place under the centre-left Prodi government, whereas under the various centre-right governments it had proven much more complicated. The 2007 agreement included, among other things, new forms of security for young workers, improved unemployment benefits, the abolition of on-call jobs and stricter rules for the use of fixed-term contracts. If unions have had some success

with tripartite agreements, they have not been able to stop the further flexibilization of the labour market or to get new comprehensive forms of social security in place.

Second, starting in the late 1990s Italian unions established new organizations specifically aimed at representing workers in flexible and often precarious employment (such as temporary agency workers or the dependent self-employed). These unions try to encourage the shift from flexible to standard jobs as well as improving the rights and conditions of flexible workers. To this effect, they represent the interests of non-standard workers in the political arena through dialogue, campaigns and collective mobilization. They work inside the confederations to which they belong, in order to coordinate their actions with other sectoral federations and to promote a more general agenda that gives more space to the needs of atypical workers. They also engage in collective bargaining at company and national levels, and they offer services to non-standard workers, particularly with respect to the dissemination of information on the protections, rights and legal framework adapted to the requirements of these groups. These new unions have seen their membership grow over time, with the largest reaching over 50,000 members in 2010. They remain very small, however, compared to the regular unions and to their potential membership. They have also started to play an important role in the negotiation of a number of collective agreements, especially at company level. However, it has not been easy to play a large role in the industry-wide agreements, where the regular unions also cover the conditions of workers in flexible employment and inter-union coordination is complicated. Still, the growing membership and influence of these new unions point towards a strong potential for the future.

Third, unions in cooperation with employers have created a specific bilateral welfare system for temporary agency workers, financed by the social partners themselves. Under this system they have improved health and safety practices, introduced new guarantees for temporary agency workers, promoted forms of stabilization of careers and income, delivered additional benefits and welfare measures and set up training activities, among others. In this way, the workers in this growing segment of the labour market have seen their work become less precarious.

## Netherlands

Trade unions in the Netherlands have been dealing with precarious work actively since the 1990s, following the growing incidence of fixed-term contracts, part-time work, temporary agency work and low pay (Boonstra, Keune and Verhulp, 2011). Flexible types of employment were initially rejected as unacceptable. However, as a consequence of actual labour market developments,

the trade unions soon started to follow a strategy directed at the inclusion of this atypical workforce. The idea was for all work to be uplifted to the standards of the law and the collective labour agreements, improving the legal position as well as the working conditions of flexible workers. In the second half of the 1990s, unions concluded an agreement with employers in which they traded their interests following a model that has become known as “flexicurity”, codified in the Law on Flexibility and Security which came into force in 1999. Trade unions accepted more flexibility to accommodate employers, but demanded in exchange the guarantee of workers’ rights and the extension of social security rights to atypical jobs. Moreover, part of this flexibility was restricted in the sense that it could be achieved only through collective agreements.

A decade later, however, trade unions have begun to recognize that this strategy was to some extent a miscalculation. There are sectors and groups on the labour market where flexibility is now the standard, instead of the exception that trade unions foresaw when they concluded the agreement. In the same way, forms of bogus self-employment have developed that are very difficult to address, marginal part-time employment has expanded, and most recently new forms of flexible types of employment have also emerged. Although the coverage rate of collective agreements remains high at around 85 per cent, it is becoming increasingly difficult for unions to prevent collective agreements from being turned into instruments of flexibilization instead of reduction of flexibility.

As a result, the line of attack towards precarious work has recently been adapted and diversified. Dutch unions have joined the ILO in the campaign for “decent work”, and the Confederation of Dutch Trade Unions (FNV) has set the following objectives:

- Limit flexible contracts to “sick and peak”, i.e. to the replacement of permanent workers who are ill and to peaks in economic activity. If a person works for nine months a year it should be on a normal (permanent) contract.
- Equal pay for equal work. For example, temporary agency workers should be paid according to the normal collective agreement valid at the company where they work from the very first day.
- Work should lead to economic independence and not to low pay and working poverty.

The FNV has identified a number of sectors which it deems specifically problematic in terms of the Decent Work Agenda, including the postal sector, the cleaning sector, meat processing, supermarkets, domestic aid, the construction sector, education, the taxi sector and the temporary agency work sector. Trade unions have started media campaigns to inform the general public about the characteristics and consequences of precarious work. They

are involved in court cases to try and get a ban on “payrolling” practices.<sup>2</sup> They are working to improve the collective agreement for the temporary work agency sector and are debating whether they should stop making such agreements altogether and start treating temporary agency workers exclusively under the regular collective agreement of the sector or company in which they are employed. Also, considering that the bargaining position of the trade unions in quite a few sectors is simply not strong enough, and that collective agreements have been used on a number of occasions to further flexibilize the regulations concerning fixed-term contracts, they are pushing for changes in the legislation to make it tighter and thus reduce the risk of flexibilization through collective agreements. They have also put the employer practice of dismissing workers on open-ended contracts and replacing them by fixed-term contracts of (bogus) self-employed on the agenda of the key institutions of the Dutch “Poldermodel”, the tripartite Social Economical Council and the bipartite Foundation of Labour, with a view to placing it on the political agenda and to change regulations and practice.

## Slovakia

Unions in Slovakia are critical of the recent growth in precarious employment and most of them share a long-term vision of reducing such employment (Kahancová and Martišková, 2011). Their approach is largely a general and inclusive one, without many explicit actions to address specific groups of workers in precarious employment. This is to an important degree the result of limited membership as well as a lack of organizational power. Indeed, in the post-socialist context the unions have to spend a lot of their time and energy in simply maintaining their legitimacy as a socio-economic and political actor.

Kahancová and Martišková claim that the main strategy of unions towards precarious employment is their engagement in national-level social dialogue so as to influence the shaping of labour legislation. They are part of the national tripartite council which acts as an advisory body to the Government. They also interact with parliamentary factions, ministries and other political actors to play a part in the political process. The effectiveness of this involvement varies, depending both on the issue at stake and on the political support the unions have in parliament and government. In the 2007

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2. Under these practices, construction companies hire workers but have an external bureau taking responsibility for the administrative and legal aspects of the employment relationship. Payrolling is characterized by a split in the role of the employer into a “formal” and a “material” employer, much like the contract of temporary work agencies. The difference, however, is that in practice these contracts very closely resemble normal employment contracts because, other than the temporary agency contracts, the employer in who is undertaking the work takes place (the “material employer”) hires the worker himself and merely transfers responsibilities to an agency (the “formal employer”).

reform of the labour code, the unions saw several of their proposals accepted by the social-democratic Government. The reform strengthened the rights of workers in precarious employment in several ways. Conversely, in 2010, the new conservative Government launched new reforms that are to increase flexibility and precariousness despite union protests, demonstrations and political manoeuvres. Indeed, the union's capacity for independent political action is limited.

Slovak unions also ascribe a central role to collective bargaining in improving precarious employment. However, according to an estimate of the Confederation of Trade Unions of the Slovak Republic (KOZ SR), only some 20 per cent of employees are covered by collective agreements, leaving the vast majority out of the reach of such agreements. Also, Kahancová and Martišková did not find extensive evidence on collective bargaining specifically targeting and regulating precarious employment. Rather, this is largely left to the general bargaining procedures and within general stipulations of the collective agreements. This fits with the general inclusive strategy of unions and their long-term goal of reducing precarious employment. At the same time, it seems only marginally effective as an instrument to address present problems related to precariousness. In two sectors – metallurgy and agriculture – collective bargaining does indeed target precarious employment; however, the collective agreements in the metallurgy sector do so in a way that increases rather than decreases the differences between “insiders” and “outsiders”. In general, the authors conclude, collective bargaining is less effective in addressing precarious employment than union influence on political and legislative processes.

## Spain

Among the seven countries discussed here, Spain is probably the country with the highest incidence of precarious work, in particular because of its extraordinarily high share of fixed-term contracts, but also because of its high in-work poverty rate. It therefore comes as no surprise that reducing precariousness is a priority issue for Spanish trade unions (Ramos Martin, 2012). In recent years the Spanish unions have campaigned extensively against precarious work, making use of their relatively strong mobilization power. In particular, they have focused on the excessive flexibility of fixed-term contracts, the difficulty faced by temporary and part-time workers in accruing rights to social security and maternity leave, and the level of wages. Through their actions the unions address the Government first and foremost: often such campaigns, including general strikes, have been triggered in response to government proposals for labour market reforms regarding temporary contracts, the collective bargaining system, the regulation of temporary work agencies and wage setting. During the present crisis, both government reforms aimed at flexibilizing and decentralizing the labour market on the one

hand, and union protests on the other, have intensified. On these same issues, unions have also been active in social dialogue; in the past decade a number of bi- and tripartite agreements have been negotiated with the employers' organizations and the Government. A major issue in such agreements has been the attempt to reduce the use of temporary contracts. Whether through dialogue or protest, unions have had some successes. At the same time, particularly since the beginning of the crisis, the various governments have been focusing on austerity, flexibilization and decentralization of employment relations. The crisis has also reduced the influence of unions on government policy.

Considering that collective agreements cover almost the entire labour market in Spain, they are potentially powerful instruments for trade unions to address precarious work. However, in practice, as Ramos Martin (2012) shows, collective agreements can often become instruments of flexibilization by further extending, for example, the possibilities for employers to use fixed-term contracts. Indeed, at the sectoral/regional levels where most agreements are negotiated the bargaining position of unions is not strong, in part because of their low membership levels, among the lowest in the European Union. This is why Spanish unions typically address the Government and the legal framework when trying to improve the situation for precarious workers.

Ramos Martin provides successful examples of such actions. One concerns their campaigning for equal treatment of temporary compared to permanent civil servants, making sure that their years in temporary positions count equally in the accrual of internal promotion rights. After years of campaigning, this issue was taken to the Court of Justice of the European Union which ruled in favour of the temporary civil servants. Another action relates to domestic workers, who used to be subject to special regulations that allowed their employers to dismiss them at any time without any sort of compensation. In addition, they had in practice no access to social protection and did not manage to accumulate sufficient pension contributions. After years of trade union agitation and after the issue was incorporated in two tripartite agreements, the Government adopted in 2011 the necessary legislation to remedy the situation, thus improving the working conditions of over 700,000 mostly female workers.

## United Kingdom

In the United Kingdom, trade unions have been developing a series of initiatives aimed at workers in precarious employment – or “vulnerable workers” in their terminology. The main trade union confederation, the Trades Union Congress (TUC), in 2007 established a commission to examine the challenges of these workers, indicating increased interest in and awareness of their disadvantaged conditions, and representing an attempt to put the issue on the political agenda.



Simms (2011) presents a number of trade union actions dealing with precarious work. One major area concerns collective bargaining, which has proven a challenging enterprise since collective agreements cover only about a third of employees, and the sectors where high levels of precarious employment have emerged are often not unionized and no extension mechanisms of other agreements exist. The future coverage of such workers by collective agreements hence depends largely on their becoming organized.

At the same time, there are some sectors which traditionally have had large numbers of precarious workers and which have long-established bargaining practices. They include performing artists and nurses, and show that organizing and regulating precarious work is indeed possible and can be effective. There are also examples of new forms of precarious work that unions have tried to cover in their bargaining processes, such as workers involved in the contracting out of public services to private employers or in transfers of undertakings. Here some notable successes have been observed, although they remain complex situations in which bargaining addresses the two employers involved in such processes.

A good example of a union expanding its bargaining coverage to new groups of precarious workers beyond its core group of members is the transport unions, which have begun to organize and to extend collective bargaining to more groups of workers in precarious work in transport, for example cleaners on the London Underground.

The other major area in which many union initiatives have been developed is that of organizing. The UK report provides a detailed analysis of the organizing of cleaning workers, of Polish migrant workers in an industrial region in the North of England, of fixed-term and hourly paid workers in higher education and of performance artists. These examples show that successes can be achieved with targeted campaigns, motivated union organizers and sufficient resources. They also show, however, that organizing workers in precarious employment remains a difficult and time-consuming task which requires much human and financial investment and a lot of personal contact. Also, they demonstrate that it is difficult to keep organization campaigns going for a long time because of declining enthusiasm or dwindling financial support. Indeed, such campaigns require a strong commitment from the unions involved, both from their leadership and staff.

## Conclusions and policy implications

These seven country cases have provided a number of important insights and lessons concerning trade union activities aimed at the reduction of precarious employment. First, the importance of precarious employment as an object of union strategies has increased substantially with the rise of such employment in recent decades across Europe. Despite the fact that unions

are often accused of being representatives of “insiders” rather than “outsiders” on the labour market, they have developed a range of initiatives to attempt to curb the trend and to improve the conditions of precarious work.

They have done so out of various motives. One is their orientation as societal actors interested in raising workers’ status in society in general and advancing social justice. Indeed, trade unions in Europe often see themselves to an important extent as representatives of the entire workforce, not only of their members, in particular where the weaker groups on the labour market are concerned. Another motive is of course the fact that the growth of precarious employment constitutes a threat to the very people they represent. Reducing precarious employment and improving the quality of precarious jobs are seen as a way to uphold labour market standards in general.

The studies show that unions use a variety of strategies and instruments to address problems of precarious work, including collective bargaining, influencing national policies and legislation through social dialogue or campaigning, litigation in court, organizing precarious workers and providing them with services, mobilization and campaigns to influence public opinion. Most unions have engaged in one way or another in all of these types of activities, but the emphasis differs strongly between countries, depending on the specific national circumstances as well as the resources the unions can draw upon.

From a union perspective, each strategy has its strengths but also its weaknesses. For example, collective bargaining is the traditional regulatory instrument for unions and may provide them with direct leverage over the conditions of precarious work. At the same time, in many countries only a fraction of workers in precarious employment are covered by such agreements, while in several cases the bargaining power of unions has proven insufficient to substantially improve the position of these workers.

Legislation has the advantage of having a comprehensive coverage, at least in principle. At the same time, the law does not react rapidly to the emergence of new types of precarious employment, as employers continue to creatively explore the boundaries of legislation. Improvements in legislation also depend very much on the colour of the governments in power; while for legislation to be effective, union monitoring and litigation is sometimes indispensable.

Organizing workers in precarious jobs is a notoriously difficult task, but in a number of cases it has worked quite well, especially where ample resources have been dedicated to it, union leadership has provided support and public opinion has been mobilized. But even in these cases, maintaining success can be complicated when resources dry up and support dwindles; in addition, organizing often results in conflicts with employers and managers.

Despite the considerable interest in reducing precarious work, the steady rise of such types of employment clearly shows that these union initiatives have not been sufficient to curb the trend. This can to some extent

be explained by the strategic choices of unions themselves: even though they are giving increasing importance to activities aimed at reducing precarious work and in some cases even consider it a priority issue, the discourse remains to some degree symbolic as actual resources dedicated are often meagre, instruments are not used to the full extent to reduce precariousness, and organizing campaigns remain temporary. Without making precarious jobs an unquestionable priority, results will remain limited. At the same time, the resources available to unions are often limited compared to the fast growth of precarious employment, in particular in countries where union membership is low and institutional positions are weak. In most EU countries, it seems doubtful that unions can achieve a substantial decline in precarious employment on their own. Indeed, an effective and structural reduction of precarious work requires much more effort and resources from both trade unions and other actors such as employers and their organizations, parliaments and non-governmental organizations. Consequently, unions will no doubt have to strengthen their cooperation, alliances and dialogue with these other actors if they are to achieve the results they want.

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# Negotiating parity for precarious workers

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*By viewing labour as a commodity, we at once get rid of the moral basis on which the relation of employer and employed should stand, and make the market the sole regulator of that action.*<sup>1</sup>

JOHN KELLS INGRAM

Among the founding propositions of the International Labour Organization are that universal and lasting peace must be founded on social justice and that labour is not a commodity.<sup>2</sup> These propositions seek to advance social justice and protect workers from the vagaries of market forces through, for example, the regulation of hours of work, freedom of association and the right to collective bargaining. The intention of these regulations is to protect workers and enable them to secure a fair and reasonable wage – labour standards that would not exist had their determination been left to the usual and unequal, system of individual bargaining between workers and employers.

Technological advances, global economic integration and changes in business organization transformed what was once considered the “standard employment relationship” – developed and supported by legislation or collective agreement and implying full-time, indefinite and direct employment with one employer. The “contractualization” of the employment relationship had two central aspects: the placing of limits on the employers’ powers of command; and the use of the employment relationship as a means to provide protection against social and economic risk (Deakin, 2002). The labour norms associated with such an employment contract included social policies such as pensions, unemployment insurance and medical coverage, a degree of regularity in the employment relationship and protection from unacceptable working conditions. These provided the foundations for the social stability to underpin economic growth (Rodgers and Rodgers, 1989).

While atypical working arrangements have always existed alongside the standard employment relationship, the demand for greater flexibility in the organization of work resulted in an increase in these non-standard and contingent forms of work in many industrialized economies and the expansion of the informal economy and subcontracted labour in a number of developing economies (Fudge, 2006). Vertically integrated enterprises increasingly subcontracted intermediate inputs and outsourced non-core activities such as accounting and customer services. The fragmentation of the vertically integrated firm was accompanied by an increasingly diverse set of employment relationships: part-time, fixed-term, temporary agency and contract workers, many of which only partially fulfilled the requirements of *employment* under the

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1. “Work and the Workman”, address to the British Trades Union Congress meeting in 1880, cited in O’Higgins (1997).

2. Constitution of the International Labour Organization, Part XIII of the Treaty of Versailles (Arts 387–427) and the Declaration of Philadelphia.

relevant labour law (Casale, 2011). As the employment relationship evolved over time, many of the labour norms that had been associated with the standard employment contract were diluted (Deakin, 2002). At the same time, the increased use of economically dependent or pseudo self-employed workers also led to a blurring of the “binary divide” between employees and the self-employed.<sup>3</sup>

The decoupling of work from employment presents a significant challenge in terms of ensuring adequate protection for those in atypical, non-standard and contingent work arrangements. Presenting these work arrangements as part of the “new economy”, modern, flexible work solutions that meet the interests of enterprises and workers belies the involuntary condition of precarity which characterizes many of these forms of work. Indeed, in a survey of temporary agency workers in the European Union, workers replied that the main reason they engaged in this form of work was to find permanent employment (Eurofound, 2007).

We use the term precarious work in this paper to focus on the involuntary state of uncertainty that sets these workers apart from those who voluntarily engage in part-time work to supplement their primary activity or ensure a better work–life balance. Precarious work is described as having four dimensions: (1) uncertainty as to the continuing availability of the work/job; (2) limited control (individually and collectively) over working conditions, the labour process and pace of work; (3) limited access to legal and regulatory protection and to social protections; and (4) low-wage jobs and a high degree of economic vulnerability (Rodgers and Rodgers, 1989).

While a defining feature of precarious work arrangements is the lack of job and income security, a number of studies show that they are also associated with less favourable working conditions: an intensification of work, increased working hours, unpaid overtime, higher risk in respect of health and safety and a gap between the wages of regular employees and the incomes of these “atypical” workers (Bispink and Schulten, 2011; Eurofound, 2010; Haidinger, 2012; IndustriALL, 2012). Women and minority workers tend to make up the greater proportion of precarious workers in both developed and developing countries (Fudge, 2006; Fudge and Owens, 2006).

Other papers in this issue examine the different strategies that unions have adopted towards precarious employment. This paper examines the role that collective bargaining plays in reducing segmentation, regularizing employment, and negotiating parity for precarious workers. The first section examines the different collective bargaining arrangements that cover precarious workers. The second section examines the content of collective agreements and the degree to which they improve job quality and job security for precarious workers. The third section examines complementary regulatory measures that underwrite collective bargaining as a means to limit segmentation and negotiate parity for precarious workers.

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3. Expression used by Freedland (1995), quoted in Deakin (2002).

## The role of collective bargaining in regulating precarious work

Industrial relations systems remain diverse in different parts of the world. While the coverage of collective bargaining is somewhat limited in developing countries, it remains an important means of regulating the terms and conditions of employment in a many of countries. As a form of regulation, collective bargaining seeks to balance the unequal power relationship that exists between an employer and an employee. Coverage by collective agreements is generally associated with better wages, a more equitable wage distribution, lower turnover, a higher degree of protection against risk to incomes and employment and better compliance with labour standards (Hayter, 2011). Given the current transformations in the world of work outlined above, what role does collective bargaining play in improving the terms and conditions of those in precarious work arrangements?

In examining the different collective bargaining arrangements that cover precarious workers, it is interesting to note that while specific unions or internal union structures do exist to represent and bargain on behalf of self-employed or temporary agency workers, precarious workers are typically represented by the relevant union for the sector, region, occupation or workplace where they work.

In respect of multi-employer bargaining, employers' interests may be represented by a confederation, industry-based employers' association(s) or dedicated association of temporary work agencies (for example, the Association of Nurse Temp Agencies in Denmark). We see much greater variation in who occupies the seat of employer at the bargaining table when it comes to enterprise-level bargaining. This may be an indication of the way in which different countries allocate responsibility for collective bargaining to distinct actors.

We examine three types of bargaining arrangements that provide varying degrees of coverage to precarious workers. The first type is inter-sectoral bargaining agreements. These may be supplemented by collective agreements at other levels. One example is the Inter-professional Agreement in Belgium (2011–12) which is declared universally applicable to all private sector workers in employment relationships (see table 1).

The second type of bargaining arrangement involves multi-employer bargaining in respect of a particular sector. This may take place nationally or at a regional and/or municipal level. This type of bargaining arrangement typically ensures both broader coverage and parity for those in precarious work. Provisions in the collective agreement may be extended to similar undertakings in a sector or geographic area. If such extension covers "all workers" or all persons "engaged in an industry", as opposed to "employees" it can function as a powerful tool to expand the coverage of workers covered by the agreement to include those in precarious work arrangements (Ebisui, 2012).



Multi-employer agreements may also be supplemented by collective agreements at other levels.

One such example is the Metal Engineering and Industries Bargaining Council in South Africa (MEIBC). The collective agreement that is concluded by the bargaining council covers all employees in the industry, including those working on assignment from temporary employment services (see table 2). Another example involving economically dependent self-employed workers concerns freelance journalists and photographers in Germany, represented by DJV, who concluded a collective agreement with the Federation of German Newspaper Publishers and several regional publisher associations. The agreement defines collectively agreed rates for articles and photographs (Eurofound, 2009).

The third type of arrangement concerns a collective agreement signed in respect of a particular enterprise. Collective agreements may be signed directly between the enterprise and trade union in respect of regular and non-regular/precarious employees, between the temporary work agency and union

**Table 1. Types of bargaining arrangements**

Bargaining arrangement	Social partners	Collective agreement	Coverage
Multi-employer inter-sectoral	Employers' federations, union confederations and federations	<b>Belgium:</b> Inter-professional Agreement, FEB/VBO, UNIZO, UCM & BB, FGTB/ABVV, CSC/ACV, CGSLK/ACLVB (2011–12)	All private sector employees (including part-time, fixed-term, temporary agency workers)
	Associations of temporary employment agencies, union federations	<b>Spain:</b> National Collective Agreement on temporary agency workers, AGETT, AETT, FEDETT, AGETT & CCOO, UGT (2008)	Temporary agency workers
Multi-employer Sectoral	Sectoral employers' association and one or more trade unions	<b>Germany:</b> Stahl & IG Metall (2010, 2011) for North Rhine-Westphalia, Lower Saxony and Bremen: general pay increase, regulates use of TAW and equal pay for work of equal value.	All fixed-term, regular employees and temporary agency workers in the sector in three regions
	Temporary work employers' organizations and trade union	<b>Germany:</b> BAP and iGZ & IG Metall (2012): sectoral bonuses for temporary workers in the metal industry depending on the length of their assignment.	Temporary agency workers in the metal industry
Enterprise	Enterprise and trade union(s)	<b>Japan:</b> Post Holdings & enterprise union (2007, 2010): 2,000 yen monthly wage increase for fixed-term employees, hire 2,000 fixed-term as regular. <b>Turkey:</b> UPS and Tümtis (Türkiye Motorlu Tasit Isçileri supported by ITF (2011–13): regulates use of subcontracting; 260 subcontracted workers become regular employees	All fixed-term salaried employees (including non-unionized) at enterprise All members
	TWA and trade union	<b>Germany:</b> IG Metall and Adecco for Audi (2007): Equal pay for work of equal value (departing from industry agreement for Bavaria that derogates from equal treatment).	Temporary agency workers at enterprise

**Table 2. Employment, pay and equal treatment**

Issue	Outcome	Agreement
Employment	Limit segmentation	<p><b>South Africa:</b> SAA &amp; SATAWU/AIWU: use of labour brokers to be phased out over 18 months from 1 April 2009. During phase out, ratio of broker employees: permanent employees to be 20:80 for cabin crew, 40:60 for cargo and 30:70 for other division.</p> <p><b>United States:</b> IKEA Swedwood &amp; IAMAW supported by BWI (2012): Limits the number of temporary workers that can be hired and requires them to undertake safety training before entering plant.</p>
	Transition to regular employment	<p><b>India:</b> GlaxoSmithKline &amp; Milk Food Factory Workers' Union supported by IUF (2010): regularization of 443 temporary agency workers in a phased manner.</p> <p><b>France:</b> Caterpillar &amp; FO, CFTC and CGT – Grenoble and Echirolle plants (2012): transformation of 80 precarious labour contracts to convert in 2012 into permanent contracts.</p> <p><b>Germany:</b> Deutsche Post &amp; Ver.di (2011) – 1,500 part-time employees to receive regular full-time contracts.</p>
Wages and working time	Equal pay	<p><b>Germany:</b> Adecco for Audi &amp; IG Metall (2007) equal pay for equal work. In July 2012, Audi announces intention to cut hundreds of temporary jobs.</p> <p><b>South Africa:</b> Metal Engineering and Industries Bargaining Council (2011–14): all workers procured through Temporary Employment Service to enjoy existing terms and conditions of employment outlined in the Main Agreement. Duration limited to four months, after which employment regularized. Portable entitlements to industry fund.</p>
	Narrowing pay gap	<p><b>Netherlands:</b> ABU &amp;, FNV, CNV, De Unie and LBV (2012–17) initially derogated from the principle of equal pay. Renewed agreement signed in November 2012 introduces users (equal) pay “hirer’s remuneration” from the first day with the hiring company. Implementation date as of first week of 2015.</p> <p><b>Germany:</b> IG Metall &amp; BAP and iGZ (2012): sector-related supplement to close the pay gap between regular and temporary workers, works agreement to agree on engagement of temporary agency workers.</p>
Benefits	Equal access to benefits, pension and skills development	<p><b>South Africa:</b> AMEO &amp; NUMSA (2009/2010): short-term workers entitled to participate in industry’s multi-skilling programme and social security and medical aid extended to them.</p> <p><b>Japan:</b> Aeon &amp; enterprise union (2004 and ongoing): equal training opportunities previously limited to regular workers.</p>

in respect of temporary agency workers on assignment at a particular enterprise, or between a temporary work agency and union in respect of temporary agency workers engaged by that agency. Collective agreements at this level may only partially apply to those in precarious work arrangements.

For example, in Japan, a survey of collective agreements conducted in 2011 found that of the 2,597 company-level unions that responded, 91.4 per cent reported to have signed a collective agreement. Of those that had signed collective agreements, 41.9 per cent applied fully or in part to part-time workers and 45 per cent applied fully or in part to fixed-term workers.<sup>4</sup>

While bargaining arrangements regulating conditions of work for precarious workers are of course influenced by the legal and institutional context,

4. The survey targeted 4,086 such trade unions. Ministry of Health, Labour and Welfare: *2011 Collective Agreement Survey* (Tokyo, MHLW, 2012), available at: <http://www.mhlw.go.jp/toukei/list/18-23.html> (in Japanese).

we note that the coverage of these differs depending on the level at which the collective agreement is reached and the parties to the collective agreement: multi-employer bargaining arrangements appear to offer more comprehensive coverage.

### Negotiating parity for precarious workers

Trade unions are often accused of representing the interests of privileged “insiders”, to the disadvantage of unorganized workers. As we have seen, collective bargaining can be used to extend protection to precarious workers that are not members of a trade union. However, in considering the role that collective bargaining plays, the question is also one of the degree to which these agreements provide an equal or a subordinate level of protection to precarious workers. Do they pit “insiders” against “outsiders” or do they close the gap between precarious workers and regular employees?

As the examples below demonstrate, when precarious workers are represented by unions and covered by collective agreements, they enjoy significant improvements in their terms and conditions of employment. Collective bargaining is used at different levels to negotiate parity for precarious workers:

- (a) addressing employment insecurity by either limiting recourse to non-standard contracts to specific contingencies or facilitating the transition to regular employment;
- (b) providing equal pay for work of equal value or narrowing the gap between workers with different employment statuses;
- (c) providing for equal treatment in respect of benefits such as training and social security.

### Addressing employment insecurity

One way in which trade unions are using collective agreements to improve job quality is to prevent or limit labour/contractual segmentation, agreeing to the proportion of temporary agency or fixed-term workers that may be used for specific contingencies (see table 2).

Some collective agreements also provide procedural requirements when engaging or hiring workers for a limited duration. For example, an employer may be required to consult with the works council before engaging temporary agency workers, provide reasons for usage, restrict usage to coping with peaks in demand and include waiting periods. The objectives of these measures are: to discourage the use of non-standard contractual arrangements and encourage regular employment; prevent the replacement of regular employees with temporary or short-term employees; and ensure that these

work arrangements are only used in the event of an exceptional increase in the amount of work.

For example, in Australia, in a collective agreement signed in 2009 between AMWU's collective and Nestle Confectionery Australia, the parties agreed that the need for temporary, part-time, casual and contract employment would be monitored and reviewed by union delegates at each site on a quarterly basis. The company would provide and discuss information including but not limited to (i) full particulars of the nature and extent of the work to be performed; and (ii) the reasons why casual employees are required as opposed to part-time, temporary or full-time employees.<sup>5</sup>

A few collective agreements prohibit the use of temporary agency workers altogether. For example, in South Africa, the Tyre Employers' Federation and Automobile Employers' Federation and NUMSA signed a collective agreement in 2010 to phase out and prohibit the use of labour brokers in the industry altogether (IndustriALL, 2012).

The regulation through collective agreements of the degree to which agency and other forms of contingent labour can be engaged is a contentious issue. Some view these as unjustified restrictions on the provision of services and freedom of contract (Eurociett, 2011). There are also concerns that measures aimed at controlling and limiting the use of fixed-term or temporary agency work do not always benefit those working under these arrangements and may result in situations in which these workers end up taking more insecure work, or are pushed into unemployment or the informal economy (Ebisui, 2012).<sup>6</sup> Others view such limits as critical both in preventing a surge in precarious work and ensuring that collective bargaining can be effective as a means of regulation (IndustriALL, 2012, p. 17). The important issue is to achieve balance and "regulated flexibility" through a process of negotiating a collective agreement that *both* protects workers' well-being and enables recourse to temporary work arrangements as a contingency measure.

Trade unions have also used collective bargaining to address employment insecurity by facilitating the transition of fixed-term and temporary agency workers to regular employment. There are a number of examples in different countries where workers that were engaged in contingent forms of employment, often over an extended period of time, had their employment

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5. Fair Work Australia, 2012, Decision 185, *Approval of enterprise agreement: Nestle Australia Limited* (National Framework) Agreement 2009–2012 (food, beverages and tobacco industry).

6. The ILO Private Employment Agencies Convention, 1997 (No. 181), while seeking to allow the operation of private employment agencies and protect workers using their services, also addresses questions of the prohibition and/or exclusion (Articles 4 and 5). The Termination of Employment Convention, 1982 (No. 158), addresses both the possibility of excluding workers engaged on a casual basis for a short period and refers to the need for adequate safeguards against recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from this Convention (Article 2, paras 2(c) and 3).

contracts regularized by means of a collective agreement. For example, the collective agreement between GlaxoSmithKline and Milk Food Factory Workers' Union signed a collective agreement in May 2010 that regularized the contracts of 443 casual/temporary workers in a phased manner: 120 workers by 1 June 2010; 153 workers by 1 January 2011; and 170 workers by 1 June 2011 (Sundar, 2011).

In a number of instances, trade unions have negotiated a time limit for the use of temporary workers, after which period their employment is regularized. In South Africa, the Road Freight Bargaining Council agreement, concluded in 2006 and extended to non-parties in 2007, provided that a worker supplied "to one or more clients on a continuous basis for a period in excess of two months shall be deemed to be an ordinary employee" (Theron, 2011).

### Equal pay and equal treatment

Collective bargaining can be an effective tool in negotiating parity for precarious workers. Some collective agreements narrow the gap between fixed-term, temporary and regular workers. Others explicitly provide for equal pay, or more generally for equal treatment between "standard" and "non-standard" workers. The extension of the terms of a collective agreement in a particular sector or industry to all workers can also have a significant levelling effect.

The degree to which collective bargaining reduces differences between those in contingent forms of employment and those in regular employment is of course influenced by legal developments and the institutional context. For example, within the European Union, numerous Directives addressing non-standard forms of employment specifically articulate principles of non-discrimination and equal treatment in relation to those in regular employment.<sup>7</sup> However, the scope of these principles varies.

In the most recent Directive on temporary agency work, the principle of equal treatment applies only in relation to "basic employment and working conditions", defined in Article 3(1)(f) only to cover rules on working time, holidays and pay. By contrast, the principle of "non-discrimination" which appears in Clause 4(1) of both Directive 1997/81 and Directive 1999/70 is stated to apply to "employment conditions", which are not defined in either instrument but which would appear to be a broader category than the basic employment and working conditions covered in the temporary agency work Directive. The latter Directive allows derogation from the principle of equal treatment by collective agreements so long as respect is paid to "the overall protection of temporary agency workers" (Article 5(3)), or by national agreements concluded by the social partners which ensure an "adequate level of

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7. Council Directive 1997/81 EC on part-time work, Council Directive 1999/70 EC on fixed-term contracts and Council Directive 2008/104 EC on temporary agency work.

protection” for those workers (Article 5(4)). The Directives on part-time and fixed-term work both allow different treatment where this is “justified on objective grounds” (Clause 4(1) of both Directives).

In cases where such derogations have been agreed, trade unions have still been able to negotiate for equal pay for precarious workers. For example in Germany, in 2010 IG Metall reached a collective agreement for the steel industry ensuring that temporary agency workers are paid the same as regular employees in the industry. In the metal sector, in 2012, IG Metall signed a new collective agreement with two of the most significant temporary employers’ organizations (BAP and iGZ) for temporary workers in the metal and electrical engineering industries to provide a sector-related supplement to their wages depending on the length of temporary workers’ deployment in the company. These go some way towards closing the gap between regular and temporary agency workers (see table 1).

In addition to equal pay, some collective agreements also make provision for equal treatment in respect of access to training, health benefits and social security. The issue of training is particularly important since it affects future employability and in seniority-based pay systems can also affect pay. One of the risks precarious workers often face is that not having received the same training in health and safety, they are exposed to a higher incidence of workplace accidents. An innovative agreement between IKEA Swedwood and the International Association of Machinists and Aerospace Workers (IAMAW) in the United States, which came into effect in January 2012, both limits the degree of temporary employment and requires all temporary workers to undergo safety training before entering the workplace.

While certainly not the norm, these examples show that it is possible, within a particular legal and institutional context to use collective bargaining to provide protection and negotiate parity for precarious workers. Yet this is no easy task. The avoidance of collectively determined labour standards is arguably one of the reasons that some enterprises engage precarious workers.<sup>8</sup> Trade unions face a number of challenges when attempting to organize and bargain on behalf of precarious workers.

First, the limited attachment of some categories of precarious workers to a workplace or a single employer can make it difficult for unions to organize these workers and build solidarity. Precarious workers may fear retribution given the particular insecure situation they face. In addition, those in regular employment may regard precarious workers as a threat. Findings of country studies suggest that these difficulties are compounded where collective bargaining takes place predominantly at the enterprise level (Ebisui, 2012).

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8. The ILO General Survey notes that some contractual modalities deprive workers’ access to freedom of association and collective bargaining rights (ILO, 2012a, para. 935). The Committee of Experts recognized that some contractual arrangements are used to circumvent the right to organize. See ILO (2012b, para. 77). See also IndustriALL (2012).

Second, explicit restrictions in the law on who may join a union (e.g. domestic workers), who may join the union at the place where they work (e.g. temporary agency workers) and legal ambiguity about the definition of an “employee” in the law can prevent certain categories of workers (e.g. economically dependent self-employed) from effective representation and bargaining (Rubiano, 2011). Ambiguity and uncertainty about the employment relationship may render the workers’ employment status unclear, thereby leaving them out of the coverage of labour law which includes protection of their organizational and bargaining rights (Ebisui, 2012). Such restrictions and ambiguities may well be at odds with the international obligations of States under ILO Conventions or the ILO Constitution (Rubiano, 2011) and may also conflict with national constitutional or human rights guarantees.<sup>9</sup>

Third, trade unions may also have difficulty identifying the “employer” for the purposes of collective bargaining in triangular employment relationships. Ambiguities in the legal framework compound this difficulty. The fragmentation of enterprises, subcontracting and engagement of temporary workers now makes it possible for employers to escape legal obligations and liabilities since it is more often than not the entity with whom the worker has a contract that is responsible for employment-related obligations, including those that are the subject of a collective agreement (Fudge, 2006; Rubiano, 2011).

Fourth, the fragmentation of bargaining units may prevent trade unions from reaching regulatory thresholds required to either form a trade union or gain recognition as the bargaining agent. Furthermore, the greater the proportion of temporary workers, the smaller and smaller the bargaining unit becomes and the more difficult it is to bargain collectively.

### Plugging loopholes, filling potholes

ILO Conventions are clear: with only a few exceptions, all workers should be afforded fundamental rights to organize and collective bargaining, irrespective of their work arrangements or status of employment.<sup>10</sup> The exceptions which do exist in the Conventions tend to be expressed narrowly and relate to members of the armed forces, the police force, or public servants engaged in the administration of the State. Given the challenges outlined above,

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9. For example, restrictions in the laws of States parties to the European Convention on Human Rights may not be compatible in light of the European Court of Human Rights’ determination that a right to collective bargaining is an “essential element” of the Article 11 freedom of association, a right stated to apply to “everyone” (*Demir & Baykara v Turkey* (2008) ECHR 1345).

10. See Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Labour Relations (Public Service) Convention, 1978 (No. 151); and Collective Bargaining Convention, 1981 (No. 154).

how can the role of collective bargaining be strengthened so as to be a more effective tool in protecting precarious workers?

### Right to bargain collectively

Clearly, the first step in any country context is to clarify the scope of the employment relationship and the reciprocal rights and obligations in line with the Employment Relationship Recommendation, 2006 (No. 198). This is necessary to address obstacles to the effective exercise of collective bargaining that arise as a result of disguised/ambiguous employment relationships or a triangular employment setting in which responsibility for collective bargaining is unclear.

A number of countries have used social dialogue and collective bargaining as a means of addressing questions related to the scope of the employment relationship thus coverage by applicable legislation affording protection of organizational and collective bargaining rights.<sup>11</sup> For example, in South Africa, NEDLAC, the tripartite economic and social council, prepared a Code of Good Practice which was gazetted in 2006 that sets guidelines for determining who is an employee (Department of Labour, 2006). In some countries, collective agreements are used to define the scope of the “employment relationship”/“employment contract” (e.g. the Netherlands, Sweden, Romania and Denmark) (ILO, forthcoming).

Countries have approached the question of *who* bears responsibility for collective bargaining in triangular employment settings in different ways. Some countries have adopted legislation that attributes the responsibilities derived from employment obligations to the temporary work agency or the entity for which the work is performed (e.g. Paraguay and Dominican Republic) or made the “user” employer jointly and severally responsible (e.g. Mexico and Canada) (Rubiano, 2011).

Economically dependent self-employed workers have found it particularly difficult to access collective bargaining rights. A number of measures have been taken in different countries to afford these workers better statutory protection. The United Kingdom introduced a broader definition of “workers” rather than only “employees” in numerous labour Acts to extend employment rights (including collective bargaining) to those who do not meet the definition of “employee”.<sup>12</sup> In Germany, the Collective Agreement Act enables

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11. The Employment Relationship Recommendation, 2006 (No. 198), encourages member States, as part of national policy, to promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level (Article 18).

12. See, for example, the Employment Rights Act 1996, Section 230 (3); the National Minimum Wages Act 1998, Section 54(3); and S.296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.



self-employed workers to conclude collective agreements when more than 50 per cent of their income (30 per cent in the media sector) is paid by one “client”. However, those workers not covered by this rule may find themselves the subject of proceedings under competition law when attempting to conclude collective agreements on behalf of the self-employed (Rubiano, 2011).

In other instances, initiatives in respect of particular categories of workers have helped clarify their status. For example in Japan, there have been increasing numbers of cases in which community unions bargain on behalf of independent contractors. Employers have been reluctant to bargaining on the grounds that these are not “workers” in terms of the Trade Union Act. There was inconsistency between the orders of Labour Relations Commissions and lower court judgements due to ambiguity about determining criteria for “workers” in this Act. To remedy this, the Ministry of Health, Labour and Welfare set up a Study Group and released a report proposing criteria for determining the “worker relationship” which resulted in a release of administrative notice concerning the use of the report as a reference (Ebisui, 2012).

### Effectiveness of collective bargaining

While clarity in respect of the scope of the employment relationship and clear allocation of responsibility for collective bargaining is important, the question of *who* unions have the right to negotiate with also affects outcomes. The goal of “equal pay for equal work” requires a bargaining unit that is sufficiently constituted to balance power between employer and those employed under different contracts, sometimes in settings in which there are multiple employers.

As we have seen from the number of examples presented above, trade unions are more likely to advance parity if they negotiate within a multi-employer bargaining arrangement. The extension of collective bargaining agreements to non-negotiating parties in an industry is also an effective method for closing the pay gap and can support the portability of entitlements. Indeed one of the reasons that extension of collective agreements was legislated in many countries was to protect workers from the adverse effects of wage competition (see, for example, Hamburger, 1939).

Furthermore, the industry/sector itself may have an interest in preventing unscrupulous contractors from operating and undermining regulation that has been voluntarily and collectively agreed by industry actors. For example, in South Africa, the Building Industry Bargaining Council in the Western Cape region used a number of strategies to ensure that labour-only subcontractors comply with the terms of their collective agreements. The council obtained an agreement with institutions that finance large-scale housing to only contract builders registered with the council. The council’s agreement prohibits subcontracting to unregistered enterprises. The result has been a steady increase in the number of enterprises and

subcontractors registered with council and complying with the collective agreement (Goldman, 2003; Godfrey, Theron and Visser, 2007).

Is collective bargaining an effective tool in situations where the agency or contractor supplying labour has been allocated bargaining responsibility? In practice, we observe the possibility to derogate from equal treatment in European countries by way of a collective agreement. On the other hand, in the same regulatory context, we have also seen unions with significant organizational strength negotiate with temporary work agencies in respect of a “user” company and secure “equal pay for equal work” (e.g. IG Metall in Germany). We think more research is needed on the question *what* the most effective bargaining arrangement is (i.e. delivers preferred outcomes) in a setting of multiple employers.

For the purposes of effective regulation through collective bargaining, the issue of *who* constitutes the bargaining unit is both a question of representation and also one of monitoring and compliance with the terms of the collective agreement. Collective bargaining has proven to be an effective means of self-regulation in that having agreed to the terms, the parties to the agreement are more likely to comply with them and monitor their own workplaces (Hayter, 2011).

In the Netherlands, a collective labour agreement for temporary agency workers (2009–14) was signed between the association of employment agencies (ABU) and trade unions (FNV, CNV, De Unie and LBV). In addition to the role played by labour inspection, the social partners have established their own monitoring system for assessing compliance with the terms of the collective agreement. Monitoring is conducted by the SNCU (Stichting Naleving CAO voor Uitzendkrachten) which supervises compliance with the collective agreement. In this way, they hope to address the prevalence of “rogue agencies”. Employment agencies which are subject to audits, receive a certification of compliance with the collective agreement. Nevertheless, a recent study found a number of violations and non-compliance with the terms of the collective agreement between the temporary work agency and trade union in the Netherlands.<sup>13</sup> The parties renewed the agreement in July 2012 and aim to step up monitoring and achieve equal pay by 2015.

### Trade union strategies: Supporting collective bargaining

As other articles in this volume demonstrate, trade unions also have a critical role to play through other strategies: organizing precarious workers, providing educational activities and lobbying governments for legislative changes and extending basic social protection.

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13. See <http://www.staffingindustry.com/eng/Research-Publications/Daily-News/Netherlands-Over-500-recruiters-suspected-of-violations>.

In Japan, organizing non-regular workers has become a top priority for trade unions and confederations, since fewer and fewer enterprise unions are able to retain majority representation unless they organize such workers. Among non-regular workers, the proportion of part-time workers is the highest in the total workforce (this includes “part-timers” who work full-time under fixed-term contract but are called “part-timers”, so-called full-time equivalent “quasi” part-time workers). Joint efforts at national, sectoral and enterprise levels to organize part-time workers have brought about a significant increase in membership.

In 2006, the Japanese Trade Union Confederation (RENGO) inaugurated its Part-Timer United Front, placing a focus on industrial-based trade unions with large numbers of part-timers and other non-regular workers. At the time, 15 industrial unions joined forces and worked through the annual *shunto* to raise hourly wages. RENGO also opened the Non-regular-Worker Centre at its headquarters in 2008, initiating a full-fledged programme aimed at improving the treatment of non-regular workers (Hamaguchi and Ogino, 2011). Community-based unions have also been active in organizing precarious workers, including independent contractors, migrants and agency workers and negotiating directly with enterprises to resolve disputes on behalf of their members (Oh, 2010).

Other initiatives and frameworks can also support the efforts of unions to organize and bargain. In Indonesia, the Freedom of Association (FOA) Protocol was signed in 2011 by five trade unions (Federation Garteks-KSBSI, NES, KASBI, SP TSK, and GSBI) and five companies brand holders and suppliers of sports apparel (including Adidas, Nike, Puma and Pentland). The protocol requires holders of the company brand and suppliers to respect freedom of association and ensure its implementation in the supply chain. It applies to all companies irrespective of whether they have an established trade union and collective agreement. While it does not set wages and working conditions, it requires companies to conduct collective bargaining and conclude a collective agreement within six months of the formation of an enterprise union (Anwar and Supriyanto, 2012).

What is notable in the examples provided is the significant role that the Global Union Federations have played in supporting the efforts of trade unions in different countries to secure collective agreements that cover precarious workers (e.g. IUF in India, ITC in Turkey and BWI in the United States; see tables 1 and 2). For example, the International Federation of Chemical, Energy, Mine and General Workers’ Union (ICEM) has been actively engaging in its Contract and Agency Work Campaign to share experiences between trade unions throughout the world and support one another in preventing unacceptable practices. In the midst of the economic crisis in Thailand, thousands of contract and agency workers had their contracts terminated without compensation, after having worked for between eight and ten years. The workers of the Royal Porcelain Company, most of whom were

## Temporary Work Charter for the Volkswagen Group

- For Volkswagen, the moderate use of temporary work is a necessary flexibility tool.
- A share of five per cent temporary employees is a guideline.
- The principle of equal pay will be implemented in a staged plan. With growing experience and qualifications, the remuneration of temporary employees within the Group will develop in line with that of permanent staff.
- Temporary work within the Volkswagen Group will be linked to a training offering for temporary employees.
- In addition to vocational training and trainee programmes as well as direct external recruitment, temporary work will be a third route to membership of the permanent staff of Volkswagen.
- Volkswagen uses temporary work to compensate for fluctuations in economic conditions and to master special challenges calling for a temporary increase in personnel.

Available at: [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/news/2012/11/charta.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/news/2012/11/charta.html) and <http://www.igmetall.de/cps/rde/xchg/SID-BE4C4204-B316B531/internet/style.xsl/charta-der-zeitarbeit-im-volkswagen-konzern-10997.htm>

employed through temporary agencies demanded basic rights and entitlements, as laid out in the Thai legislation. The ICEM's Thai affiliates actively supported the workers, providing negotiation support. As a result, a collective agreement covering contract and agency workers in 86 workplaces in the Saraburi province was signed in 2009.<sup>14</sup>

In November 2012, the Volkswagen Group Board of Management, the European Group Works Council, the Global Group Works Council of Volkswagen, and the IndustriAll Global Union signed a ground-breaking Temporary Work Charter for the Volkswagen Group that sets out principles for use of temporary work in the entire Volkswagen Group worldwide.

The policy positions of unions differ regarding the use of temporary work agencies, particularly on issues such as outright banning or restricting the use of such agencies. Nevertheless, the Council of Global Unions has issued "Global Principles on Temporary Work Agencies" which articulate common principles, including the following (p. 2):

Workers dispatched by agencies must be guaranteed the right to join a union with a collective bargaining relationship with the user-enterprise. Such workers should be part of a bargaining unit comprising direct employees of the user enterprise and be covered by all collective bargaining agreements applying to the user enterprise.<sup>15</sup>

14. See ICEM website: <http://cal.icem.org/images/documents/countryreports/cal%20country%20report%20thailand.pdf>.

15. Available at: <http://www.global-unions.org/statement-global-union-principles.html?lang=en>.

In conclusion, as the examples cited in this article demonstrate, collective bargaining can play a meaningful role in addressing precarious work. Collective agreements are a powerful means of facilitating the transition to regular employment, ensuring equal pay for work of equal value and securing benefits. Unfortunately, these examples represent islands of good practice in a sea of insecurity and growing inequality.

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# Strengthening the collective bargaining rights of precarious workers under US labour and employment law

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While few protections exist for private sector workers in the United States, one group of workers, those falling into the category of *precarious* workers, are especially vulnerable. Over 40 million individuals in the United States, constituting roughly one-third of the workforce, could be considered to be precarious workers.<sup>1</sup> Precarious workers are distinct from standard, full-time or “regular” workers because they are often part-time, temporary, seasonal, leased, on-call, or independent contractors – and often not covered by many existing worker protection laws.<sup>2</sup>

As precarious workers, these individuals are often paid significantly lower than standard, full-time workers and may have little or no benefits. Moreover, precarious workers have no job security. While job security is limited for most private sector workers in the United States, workers that have formed labour unions and obtained collective bargaining agreements with their employers, may have some job security in the form of *just cause* dismissal requirements, under their collective bargaining agreement. Union workers also have the right to bargain over better wages and benefits and, as a result, generally enjoy higher wage rates and better benefits than other workers – particularly precarious workers – as a result of collective bargaining. While basic rights to form a union and engage in collective bargaining are weak in the United States, these rights are often not available to precarious workers.

The sheer size of the precarious workforce and their lack of rights under existing worker protection laws have profound implications for both union and non-union standard, full-time workers in the United States. Both groups of workers face considerable pressure on their wages and benefits when competing with the growing number of lower-paid precarious workers. These pressures also place union workers in a disadvantaged position by giving employers additional leverage in the collective bargaining process.

This paper focuses on proposals that would strengthen the rights of precarious workers in the United States by incorporating some aspects of international labour standards that, among other things, would require coverage of many precarious workers by US employment and labour laws. In order to understand the basis for these proposals, the first section of the paper describes the nature of precarious workers in the United States. The second section describes the limited coverage of precarious workers by US employment and labour law to precarious workers. It specifically focuses on the reasons that, the National Labor Relations Act, which governs workers’ rights to form a union and engage in collective bargaining, is often not available to precarious workers. The last section of this paper describes the advantages

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1. “Employment Arrangements”, GAO-06-656, 7/2006, p. 3 (hereinafter referred to as “Employment Arrangements”).

2. See “Contingent Workers”, GAO/HEHS-00-76, 6/2000, p. 11 (hereinafter referred to as “Contingent Workers”), in the United States, precarious workers are most frequently referred to as “contingent workers”.



and disadvantages of various proposals that would extend the protections provided by US employment and labour laws to precarious workers. It includes a discussion of how international labour standards, as defined by the International Labour Organization (ILO), could be utilized to assist precarious workers.

## Precarious workers in the United States

Precarious workers in the United States are generally referred to as *contingent* workers. The largest group of the contingent workforce in the country is part-time workers who are defined as those individuals “who regularly work less than 35 hours per week for a particular employer and are wage and salary workers” and comprise about 43 per cent of the contingent workforce (Employment Arrangements, pp. 6, 12). The second largest category of precarious workers is that of independent contractors which are reported to comprise about 25 per cent of the precarious workforce in the United States, but this number may be somewhat lower since regular employees are often classified as independent contractors – leaving these workers without the protection of many US labour and employment laws (ibid., p. 12). The misclassification of employees as independent contractors has been a focus of both federal and state governments for many years. Independent contractors are generally considered to be “[i]ndividuals who obtain customers on their own to provide a product or service (and who may have other employees working for them), such as maids, realtors, child care providers, and management consultants” (ibid., p. 6).

Other categories of precarious workers include: contract company workers who “work for companies that provide services to other firms under contract”; agency temporary workers “who work for temporary employment agencies and are assigned by the agencies to work for other companies”; on-call workers “who are called to work only on an as needed basis”; direct hire temporary workers “hired directly by companies to work for a specified period of time”; day labourers “who get work by waiting at a place where employers pick-up people to work for the day”; and on-call self-employed workers “self-employed workers who are not independent contractors” (ibid., pp. 6 and 12).

## Employment-at-will: The foundation of employment and labour rights law in the United States

The cornerstone of employment law in the United States rests on the legal concept of *employment-at-will* (see Feinman, 1976).<sup>3</sup> Under this concept, as introduced in the late 1800s, employees were presumed to be *at-will* if there was no contract or specified duration of employment and could be terminated for good cause, bad cause, or no cause at all. In essence, the at-will concept meant (and still means) that for most private sector workers, there is no job security. When it was adopted, it meant that workers could also be terminated for forming a union or engaging in collective bargaining. At the time, workers also did not have rights to minimum wages or work in a place that was free from discrimination.

Since its adoption, a number of exceptions to the basic rule of employment-at-will have been created, though its basic underlying premise that most workers have no job security remains. These exceptions have been established both by statute and through the judicial process, though judicially-created exceptions apply only to geographic regions within their jurisdictions. The most common judicial exceptions can be categorized as either based on public policy or as implied contracts.<sup>4</sup>

Statutory exceptions are contained in federal laws such as the National Labor Relations Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Worker Adjustment Retraining Notification Act, the Occupational, Safety and Health Act and state laws such as those governing workers compensation, unemployment insurance, and others.<sup>5</sup>

### Judicially created exceptions to the employment-at-will rule

#### 1. Public policy exception

The public policy exception to the employment-at-will rule has been applied by state courts in situations where employers terminate employees for reasons that threaten public policy.<sup>6</sup> For example, the public policy exception has been applied where an employer terminated an employee because he refused to perjure himself.<sup>7</sup> Other public policy exceptions have been found for employees who were fired for refusing to engage in an illegal price-fixing

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3. See also *Adair v. United States*, 208 U.S. 161 (1908). [In *Adair*, a federal statute which made it a crime to fire an employee solely due to his membership in a labour organization, was deemed unconstitutional.

4. The third exception, the implied covenant of good faith and fair dealing, may not be as relevant for precarious workers and is not discussed in this paper.

5. Many of these federal statutes are listed elsewhere in this paper.

6. See *Monge v. Beebe Rubber Company*, 316 A.2d 549 (N.H. 1974).

7. See *Petermann v. International Brotherhood*, etc. 344 P.2d 25 (Cal. 1959).

scheme,<sup>8</sup> and for filing a claim under the state workers compensation statute (the state workers compensation statute did not have an explicit provision prohibiting retaliatory discharge for filing such a claim).<sup>9</sup>

Not all jurisdictions have adopted the public policy exception. Where it has been adopted, the concept of public policy often remains ill-defined. Courts that have adopted a public policy exception appear to constrain public policy to matters where there is either a clearly defined public policy established under state or federal law.

## 2. Implied contract exceptions

Some state jurisdictions have found exceptions to the employment-at-will rule for employees that are covered by a theory of implied contract.<sup>10</sup> This is also commonly known as the *employment manual exception*. These courts have found that employment manuals combined with employer assurances regarding job security can create an employer obligation concerning termination.<sup>11</sup> For example, an implied contract may exist if individuals considering an offer of employment are told that they will have job security and that they can only be dismissed for just cause and are given an employment manual that reflects this promise. In such a situation, if the employer dismisses an employee for anything less than just cause, the employee would have a basis for legal action stemming from the breach of an implied contract that he or she could be dismissed only for a just cause. This implied contract is distinguished from an explicit contract because the employment manual and oral assurances are not negotiated and are unilaterally given to the employee by the employer.<sup>12</sup>

## 3. Applicability to precarious workers

The applicability of the employment-at-will exceptions is quite limited – particularly with respect to precarious workers. First, both types of exceptions have been recognized in only a handful of jurisdictions. Second, even when they have been recognized, they have been very narrowly interpreted. For example, with respect to the public exceptions, courts are very reticent to usurp the role of the legislature in defining public policy through the enactment of statutes.<sup>13</sup> With respect to implied contracts, courts are very hesitant

8. See *Tameny v. Atlantic Richfield Company*, 610 P.2d 1330 (Cal. 1980).

9. See *Frampton v. Central Indiana Gas Company*, 297 N.E.2d 245 (Ind. 1973).

10. See *Toussaint v. Blue Cross and Blue Shield*, 292 N.W.2d 880 (Mich. 1980).

11. *Ibid.*

12. Courts have concluded that “consideration” (an element of contract law) has been met in these cases because the employee continues to work for the employer based on the employer’s assurances of dismissal for just cause only.

13. See *Gantt v. Sentry Insurance*, 824 P.2d 680 (Cal. 1992).

to create employer obligations based on employment manuals that reflect the employer's policies. Third, exceptions created from employment manuals can be remedied easily by inserting a disclaimer clearly stating that employees remain at-will and nothing in the language of this manual should be interpreted as constituting an implied contract or other obligation on the employer regarding job security.<sup>14</sup> Since many precarious workers are hired with the clear understanding that their employment is temporary, such a disclaimer may not even be needed. Finally, considerable financial resources are needed to file legal claims based on these exceptions. Filing a claim is even more impractical for precarious workers who are likely to have fewer resources to begin with.

### Statutory exceptions to the employment-at-will rule: Creating enforceable worker protections

There are several statutory exceptions to the employment-at-will rule. These exceptions, created under federal law, further limit the employment-at-will rule by creating employee rights and employer obligations with respect to the workplace. For example, workers cannot be fired for trying to form a union and they cannot be fired for discriminatory reasons. Each of the statutes listed below, represent some exception to the at-will rule by furnishing employees with certain rights in the workplace:<sup>15</sup>

- National Labor Relations Act – reflects rights for most private sector workers to form a union and engage in collective bargaining.<sup>16</sup>
- Fair Labor Standards Act – establishes employee rights to minimum wage, overtime pay, and regulates child labour.<sup>17</sup>
- Occupational Safety and Health Act – creates duties on employers to provide a safe and healthy workplace.<sup>18</sup>
- Title VII of the Civil Rights Act of 1964 – protects employees from discrimination based on race, color, religion, sex, or national origin.<sup>19</sup>
- Worker Adjustment and Retraining Notification Act – requires employers to provide covered workers with sixty days advance notice prior to a certified mass layoff or plant closing.<sup>20</sup>

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14. See *Novosel v. Sears, Roebuck & Co.*, 495 F.Supp. 344 (1980).

15. This list is not exhaustive and does not include state statutes.

16. 29 U.S.C. §151 et seq.

17. 29 U.S.C. §§201–216, 217–219.

18. 29 U.S.C. §§553 651–678.

19. 42 U.S.C. §§2000e-2000e-17.

20. 29 U.S.C. §§2101–2109.

## Applicability of statutory exceptions to precarious workers

### Who is an employee?

Although international labour standards apply broadly to many forms of precarious workers, the same cannot be said for US labour and employment laws (Vacotto, 2011). Several challenges exist for precarious workers who seek to assert the rights provided under each of these statutes. First, precarious workers must be covered by the law. Most statutes cover only *employees*. Two tests are often applied to determine if individuals are employees covered by these laws. These include the right to control test and the economic realities test.<sup>21</sup>

#### 1. *The right to control test*

The right to control test relies on determining “whether the business has a right to direct and control how the worker does the task for which the worker is hired”.<sup>22</sup> The 11 factors considered in applying the test include:

- (a) Instructions the business gives the worker.
- (b) Training the business gives the worker.
- (c) The extent to which the worker has unreimbursed business expenses.
- (d) The extent of the worker’s investment.
- (e) The extent to which the worker makes services available to the relevant market.
- (f) How the business pays the worker.
- (g) The extent to which the worker can realize a profit or loss.
- (h) Written contracts describing the relationship the parties intended to create.
- (i) Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
- (j) The permanency of the relationship.
- (k) The extent to which services performed by the worker are a key aspect of the regular business of the company.

21. Some laws provide other definitions of who is covered and many limit protections to employees who work a specified minimum number of hours or do not apply to small employers.

22. Employers’ Supplemental Tax Guide (Supplement to Publication 15 [Circular E], Employers Tax Guide), Publication 15-A, Department of Treasury, Internal Revenue Service, 2011, pp. 6–7.

## 2. *Economic realities test*

The other major test indicating whether or not an individual is an employee is the economic realities test. In general, the test examines whether an employee is economically dependent on the employer and consists of six factors:<sup>23</sup>

- (a) The degree of control exercised by the alleged employer.
- (b) The extent of the relative investments of the worker and alleged employer.
- (c) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.
- (d) The skill and initiative required in performing the job.
- (e) The permanency of the relationship.
- (f) The integral nature of the service rendered.

## Collective bargaining and precarious workers

Since the focus of this paper is on collective bargaining, any analysis of collective bargaining and precarious workers must begin with the National Labor Relations Act (the "NLRA" or the "Act"). Enacted in 1935, the NLRA provides most private sector workers with the right to form a union and engage in collective bargaining. The Act was created to encourage the practice and procedure of collective bargaining and to protect workers' exercise of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>24</sup> While the Act may cover, under some circumstances, seasonable, short-term, or leased workers, coverage is not automatic and can be difficult to establish.

Before discussing the Act's limitations with respect to precarious workers, it is important to explain that any kind of worker, precarious or standard, full time, can find it very tough to assert their rights provided under the Act. So that even if all of the difficulties that face precarious workers are resolved, they would still be confronted with the same challenges that all workers face when seeking to form their own union and engage in collective bargaining. The challenges that all workers face under the Act are reflected by the following scenario, which could occur during a union organizing campaign:

A union begins an organizing drive. The in-house organizing committee is fired and unfair labour practices are filed with the Board. If a petition has been filed, the election is either blocked or held in the wake of the discharges.

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23. *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981).

24. 29 U.S.C. §151.

If the election is held, it is not hard to imagine the effects on employees the illegal conduct may have. In areas where skilled jobs are hard to come by, threats of discharge and closings are taken very seriously. If the election is not held, it will take a long time for the unfair labour practice to be fully litigated. When the charges are finally resolved, the union has to start its organizing drive all over again. Either way, the employer has the upper hand.

Even if the union wins an election and unfair labour practices are not at issue, the employer can bargain to impasse and unilaterally implement its last offer. If the workers cannot live with the unilaterally implemented contract, they can strike and watch permanent replacements march through their picket lines. After the election bar is lifted, their permanent replacements can vote to decertify the union. (Herrnstadt, 1988, pp. 188–189)

One study of union elections under the NLRA offers further insight into the Act's weaknesses (Bronfenbrenner, 2009). It found that for the years studied:

- 34 per cent of employers fire workers;
- 63 per cent of employers interrogate workers about their support for the union in mandatory one-on-one meetings with their supervisors;
- 54 per cent of employers threaten workers in such meetings;
- 57 per cent of employers threaten to close the worksite;
- 47 per cent of employers threaten to cut wages and benefits;
- 52 per cent of newly formed unions had no collective bargaining agreement one year after an election; and,
- 37 per cent of newly formed unions still had no labour agreement two years after an election.

The study also concluded that employers tend to appeal most labour administrative law judge decisions, regarding the representation matter. In some egregious cases, the appeal can delay a final decision regarding the election by three to five years (*ibid.*).

In addition to the challenges all workers face in asserting their rights under the Act, as described above, the challenges that precarious workers face is seemingly endless. Adopting proposals to remove each hurdle may be futile, since another hurdle immediately appears. These obstacles start with determining whether an individual is even covered by the Act. The Act applies to the 11-part right to control test which is narrower than the economic realities test and explicitly excludes independent contractors.<sup>25</sup>

25. 29 U.S.C. §152(3); Individuals are misclassified as independent contractors by some employers to evade coverage of the Act. See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008). Proposals to curtail misclassification of workers are discussed later in this paper.

Another hurdle concerns the definition of employer. Some employers create subsidiaries and other legal entities as a way to employ leased workers. Although these workers perform the same work as standard workers perform, they technically work for a different employer – the leasing company. (In some cases, the new entity may merely provide the employees for the original company.) This makes it difficult to organize the workforce because many of the workers have different employers – even though they perform the same work and are working side-by-side. Application of rules concerning employers under these circumstances is complicated and subject to challenge. Proposals include broadening the definition of employer, when a company creates a subsidiary with the intention of evading the law. Other proposals could make it easier to treat separate companies (that have no relation to one another), such as the employee leasing company and the original employer, as joint employers under the Act.<sup>26</sup>

If a precarious worker qualifies as an employee under the Act and there is no question that they work for the same covered employer, they still must form an appropriate bargaining unit in order for a union election to be conducted under the NLRA.<sup>27</sup> The bargaining unit serves as the basis for the union if it is certified by the National Labour Relations Board. (The “NLRB” administers the NLRA.) In most cases, the key to determining whether a unit is appropriate depends on whether employees share a community of interest with one another. Among other things the NLRB reviews “many considerations...into a finding of community of interest”.<sup>28</sup> These factors include the degree of functional integration, common supervision, the nature of the employees’ skills and functions, the interchangeability in contact among employees, commonality of work sites, fringe benefits provided, and the history of collective bargaining.<sup>29</sup>

While precarious workers have substantively similar interests to regular employees, their different characteristics may make it relatively easy to separate them from a bargaining unit of regular employees. For example, if they do not closely work with regular employees, do not share supervision, skills, levels of pay or benefits, and have different bargaining history, they may be vulnerable to arguments that would keep them in a separate bargaining unit from regular employees. Of course, if they also have different characteristics between themselves, it may be difficult to demonstrate that they constitute a stand-alone unit.

Relaxing the community of interest standard or establishing a presumption that precarious workers are included in a unit with regular employees

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26. The NLRB applies a number of factors to this situation.

27. See 29 U.S.C. §159.

28. “An Outline of Law and Procedure in Representation Cases”, NLRB, 8/2008, pp. 129–131.

29. *Ibid.*



could create serious problems. Including precarious workers in a unit of regular workers is one method employers utilize to inflate a bargaining unit with employees that are opposed to the union effort. One solution might be for the NLRB to adopt a presumption that precarious workers within a company can form an appropriate bargaining unit among themselves.

Even if an appropriate bargaining unit can be established for precarious workers, it still must receive official recognition from the NLRB in order to serve as the exclusive bargaining representative for the unit's employees. This official recognition is referred to as *certification* and is usually preceded by an NLRB election. The pursuit of certification means that supporters of the union must be able to withstand the possibility of an anti-union campaign and other time-consuming delays before the election is held. Anti-union campaigns are an enormous impediment to organizing standard and precarious workers (Bronfenbrenner, 2009).

Once a bargaining unit is certified, the union gains the right to negotiate collectively on behalf of the unit. Although the union now has the right to represent the workers in bargaining, employers are only required to negotiate with the union in *good faith*. There is *no* obligation that the parties reach a collective bargaining agreement. The short-term or temporary nature of many precarious workers is likely to undermine the ability to complete a bargaining process that often lasts several months or even years. The prolonged process could easily destroy the newly certified unit – since the precarious employees who started the certification or the negotiating process may not be employed through the entire process.

In addition, in order to use their full economic leverage, precarious workers must be able to assert their legally protected right to strike should bargaining reach an impasse. It is doubtful if many short-term workers would be interested in striking, giving their tenuous relationship to the employer. Even if they did go on strike, since many precarious workers have lower skills, an employer could easily find replacements.

Moreover, while it is unlawful for an employer to terminate an employee for exercising their right to strike, the NLRA has been interpreted as permitting an employer to use permanent replacements for striking workers.<sup>30</sup> This means that even though employees have not been terminated, they may find that their jobs are no longer available to them because they have been filled by permanent replacements if they choose to return to work after the strike. In such cases, they must wait until an opening occurs if they want to continue in their current jobs. Since many employers have downsized, it could be many years before a former striker is recalled, if ever. Recall rights for regular workers under these circumstances are unsatisfactory (to say the least), for short-term employees, they are especially meaningless.

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30. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S.333 (1938).

Even if a collective bargaining agreement can be reached, the contract itself must be enforced. When a contract is not enforced, employees can file a grievance, if a grievance procedure is included in the agreement. The grievance procedure, however, involves several steps and is often time consuming. The final stage involves binding arbitration, which can also be quite time consuming. Given the short-term nature of many precarious jobs, this too may present a meaningless resolution.

In order for collective bargaining rights to become available for precarious workers, rights must be dramatically strengthened for *all* workers. Instead of strengthening these rights, labour law advocates are on the defensive as collective bargaining rights for public sector workers and the NLRB itself is under attack.<sup>31</sup> Sadly, in light of the anti-union climate in the United States, it is doubtful if efforts to strengthen collective bargaining rights so that they are consistent with international labour standards for precarious workers – let alone for regular workers – can be achieved in the near future. There are, however, some signs of hope: the attacks on collective bargaining rights have led to a mobilization of groups who believe in collective bargaining (see, for example, Gardner, 2011). Some people believe that a backlash may occur which would pave the way for the enactment of stronger collective bargaining rights for all workers in the future (ibid.).

### Other protections for precarious workers

As discussed above, collective bargaining rights under the NLRA are limited for all workers in the United States and, consequently, strengthening these rights for precarious workers under the current legal framework will be difficult and complicated. Nevertheless, there may be other ways to strengthen worker protections for precarious workers. These include:

- curtailing the misclassification of employees and extending coverage of employees under federal statutes;
- adopting new methods to determine minimum wages;
- providing a degree of job security;
- establishing voluntary agreements between multinational corporations (MNCs) and unions to provide precarious workers with rights based on international labour standards; and
- considering the adoption of European notions of social dialogue.

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31. See, e.g., “Wisconsin Governor Officially Cuts Collective Bargaining”, NBC News and News Services, 11 March 2011; “Congress v. the NLRB”, WSJ online, 4 May 2011; “Bill Curbing, NLRB Powers Nears Action by House of Representatives”, BNA Daily Labour Report, 26 July 2011.

## Misclassification of employees as independent contractors

Misclassification of employees is common in the United States. Government reports estimate that up to 30 per cent of companies misclassify employees with employers, illegally passing off 3.4 million regular workers as contractors (Greenhouse, 2010).<sup>32</sup> While some workers are unintentionally misclassified, many employers purposefully misclassify workers in order to avoid coverage and compliance with many of the labour and employment laws which often apply only to employees – and not independent contractors.

One solution for discouraging the misclassification of employees is to abandon the use of different tests for determining who is an employee and adopting one, broad, uniform standard in their place. The Commission on the Future of Worker–Management Relations made such a recommendation arguing that such a definition should be based on the economic realities of the employment relationship – conferring independent contractor status “only on those for whom it is appropriate – entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth.”<sup>33</sup> The Commission went on to explain that misclassification costs both federal and state governments large amounts of tax revenues – including social security, unemployment insurance and personal income tax – noting that the law should not provide this type of incentive for employers to misclassify workers.<sup>34</sup>

Many states have investigated the issue of misclassification of employees as independent contractors, enacting legislation to address the matter (see Ruckelshaus, 2008). Advocates for precarious workers propose the following principles when drafting legislation regarding misclassification (*ibid.*):

1. Provide for right of action for the aggrieved worker(s) and the worker’s representative, including unions or community groups.
2. Provide for strong anti-retaliation protections for workers who complain.
3. Provide for monetary damages per worker misclassified in an amount likely to deter future violations.
4. Provide for debarment remedies if the violating employers are state public contractors.

ILO standards provide ample support for enforcing laws prohibiting the misclassification of employees. The Labour Inspection Convention, 1947 (No. 81), provides that “[t]he system of labour inspection in industrial

32. See Employment Arrangements, *supra* at note 1; Contingent Workers, *supra* at note 2.

33. Fact Finding Report, Commission on the Future of Worker–Management Relations, May 1994.

34. *Ibid.*

workplaces shall apply to all work places”, regardless of the characteristics of the workers that occupy them. Moreover, labour inspection must be enforced specifically in reference to “provisions relating to hours, wages, safety, health and welfare ... in so far as such provisions are enforceable by labour inspectors”. The International Labour Conference recently addressed these and other issues, marking its commitment to achieving the principles outlined in Convention No. 81, among other things (ILO, 2011).

### Providing job security

Since most private sector employees are at-will employees who can be fired for almost any reason or for no reason at all, job security remains a critical issue for all workers throughout the United States. There are a number of possibilities for addressing this issue that have been proposed or debated over the years. The public policy and implied contract exceptions to employment-at-will could be codified into federal or state law in order to improve job security for all workers. Several years ago, a Model Employment Termination Act (META) was proposed.<sup>35</sup> In general, META would have prohibited an employer from terminating an employee without good cause. The Model Act, however, would not have applied to short-term or temporary employees and left many other areas unaddressed. No state has adopted META, although Montana has enacted a Wrongful Discharge from Employment Law that has some similarities.<sup>36</sup>

### Providing for decent wages

Most precarious workers generally are required to receive a minimum wage under the Fair Labor Standards Act, the federal law establishing minimum wage, overtime and other wage protections, and state minimum wage laws which often require wage payments that exceed the federal minimum.<sup>37</sup> Under federal law, minimum wage for most workers is set at \$7.25 an hour,<sup>38</sup> but Washington State, with the most protective minimum wage law, requires payment of \$8.67 per hour.<sup>39</sup> In addition, some *communities* have adopted what is known as livable wage standards. Since minimum wage is still far below the poverty level, livable wages are aimed at ensuring wages that can

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35. National Conference of Commissioners on Uniform State Laws (August 1991).

36. See Montana Statutes, Wrongful Discharge from Employment, 39-2-9012915.

37. See Wage and Hour Division, U.S. Department of Labor, Minimum Wage Laws in the States – 1 January, 2011, <http://www.dol.gov/whd/minwage/america.htm>.

38. Fair Labor Standards Act, supra at note 17.

39. Ibid.

provide workers with a decent standard of living. For example, the city of Chicago passed an ordinance requiring some very large retailers to pay at least \$10 an hour (Bellandi, 2006).

An even higher “minimum wage” might be achieved by adopting a *prevailing wage* for workers in industries dominated by precarious workers. The concept of prevailing wages is borrowed from public contract law, which requires that certain employers who receive public contracts for construction, services, and other activities pay employees working on the contract a prevailing wage that satisfies specific requirements.<sup>40</sup> These prevailing wages are considerably higher than minimum wages and are, in general, based on the wages paid for certain occupations in specific geographic areas. A system of prevailing wages could be established for workers regardless of the nature of their employment. The drawback of this approach is that precarious workers in general are already low paid workers – so that a prevailing wage determination may remain low.

### Voluntary agreements

Global framework agreements (GFAs) represent another mechanism for strengthening the rights of precarious workers by utilizing international labour standards. Global framework agreements are negotiated between multinational corporations (MNCs), their works councils, international labour federations, and individual unions. In order to assist precarious workers, GFAs must contain these four elements (Herrnstadt, 2007):

- **Broad coverage:** GFAs must cover the entire corporate enterprise and related entities. If a GFA covers only MNCs direct employees of a corporation, than leased employees, part-time and short-term employees working alongside the regular direct employees will not be covered. This omission will raise doubts about the MNC’s commitment to the GFA and will create two classes of workers.
- **ILO Conventions and accompanying jurisprudence:** GFAs must include labour standards explicitly referenced by the Conventions of the International Labour Organization and accompanying jurisprudence. The agreements must commit signatory companies to exceeding national laws that fall short of the international labour standards contained in the GFA. One model agreement, the Model for the International Metalworkers’ Federation (IMF), requires MNCs to pay decent wages and benefits that are sufficient to meet the basic needs of workers and their families and

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40. See the Davis-Bacon Act, 40 U.S.C. §§276a to 276a-5, Service Contract Act of 1965, 41 U.S.C. §§351–358, and the Walsh-Healey Public Contracts Act, 41 U.S.C. §§35–45.

provide some discretionary income, make certain that hours of workers are not excessive and that working conditions are decent.<sup>41</sup>

- **Effective implementation:** GFAs must be effectively implemented through proper education and communication. Agreements must be distributed to all related enterprises and individuals connected to the company – including regular and precarious workers, management, contractors, and suppliers. The agreements must be distributed along with an explanation written in easily understood language. Concepts like the freedom of association and collective bargaining are not easy to understand, so this education component is critical for all levels of the MNC and its enterprises.
- **Monitoring and enforcement:** in addition, GFAs must be monitored and enforced in a transparent manner. External independent monitoring of the MNC and its suppliers, at all levels, must take place on a regular basis. Conflicts that arise under the GFA must be subject to a dispute resolution mechanism such as binding arbitration. It will do little good if no one knows if an MNC is complying with the GFA, and if it can violate the agreement without a satisfactory recourse.

GFAs could lead to stronger rights for some precarious workers. However, they are voluntary and cannot provide the same level of protection for regular or precarious workers as legally enforceable protections established by federal (or state) laws. Moreover, past experience with GFAs has not been particularly promising. Over fifty GFAs have been negotiated but none fully address the four elements outlined above. Many have limited coverage and inadequate reference to labour standards (Herrnstadt, 2007). Even fewer have proper implementation provisions and enforcement mechanisms. Nevertheless, the dialogue from which the GFA emerges could serve the interests of all workers – and provide a forum for raising worker protection issues faced by precarious workers.

### Importing social dialogue from Europe to the United States

Works council frameworks, such as those existing in Europe, could be established in the United States to provide a mechanism for representation of precarious workers. However, the political climate, lack of social dialogue and anti-union conduct in the United States are likely to undermine efforts to import the works council concept. Even more troubling is the fact that many European-based MNCs abandon the concept of social dialogue when they establish facilities outside Europe (Compa, 2010).

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41. IMF Model Framework Agreement; see [www.IMFMetal.org](http://www.IMFMetal.org).

Furthermore, there is a risk that works councils could be used for anti-union purposes in the United States. It is conceivable that US management could use works councils to recruit non-union employee representatives to undermine collective bargaining efforts with unions. US labour history is replete with examples of how companies have used so-called labour management cooperation programmes and other innovative management mechanisms in this way (Herrnstadt, 1998).

### Extension mechanisms of collective bargaining agreements

Extending collective bargaining agreements beyond their normal coverage raises some interesting issues. Such an extension mechanism could make relevant negotiated wage rates applicable for all workers in the same industry. The advantage of such a concept would be that all workers would receive the benefits of the union's collective bargaining agreement, regardless of whether they are included in an appropriate bargaining unit represented by the union. This would, of course, raise significant questions regarding enforceability of the contract since the collective bargaining agreement would not actually cover these workers. While a whole new statutory framework could be envisioned for establishing an enforcement regime, given the current political climate in the United States, the legislative success of such an endeavor is highly doubtful. Moreover, this sort of extension mechanism presents political and legal questions for a union, including questions regarding its obligation to the unrepresented workers who are not union members and who do not pay any fees for representation. In addition, an extension mechanism could also provide a disincentive for precarious workers to seek their own union representation, since they are receiving collective bargaining benefits for free.

### Adopt core international labour standards in international trade and investment agreements

International labour standards are not only social issues – they are also economic issues. Indeed, many corporations that shift production to other countries do so to take advantage of lower labour costs that exist when core labour standards are neither recognized nor enforced. This is why many labour advocates argue that specific references to ILO Conventions and acceptable conditions of work must be included in international trade and investment agreements. By including these standards in these agreements, precarious workers and their advocates would have a valuable tool to promote their interests, including fundamental human rights to form a union, engage in collective bargaining and earn acceptable wages and have reasonable hours of

work. If these rights were included in trade and investment agreements and effective enforcement mechanisms were available that would permit violations to be processed under meaningful dispute resolution mechanisms, precarious workers would have another tool to assist them.

## Conclusion

Collective bargaining rights in the United States are weak and must be improved for all workers. Sadly, efforts at meaningful labour law reform, which would address many of these weaknesses, have yet to be successful. Given these circumstances, it is difficult to articulate realistic proposals for improvement in collective bargaining laws aimed narrowly at precarious workers.

Strengthening other worker protections for precarious workers could help to advance their rights in the future. Efforts to provide a broad and uniform definition of employee and curtail the misclassification of individuals as non-employees are two obvious proposals. Other proposals address activities to ensure that all employees receive decent wages, some form of job security, and encourage voluntary agreements that are centered on international labour standards. Still other proposals call for entirely new labour relations systems built on European concepts of social dialogue and the adoption of enforceable labour standards in international trade and investment agreements. Lastly, consideration is given to adopting internationally recognized labour standards in trade and investment agreements.

The key to any of these proposals rests firmly, however, on the ability to change a North American corporate culture that can be hostile to workers' rights to form a union and to engage in collective bargaining. It is critical that legislative initiatives, both large and small, be vigorously pursued to adopt laws and regulations that will guide employers toward accepting these fundamental human rights, based on ILO Conventions and accompanying jurisprudence. In this vein, concerted global campaigns to stop the exploitation of precarious workers, like those that are being led by many labour federations, must be aggressively pursued so that the public, policy makers and especially the corporate community learn about the critical importance of freedom of association and collective bargaining for all workers. Until a fundamental understanding can be established worldwide on the importance of freedom of association and collective bargaining, great challenges remain for advocates who aim to improve the collective bargaining rights and other employment protections for the most vulnerable workers, those who find themselves in precarious positions.



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# Precarious work and the exercise of freedom of association and collective bargaining

*Current ILO jurisprudence*

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The impact of precarious forms of employment on workers' access to freedom of association and collective bargaining rights is currently one of the main concerns of the trade union movement around the world. It is argued that these forms of employment are increasingly used by employers, both in the private and public sectors, to undermine the right to organize and eliminate or weaken the right to collective bargaining as well as to deprive workers of labour protection. This article focuses on precariousness arising mainly from the "contractual arrangements under which the work is performed including stand-by, temporary, employment-agency, casual, part-time, and seasonal contracts, pseudo self-employment, no direct or an unclear employer/employee relationship".<sup>1</sup>

Faced with a growing number of allegations, the ILO Committee on Freedom of Association (CFA) and Committee of Experts on the Application of Conventions and Recommendations (CEACR) have developed a rich case law. Both reaffirm that the different categories of workers in precarious employment should be able to exercise their rights to freedom of association and collective bargaining, and indicate that, when necessary, special measures should be adopted to guarantee effective access to these rights. In this article we will review some of the cases symptomatic of the more common restrictions raised with the ILO, and identify the relevant principles. We will also underline that trade union action is still much needed in this area, both to expand the jurisprudence and to exert pressure on governments to obtain the implementation of the supervisory bodies' recommendations that freedom of association be fully respected in law and in practice.

A very brief description of the ILO supervisory system may be useful in this context. Trade unions may have recourse to two kinds of mechanisms within the ILO:

- They can send observations on the application of a ratified Convention in the framework of the regular system of supervision. Under this system, an independent and technical body, the CEACR, examines periodic reports submitted by ILO member States on the measures they have taken to implement in law and in practice the provisions of ratified Conventions, together with observations in this regard sent by workers' organizations and employers' organizations. To accomplish this task, the CEACR expresses its views on the content and meaning of the provisions of Conventions and determines their legal scope, where appropriate. In a second stage, the report produced by the Committee is examined by a tripartite body, the Committee on the Application of Standards of the International Labour Conference.
- Trade unions can file complaints under the special procedures. These include a representations procedure and a complaints procedure of general

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1. Definition agreed in the context of the ILO Workers' Symposium on Policies and Regulations to Combat Precarious Employment (Geneva, 4–7 October 2011).

application which relates only to ratified Conventions, as well as a special procedure for freedom of association that trade unions can use even against governments which have not ratified the relevant Conventions. Complaints about violations of freedom of association are examined by the CFA, a tripartite committee of the ILO Governing Body. If it finds that there has been a violation of freedom of association standards or principles, the CFA makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations.

The work of these bodies has an important added value for the activity of trade unions at national level. ILO observations and recommendations, together with the text of relevant Conventions, may be used, for instance, to defend a specific case in negotiations with the employer or the government; to strengthen a submission to a judge when the case is pending before a domestic court; or, more broadly, to seek the amendment of a law or reinforce a position in the context of a labour law reform.

The right to freedom of association is enshrined in the Preamble to the ILO Constitution, as well as in a series of key Conventions and Recommendations. In this article, we will mainly focus on the principles linked to two fundamental Conventions in this area, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

### Right to establish and join organizations

Article 2 of Convention No. 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. In dealing with different complaints filed by trade unions around the world, the CFA has emphasized that this right applies to all workers, whether they are employed on a permanent basis, for a fixed term, or as contract employees; to workers undergoing a period of work probation; to persons hired under training agreements as apprentices or otherwise; to persons working under community participation programmes intended to combat unemployment; workers in cooperatives; workers in export processing zones; and domestic workers (see ILO, 2006, paras 255–267). This principle is further developed in a number of cases that have been examined by the CFA.

In a case regarding Peru (No. 2675), the complainant organization objected to legislation applicable to industrial companies subject to the non-traditional export scheme, which authorized them to conclude very short-term casual contracts which are renewed indefinitely for years and

which have prejudicial effects on the exercise of trade union rights (because workers are afraid that their contracts will not be renewed) and on conditions of work. The Government stated in the context of the case that in general, in the sector in question “temporary contracts have been used repeatedly as a means of discouraging trade union membership”, and that this had generated “negative effects on the level of social protection”. The CFA invited the Government to examine, with the most representative workers’ and employers’ organizations, “a way of ensuring that the systematic use of short-term temporary contracts in the non-traditional export sector does not become in practice an obstacle to the exercise of trade union rights”.

Allegations in a case regarding Mexico (No. 2013) related, among other things, to the refusal to register a union, arguing the absence of an employment relationship between the teaching staff concerned and the institution in which the work was performed. The complainant stated that, according to the General Directorate, inspections carried out with the employers’ legal representatives showed that while none of the members of this group were recognized as workers within the meaning of the Federal Labour Act, some members were recognized as providers of occupational services. It was therefore deduced that their relationship was of a strictly civil nature and did not constitute an employment relationship. The CFA recalled that the criterion for determining the persons covered by the right to organize is not based on the existence of an employment relationship, which is often non-existent – for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy this right. The CFA requested the Government “to take steps to guarantee that the teaching staff in question who are governed by contracts for professional services and other categories in similar conditions may legally establish, and join, organizations of their own choosing for the promotion and defence of their interests”.

The CEACR (2008) addressed the right to organize of casual workers in Bangladesh. The Government indicated that although workers in any sector have the right to establish trade unions under the Labour Law of 2006, workers in the shipbreaking sector were casual workers and did not have an opportunity to form unions, because of the limited period of their employment (connected to the breaking of a specific ship). The CEACR recalled that workers without distinction whatsoever, including casual and informal-sector workers in the shipbreaking industry, should have the right to establish and join organizations of their own choosing.

In an observation regarding Colombia, the CEACR (2009) referred to the use of various types of contractual arrangements, such as associated work cooperatives, service contracts and civil or commercial contracts which cover actual employment relationships and are used for the performance of functions and work that are within the normal activities of the establishment and under which workers may not establish or join trade unions. The

CEACR requested the Government to take the necessary measures “to guarantee explicitly that all workers, without distinction, including workers in cooperatives and those covered by other forms of contracts, irrespective of the existence of a labour relationship, enjoy the guarantees afforded by the Convention”.

A case related to the Republic of Korea (No. 2620) concerned the refusal by the Government to register the Migrants’ Trade Union (MTU), as well as allegations of generalized discrimination against and repression of migrant workers. The CFA considered that all workers, regardless of their status, should be guaranteed their freedom of association rights so as to avoid the possibility of having their precarious situation taken advantage of. Emphasizing the importance of guaranteeing the right of migrant workers, both documented and undocumented, to organize, the CFA requested the Government “to undertake an in-depth review of the situation concerning the status of migrant workers, along with the social partners concerned, so as to fully ensure and safeguard the fundamental rights to freedom of association and collective bargaining of all migrant workers, whether in a regular or irregular situation, and in conformity with freedom of association principles, and to prioritize dialogue with the social partners concerned, as a means to find negotiated solutions to the issues faced by these workers”. The CFA requested the Government to proceed with prompt registration of the MTU.

In 2012, the CEACR noted that one of the main concerns indicated by trade union organizations was the negative impact of precarious forms of employment on trade union rights and labour protection, notably short-term temporary contracts that are repeatedly renewed; subcontracting, even by certain governments in their own public service to fulfil statutory permanent tasks; and the non-renewal of contracts for anti-union reasons. The CEACR added that some of these modalities often deprive workers’ access to freedom of association and collective bargaining rights, particularly when they hide a real and permanent employment relationship. Some forms of precariousness can dissuade workers from trade union membership (CEACR, 2012, para. 935).

### Right to establish organizations of their own choosing

According to the ILO supervisory bodies, the free exercise of the right to establish and join unions implies the free determination of the structure and composition of trade unions. Regarding temporary workers in the construction sector, this right was reaffirmed by the CFA in a case concerning the Philippines (No. 1615). The allegations referred to a policy instruction which stipulated that “for project employees, the appropriate collective bargaining unit is the industry, not any particular project ... Therefore the employees of a particular project cannot constitute an appropriate collective bargaining

unit. They may however join the recognized industry union in the construction industry.” The complainant stated that this imposition of an industry bargaining unit, denying workers the choice of forming enterprise-level or company-level bargaining units, was a clear violation of the right to organize and to bargain collectively. The CFA recalled that workers, without distinction whatsoever, should enjoy the right to establish and join organizations of their own choosing, whether employed on a permanent basis or for a definite period or project.

Another case regarding Colombia (No. 2556) is also of particular interest in this regard. The allegations presented by the union referred to the refusal by the administrative authority to register the Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA), its statutes and its executive committee on the grounds that, among other things, its membership included workers from the temporary employment agencies serving the industries of the sector. The Government explained that for registration to take place the workers have to be providing their services within companies belonging to the same industry and to be bound to those companies through contracts of employment. The CFA recalled in this regard that “the status under which workers are engaged with the employer should not have any effect on their right to join workers’ organizations and participate in their activities”. The CFA requested the Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee.

### Right to strike

According to ILO principles, the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. It is considered an intrinsic corollary to the right to organize protected by Convention No. 87 (see ILO, 2006, paras 522–523). It is not, however, an absolute right. It can be restricted or prohibited:

- in the public service only for public servants exercising authority in the name of the State; or
- in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); or
- in case of acute national emergency and for a limited period of time.

Outside these specific situations, precarious workers should be entitled to the right to strike, including the right to solidarity strike. In this respect, regarding the United Kingdom the CEACR indicated that “workers should be able to take industrial action in relation to matters which affect them even

though, in certain cases, the direct employer may not be party to the dispute” (CEACR, 1997). This could be the case where, for example, “the structural organization of parent, subsidiary or subcontracting companies leads to a situation where the interests of the workers cannot necessarily be resolved with their direct employer, yet the undertaking of industrial action may lead to the resolution of their legitimate claims” (ibid.). In this regard, the CEACR recalled its position that workers should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful.

In 2010, the CEACR examined comments sent by a union which referred to the prohibition of the right to strike by agricultural workers during the harvest in Chile. The Government indicated that the fact that these workers could not negotiate a collective agreement or benefit from the right to strike was due to the fact that they performed seasonal work of short duration. In this respect, the CEACR recalled that “the right to strike is an intrinsic corollary to the right to organise which may only be restricted in the case of essential services and in the case of public servants exercising authority in the name of the State” (CEACR, 2010a). Under these conditions, observing that agricultural workers did not form part of either of these categories, the CEACR requested the Government “to take the necessary measures to ensure in law and practice that agricultural workers can enjoy the right to strike”.

### Right to be protected against acts of anti-union discrimination

Protection against anti-union discrimination is one of the pillars of Convention No. 98 and is key to guaranteeing the effective exercise of freedom of association and collective bargaining rights. This protection is particularly important for precarious workers, who are in a more vulnerable situation and therefore more exposed to this kind of violation. Article 1 provides in this regard that such protection applies in respect of acts calculated to:

- (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
- (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Regarding workers under short-term contracts, the CFA has pointed out that the non-renewal of a contract for anti-union reasons constitutes a prejudicial act within the meaning of Article 1 of Convention No. 98. It has also considered that subcontracting accompanied by dismissals of union leaders can constitute a violation of the principle that no one should be prejudiced in his



or her employment on the grounds of union membership or activities (ILO, 2006, paras 785–786).

According to the CFA, legislation should lay down “explicitly remedies and penalties against acts of anti-union discrimination” in order to ensure the effective application of Article 1 of Convention No. 98. In this regard, the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed (*ibid.*, para. 818).

CFA case law contains an interesting example regarding the protection of undocumented workers. In a case concerning the United States (No. 2227), the remedies available to undocumented workers dismissed for attempting to exercise their trade union rights included: (1) a cease and desist order in respect of violations of the law; and (2) the conspicuous posting of a notice to employees setting forth their rights under the law and detailing the prior unfair practices. The CFA considered that such remedies in no way sanctioned the act of anti-union discrimination already committed, but only acted as possible deterrents for future acts. Such an approach was likely to afford little protection to undocumented workers who could be indiscriminately dismissed for exercising freedom of association. The CFA concluded that the remedial measures in question were therefore inadequate to ensure effective protection against acts of anti-union discrimination.

Another case concerning the Republic of Korea (No. 2602) is relevant with regard to anti-union discrimination. The complaint concerned the situation of “illegal dispatch workers”, a form of false subcontracting which served to disguise what was in reality an employment relationship in the metalworking sector where in practice the workers had no legal protection under the terms of the law and, in particular, were left unprotected as regards numerous acts of anti-union discrimination. Recalling that it had also previously examined the difficulties faced by precarious workers in disguised employment relationships in the construction industry, the CFA requested the Government to develop, in consultation with the social partners concerned, “appropriate mechanisms aimed at strengthening the protection of subcontracted (‘dispatch’) workers’ rights to freedom of association and collective bargaining ... and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights”.

The CEACR (2010b) examined allegations of continuing discriminatory use of fixed-term contracts in Belarus. The union alleged, in particular, that members of free and independent unions were forced to leave their unions under the threat of non-renewal of their contracts, pressure and harassment. The CEACR noted these allegations with concern and urged the Government to take the necessary measures to ensure they were brought to the attention of the tripartite Council for the Improvement of Legislation in the Social and Labour Sphere without further delay.

## Right to bargain collectively

Convention No. 98 in its Article 4 stipulates that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. The only possible exclusions from the application of Convention No. 98 relate to the armed forces and the police, and public servants engaged in the administration of the State.

Concerning the categories of workers under examination in this article, the CFA has stated that no provision in Convention No. 98 authorizes the exclusion of staff having the status of contract employee from its scope (ILO, 2006, para. 898). The CFA has also indicated that temporary workers should be able to negotiate collectively. With regard to temporary job offers in the public sector to combat unemployment, in which the wages were not determined under the terms of the collective agreements governing remuneration of regular employees, the CFA expressed the hope that governments would ensure that, in practice, the job offers remained of a limited duration and did not become an opportunity to fill permanent posts with unemployed persons, restricted in their right to bargain collectively as regards their remuneration (*ibid.*, paras 906–907).

A case concerning Canada (No. 2430) is relevant in this context. The case dealt with the denial of collective bargaining to part-time academic and support staff of colleges of applied arts and technology in Ontario. While taking due note of the explanations given by the Government on the specific circumstances of college programmes and activities and on their limited community of interests with full-time staff, the CFA pointed out that “all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights” and that “no provision of Convention No. 98 authorizes the exclusion of staff having the status of contract employee from its scope”. While the particular circumstances of the part-time employees concerned may call for differentiated treatment and adjustments as regards the definition of bargaining units, the rules for certification, etc., as well as specific negotiations taking their status and work requirements into account, the CFA failed to see any reason why the principles on the basic rights of association and collective bargaining afforded to all workers should not also apply to part-time employees. The CFA therefore requested the Government “rapidly to take legislative measures, in consultation with the social partners, to ensure that academic and support part-time staff in colleges of applied arts and technology fully enjoy the rights to organize and to bargain collectively, as any other workers”.

A similar situation arose in another Canadian case (No. 2083), this time concerning the denial of collective bargaining rights to casual workers

in the public service. The CFA recalled in this regard that “all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights”. It requested the Government to take appropriate measures in the near future to ensure that casual and other workers, currently excluded from the definition of employees, be granted the right to bargain collectively, in conformity with principles of freedom of association.

A case regarding the Republic of Korea (No. 1865) concerned precarious and particularly vulnerable construction workers exercising their right to organize and bargain collectively in a complex bargaining context, involving several layers of subcontractors over which only the main contractor had a dominant position. The CFA deeply regretted to note that some courts had taken decisions concluding that collective agreements signed by the construction union and the main construction company were only applicable to employees of the main company and did not apply to workers hired by subcontractors. It requested the Government to undertake further efforts “for the promotion of free and voluntary collective bargaining over terms and conditions of employment in the construction sector covering, in particular, the vulnerable ‘daily’ workers”.

In case No. 2602 on the Republic of Korea mentioned above, the CFA reaffirmed the right to collective bargaining of self-employed workers. Dealing with the situation of owner drivers, the CFA noted that according to national law an organization shall not be regarded as a trade union if those who are not employees are allowed to join it. The Government indicated that while self-employed persons could establish their own organizations representing their interests, through which they could address their demands to the Government and business organizations, such organizations could not be considered as trade unions. In this regard, the CFA requested the Government to “develop, in consultation with the social partners concerned, specific collective bargaining mechanisms relevant to the particularities of self-employed workers”. In the same case, the CFA addressed the situation of subcontracted workers in the metal sector and urged the Government to take all necessary measures to “promote collective bargaining over the terms and conditions of employment of these workers, including through building negotiating capacities, so that subcontracted workers may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith”.

The CEACR (2011) examined the situation of contract labour and collective bargaining in the Netherlands. The comments from the Netherlands Trade Union Confederation (FNV) concerned the impact which an opinion published by the Netherlands Competition Authority (NMA) had had in practice, by discouraging negotiations with employers, at the sectoral level, on the terms and conditions of contract labour (i.e. performed by individuals who do not necessarily work under the strict authority of the employer and who may have more than one workplace). The trade union recalled that

in its 2007 opinion document, the NMA had expressed the view that a collective labour agreement which contains provisions on contract labour should be nullified, since the contract worker was considered to be an undertaking pursuant to the competition law and that, as a result, employers had reacted with an unwillingness to renegotiate conditions of labour, especially in the performing arts sector. The CEACR recalled that Article 4 of Convention No. 98 establishes the principle of free and voluntary collective bargaining and the autonomy of the bargaining parties and requested the Government to provide information on the outcome of the ongoing judicial process.

In an observation concerning Haiti (CEACR, 2010c), noting the Government's indication that there were no collective agreements in force for rural workers, workers in the informal economy, self-employed workers and domestic workers, the CEACR requested the Government to examine, in conjunction with the social partners concerned, ways of promoting collective bargaining for those sectors.

In 2010, the CEACR also examined the right to collective bargaining of apprentices and workers engaged for specific task or for a specified period in Chile. Comments from a national union referred to the Labour Code, which provides that in no event may the remuneration of apprentices be determined by means of collective agreements or contracts, or arbitration awards issued in the context of collective bargaining, and that workers governed by an apprenticeship contract and those engaged solely for a specific task or activity, or for a specific period, may not engage in collective bargaining. According to the Government, the reason for this prohibition was that services were provided on a temporary basis and in any event for a shorter time than the period of validity of a collective instrument (two years). The CEACR pointed out that, according to the Convention, only the armed forces, the police and public officials engaged in the administration of the State may be excluded from collective bargaining, and requested the Government to take the necessary steps to amend the legislation in order to allow the workers concerned to enjoy fully the right to collective bargaining (CEACR, 2010d).

The Government of the United States drew CEACR's attention to the fact that workers employed by temporary work agencies may not belong to the same bargaining unit of the user enterprise unless both employers consent, but that employees employed by the skills provider can still form their own bargaining units. The CEACR recalled that Article 12 of the Private Employment Agencies Convention, 1997 (No. 181) requires member States to determine and allocate, in accordance with national law and practice, the respective responsibilities of employment agencies and user enterprises in respect of collective bargaining. It indicated in this regard that "any differential allocation of collective bargaining responsibilities between employment agencies and user enterprises must ensure that employees of employment agencies are able to exercise the right to bargain collectively in practice" (ILO, 2010, para. 311).

## Consultation and employment flexibility

The CFA has also developed an important principle concerning the need to consult workers' organizations regarding employment flexibility. It has indicated in this respect that a contraction of the public sector and/or greater employment flexibility (for example, the generalization of short-term contracts) do not in themselves constitute violations of freedom of association. However, there is no doubt that these changes have significant consequences in the social and trade union spheres, particularly in view of the increased job insecurity they can engender. Employers' and workers' organizations should therefore be consulted as to the scope and form of the measures adopted by the authorities (ILO, 2006, para. 1078).

## Conclusions

As described above, trade unions have repeatedly had recourse to the ILO supervisory mechanisms regarding the denial of freedom of association and collective bargaining rights to workers in precarious employment. While the impact of these actions at national level remains to be studied, at the international level they have led to the development of specific case law affirming that the protection afforded by both Conventions No. 87 and No. 98, and more broadly by ILO principles on freedom of association, covers the various forms of precarious employment. Furthermore, the supervisory bodies recognize that some forms of precariousness often deprive workers of access to freedom of association and collective bargaining rights or can dissuade them from trade union membership.

The broad scope of application of Convention No. 87, which allows the exclusion of only the armed forces and the police, is systematically confirmed by the ILO supervisory bodies. The *right to organize* therefore applies to all workers without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term, or as contract employees; to workers undergoing a period of work probation; persons hired under training agreements as apprentices or otherwise; persons working under community participation programmes intended to combat unemployment; part-time workers; workers in export processing zones; domestic workers; self-employed, casual and informal-sector workers; workers in cooperatives; those covered by other forms of contracts, irrespective of the existence of a labour relationship; and all migrant workers, whether in a regular or irregular situation.

The ILO supervisory bodies have drawn attention to the need to ensure that the systematic use of short-term temporary contracts does not in practice become an obstacle to the exercise of trade union rights. Concerning agency and temporary work in particular, the supervisory bodies have indicated that the status under which workers are engaged with the employer or the

duration of their contracts should not have any effect on their right to *join workers' organizations of their own choosing* and participate in their activities.

No specific restrictions could be applied on the *right to strike*, including solidarity strikes, of the examined categories of workers beyond those admitted for any worker. These restrictions mainly refer to public servants exercising authority in the name of the State and workers in essential services. The supervisory bodies have indicated that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute. This could be the case where, for example, the structural organization of parent, subsidiary or subcontracting companies leads to a situation where the workers' interests cannot necessarily be resolved with their direct employer, yet undertaking industrial action may lead to the resolution of their legitimate claims.

Adequate and effective *protection against acts of anti-union discrimination* is crucial for workers in precarious employment. In the case of workers hired under a form of false subcontracting which functions to disguise what is in reality an employment relationship, the supervisory bodies have requested a government to develop specific mechanisms, aimed at strengthening the protection of these workers' rights to freedom of association and collective bargaining and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights. This request to develop "specific mechanisms" to ensure the effective protection of workers in a more vulnerable situation could be further explored by the trade union movement in its quest to protect precarious workers through regulation.

According to Convention No. 98, governments have an obligation to *promote collective bargaining* for all workers and employers, the only possible exclusions being the armed forces, the police, and public servants engaged in the administration of the State. For the supervisory bodies, the right to collective bargaining applies in particular to staff having the status of contract employee; temporary and casual workers; part-time workers; self-employed workers; apprentices and workers engaged for a specific task or for a specified period; workers in the informal economy; domestic workers and subcontracted workers.

In the case of self-employed workers, the supervisory bodies have requested a government to develop *specific collective bargaining mechanisms* relevant to the particularities of these workers. The need to take all necessary measures to promote collective bargaining rights of subcontracted workers, including through *building negotiating capacities*, has also been emphasized. The specific situation of workers in precarious employment may therefore call for specific mechanisms and measures in order to ensure the effective access of these workers to this fundamental right.

Furthermore, according to the ILO supervisory bodies, employers' and workers' organizations should be *consulted* as to the scope and form of

measures adopted by the authorities regarding *employment flexibility*, since these changes have significant consequences in the social and trade union spheres, particularly in view of the increased job insecurity they can engender.

More detailed and well-documented complaints could contribute to further develop and strengthen the existing jurisprudence. Certainly, the legal recognition of these rights does not necessarily mean that workers in precarious employment will be able to exercise them in practice. However, in our view, this case law constitutes a solid basis for trade union action. It can and should be used to support the development of adequate national legislation, as well as administrative and judicial enforcement mechanisms to ensure the actual protection of these workers' freedom of association and collective bargaining rights.

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# Precarious work and access to collective bargaining

*What are the legal obstacles?*

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**KEYWORDS** precarious employment, workers rights, collective bargaining, role of ILO, trade union attitude, labour legislation, comment, definition, developed countries, developing countries

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The debate on precariousness and its intimate relationship with “flexible” work arrangements or “non-standard” work is not new; many commentators have been following the trend over the last two decades and reporting on how it is affecting not only many people’s jobs but also their living conditions (see for example Rodgers and Rodgers, 1989; and more recently Vosko, 2010 and Standing, 2011).

The ongoing economic crisis, however, has fuelled demands from employers among others to accelerate and increase measures to implement flexible working conditions.<sup>1</sup> This is in fact already happening in a number of countries where new legislation relaxing labour market regulation has been enacted as a countermeasure to the crisis. For example in Greece, under Law 3899 of 2010, the maximum duration of short-term work was increased by up to nine months per calendar year (from six); in Romania, Law No. 40/2011 amending the Labour Code now provides for a maximum duration of the probation period of 90 days for operational positions and 120 days for managerial positions (up from 30 and 90 days, respectively); in Slovakia, the new Labour Code passed on 13 July 2011 increases the maximum number of successive fixed-term contracts from two to three, the maximum duration for a single fixed-term contract from two to three years, and the maximum cumulated duration of successive fixed-term contracts from two to three years; in Poland, the Anti-Crisis Act passed in 2010 states that the number of successive fixed-term contracts is unlimited, provided that the total duration does not exceed 24 months; in the Netherlands, the Act of 30 June 2010 makes it possible to conclude four successive fixed-term contracts with employees up to the age of 27 years old (up from three such contracts); and more recently Spain, where by Royal Law-Decree 14/2011 the Government suspended the limitation on the use of temporary contracts until December 2013 (before, its duration could not exceed 24 months in a 30-month period).

There is a tangible risk that precariousness will rise in the coming years as a result of such measures. In this scenario, collective bargaining can be seen as an alternative in ameliorating the conditions of workers, especially those most at risk of falling into precariousness – women and young adults. Assuming that collective bargaining is the main gateway to accessing decent working conditions and other benefits (see ILO, 2009, p. 18), and is also in many places the most common method of determining pay (European Parliament, 2010, para. Q), it is increasingly emerging as a powerful labour market institution that can assist in the reduction of the gap between those in “standard” (permanent, full-time) employment and those hired on a “non-standard” basis. However, access to collective bargaining is full of obstacles

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1. For example, at the recent Tripartite Meeting of Experts to Examine the Termination of Employment Convention (No. 158) and Recommendation (No. 166), held at the ILO on 18–21 April 2011, the Employers’ Group requested the abrogation of Convention No. 158, mainly on the basis of lack of “flexibility”.

and challenges both in law and in practice, hindering the capacity of such workers to avail themselves of this right.

This article focuses on these obstacles from a legal perspective, with the aim of identifying how such obstacles restrict access to collective bargaining. As a starting point it briefly addresses two questions: who are the “workers in precarious employment” and who has the right to bargain collectively? These questions aim to delimit the boundaries of precarious work and to consider which workers can be legally or statutorily excluded from the right to collective bargaining. The answers will be extracted from the relevant literature and the standards developed within the ILO, respectively.

Once this framework has been set, a menu of the most common legislative obstacles that prevent workers from accessing collective bargaining will be presented, focusing on those exclusions that may particularly affect workers in precarious situations. Finally, some suggestions to tackle these obstacles will be offered. The article, despite its acknowledged limitations, intends to provide a contribution to the present debate on precarious work.

### Who are the “workers in precarious situations”?

The definition or scope of “precarious work” has been extensively discussed. However, from a legislative angle the identification of “precarious workers” or “workers in precarious situations” is not an easy task. For instance, from a strictly legal point of view, precarious work does not fall within any group or category when contrasted with the different classifications of occupations, status of employment, or economic activity, and for this reason legislation does not refer to workers performing this category of work as such.<sup>2</sup> The absence of a legal definition or of legal references to precarious work is noteworthy, because so far the void has been filled by the work of academics and policy-makers who have drawn broad boundaries for defining it. In addition, the definitions vary depending on factors such as the labour market as well as political and social settings, which usually makes it difficult to match the term with specific groups of workers.

From a trade union perspective, for instance, precarious work is particularly correlated with work arrangements that deviate from the standard employment relationship and are characterized by the absence of regular, full-time, employee-employer obligations (see UNI, 2010; IUF, 2006; BWI, 2010; and Rasell and Appelbaum, 1998). These work arrangements include

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2. See generally the *International Standard Classification of Occupations* (ISCO-08), the *International Classification of Status in Employment* (ICSE-93) (ILO, 1993), and the *International Standard Industrial Classification of all Economic Activities* (ISIC Rev. 4) (United Nations, 2008). Many countries adopt their national classification systems based on these international standards.

part-time, fixed-term and temporary work in their many shapes and combinations, including some forms of self-employment (employment status).

Others concur, but also suggest that precariousness goes beyond the different types of work arrangements to include situations where the main features of precarious work rest on conditions such as insecurity or uncertainty at work, coupled with low income and limited or lack of social benefits and statutory entitlements (Vosko, 2010; Standing, 2011). As a result, some forms of standard employment may also be precarious if they present a mixture of these characteristics. Applying these criteria, some definitions also include irregular workers (Rubery, 1989) and workers in the informal economy (Sylos-Labini, 1964) within the scope of workers in precarious situations. Thus, the identification of such workers can be complex, since it is to be expected that many groups of workers, irrespective of work arrangement or status, may experience some degree of precariousness if they are affected by some of the factors referred above.

Since it is not possible here to discuss all categories of workers, this article will concentrate on exclusions that especially affect workers in the informal economy, as well as those in a non-standard employment relationship and the self-employed.

### Who has the right to collective bargaining?

At the heart of the ILO values and mandate are the rights and principles concerning freedom of association and collective bargaining. Referred to in the ILO Constitution and the 1998 Declaration on the Fundamental Principles and Rights at Work, they are developed in the Conventions and Recommendations adopted by the International Labour Conference, particularly in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).<sup>3</sup> Convention No. 87 essentially provides for the right of workers (and employers) to establish and

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3. Other ILO Conventions and Recommendations that complete the *corpus iuris* on freedom of association and collective bargaining include the Right of Association (Agriculture) Convention, 1921 (No. 11); the Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84); the Collective Agreements Recommendation, 1951 (No. 91); the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92); the Cooperation at the Level of the Undertaking Recommendation, 1952 (No. 94); the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113); the Communications within the Undertaking Recommendation, 1967 (No. 129); the Examination of Grievances Recommendation, 1967 (No. 130); the Workers' Representatives Convention, 1971 (No. 135) and Recommendation (No. 143); the Rural Workers' Organizations Convention, 1975 (No. 141) and Recommendation (No. 149); the Labour Relations (Public Service) Convention, 1978 (No. 151) and Recommendation (No. 159); and the Collective Bargaining Convention, 1981 (No. 154) and Recommendation (No. 163).

join organizations of their own choosing without any previous authorization from public authorities (Article 2), while Convention No. 98 focuses on relations between workers and employers and their respective organizations and supports the regulation of terms and conditions of employment by means of collective agreements, requiring member States to adopt appropriate measures that encourage and promote the full development and utilization of machinery for voluntary negotiation (Article 4).

It is significant for the following discussion that these two ILO instruments, which enjoy near-universal support,<sup>4</sup> apply in principle to all workers without distinction whatsoever, with the sole exception of members of the armed forces and the police (Article 8 in Convention No. 87 and Article 5(1) in Convention No. 98), and public servants engaged in the administration of the State (Convention No. 98, Article 6).

The supervisory mechanisms of the ILO, devised in parallel to its standard-setting activity, have also played an important role in clarifying the scope of application of the rights and principles on freedom of association and collective bargaining. In particular, as a result of the monitoring activity of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the complaint-based procedure of the Committee on Freedom of Association (CFA), a solid jurisprudence has been developed through their observations and recommendations when dealing with cases of exclusions, both in law and in practice, in ILO member States. For instance, in relation to workers at risk of precariousness, as early as 1983 the Committee of Experts questioned some countries where home workers, domestic workers, temporary workers or self-employed workers were denied the right to organize, and stated that in view of the fact that “they are not specifically excluded from Convention No. 87, all these categories of workers should naturally be covered by the guarantees afforded by the Convention and should, in particular, have the right to establish and join organisations” (ILO, 1983, para. 98).

More recently, the CFA has also dealt with specific cases involving the exclusion of workers in precarious situations and has recommended that these workers, like any other workers, should enjoy the right to organize and to bargain collectively. For example, when addressing the case of part-time workers, the Committee held that

[w]hile the particular circumstances of the part-time employees concerned [...] may call for differentiated treatment and adjustments as regards the definition of bargaining units, the rules for certification, etc., as well as specific negotiations taking their status and work requirements into account, the Committee fails to see any reason why the principles above on “the

4. By November 2012, Convention No. 87 had 150 ratifications, and Convention No. 98 had 160.

basic rights of association and collective bargaining afforded to all workers should not also apply to part-time employees". (ILO, 2006a, para. 360)

Also, in the case of self-employed workers, the Committee recalled that

[t]he criterion for determining the persons covered [...] is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize. (ILO, 2001, para. 416)

In sum, all workers, with the exception of members of the armed forces and the police and public servants engaged in the administration of the State, should be afforded the basic and fundamental rights to freedom of association and collective bargaining, irrespective of the work arrangements or status of employment. While these rights enjoy a wide consensus at international level, national legislation in a number of cases still deviates from them, raising barriers that impede access to these fundamental rights. The next part of this article provides an overview of some of the most common legislative obstacles in this regard.

## Exclusion of precarious workers from collective bargaining

### Explicit exclusions

The most clear-cut obstacle preventing access to collective bargaining is the explicit exclusion of workers from labour law, be it by category, status or form of employment. As a general rule, this not only means that the workers in question are prevented from the right to collective bargaining, but also that in most cases they are not afforded any of the rights provided for in labour law.

Although less and less common, provisions still exist in some national legislation that, for instance, specifically exclude domestic or health-care workers, teachers, self-employed workers, or workers hired on temporary basis from the application of labour law. This is the case in Canada, where in a number of provinces, such as Alberta, New Brunswick, and Nova Scotia, domestic workers are excluded from labour legislation. The same occurs with self-employed workers, who are specifically excluded in the provinces of Alberta, Ontario, and Prince Edward Island.<sup>5</sup> Other countries excluding both domestic

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5. In Canada, domestic workers are excluded in Alberta under the Labour Relations Code 1988, Section 4(2)(f); in New Brunswick under the Industrial Relations Act 1971, Section 1(1); and in Nova Scotia under the General Labour Standards Code Regulations,

workers and self-employed workers include the Republic of Korea and the United States (at federal level).<sup>6</sup> In addition, domestic workers are commonly left out of labour legislation in Middle East countries such as Jordan, Kuwait, Qatar and the Syrian Arab Republic, and also in countries from other regions such as Bangladesh, Morocco, Trinidad and Tobago and Turkey.<sup>7</sup>

Bangladesh and Ethiopia also exclude teachers or persons involved in education and training and persons working as health carers,<sup>8</sup> while workers under temporary arrangements (“casual workers”) are left out in Bangladesh, Qatar and the Syrian Arab Republic.<sup>9</sup>

Unless a special piece of legislation regulates the activities of these categories of workers (as is usually the case of public employees, who generally are afforded the same (not very often) or some of the rights afforded to other workers through specific statutes), exclusion from the protection afforded by the labour code is complete. In this regard, there have been some developments in a number of countries, where special statutes have been enacted with the aim of addressing the particular situation of these categories of workers. This is the case in the United States, where Domestic Workers Bills of Rights were adopted in the States of New York and California in 2010 and 2011 respectively, in many respects providing protection equivalent to that enjoyed by other workers.

More rarely, labour legislation excludes certain categories of workers from the right to collective bargaining alone. Legislation providing such type of restrictions were in force in Canada until not long ago, where for instance the Health and Social Services Delivery Improvement Act (also known as Bill 29), passed in 2002 in the province of British Columbia, excluded some sub-categories of health-care workers from access to collective bargaining. However, in a decision rendered in 2007, the Supreme Court of Canada ruled that such a prohibition was against the Canadian Charter of Rights and Freedoms.<sup>10</sup> In addition, for many years the Colleges Collective Bargaining

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Section 2(1). Self-employed workers are excluded in Alberta under the Labour Relations Code 1988, Section 1(1); in Ontario under the Labour Relations Act 1995, Section 1(3); and on Prince Edward Island under the Labour Act, Section 7(2).

6. Republic of Korea: Trade Union and Labour Relations Act, No. 5310 (as amended in 2010), Section 2(4); United States: National Labor Relations Act, Section 2(3).

7. Jordan: Labour Code, Article 3; Kuwait: Labour Code 2010, Article 5; Qatar: Labour Law 2004, Article 3; Syrian Arab Republic: Labour Code 2010, Article 4; Bangladesh: Labour Act 2006, Section 1(4); Morocco: Labour Code, Law No. 65-99, Article 4; Trinidad and Tobago: Industrial Relations Act, Section 2(3)(f); Turkey: Labour Law, No. 4857, Article 4.

8. Bangladesh: Labour Act 2006, Section 1(4); Ethiopia: Proclamation No. 377/2003, Section 3(2).

9. Bangladesh: Labour Act 2006, Section 1(4); Qatar: Labour Law 2004, Article 3; Syria: Labour Code 2010, Article 4.

10. *Health Care Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2 S.C.R. 391, 2007 SCC 27. For a review of the Supreme Court decision, see Etherington (2009).

Act in the province of Ontario prohibited teachers and staff working on a part-time and short-time basis from participating in collective bargaining units. As a result of the Supreme Court decision, the law was amended in 2008 to remove such restrictions.

Although the explicit exclusion of some specific categories of workers seems not to be prevalent in labour legislation, domestic workers deserve special attention – first, because in the list of excluded categories such workers appear frequently, and second, because nowadays there is a wide consensus that domestic work not only involves tasks related to housekeeping, but also many other types of work carried out in or for the household and that are linked to precarious work, such as health care, nursing and others (ILO, 2010). Such provisions therefore have the potential to exclude many more workers than was probably intended.

### Definitions of “employee”

Beyond the examples mentioned above, labour legislation for the most part does not explicitly exclude any other category of workers from its application. However, legislation generally contains a legal definition of the term “employee”. While these definitions may vary from country to country, depending on the context and legal framework, they all share a feature that may prove as effective as the exclusions mentioned above: if workers do not fit the definition of “employee” they will not be entitled to any rights under labour law (such as the right not to be unfairly dismissed, or to pensions), and their contract will not be a contract of employment but, for instance, a contract for the provision of services. The same applies in those countries where the distinction between “employee” and “self-employed” worker is based on case law.

In either case, to determine whether a worker is an “employee” or a “self-employed” worker has always been a complex issue. Rivers of ink (or bytes – a Google search delivers around 280,000,000 results in English alone) have been spilled in the search for an answer. For the purpose of this article, it must suffice to say that the tests developed in this regard have usually adopted a distinction between the two statuses based on (economic) dependency and subordination, where “employees” are characterized by these two factors together (see ILO, 2006b); however, such tests are increasingly using a larger set of criteria, in line with the ILO Employment Relationship Recommendation, 2006 (No. 198).

While there is an ongoing debate on whether the concept of “employee” is still valid and necessary (see Davidov, 2006), the truth is that recourse to “independent contractors” or misclassification of workers as “self-employed” has been used (and sometimes abused) by some employers to avoid their responsibilities, as shown by Stone (2006a).



In addressing this issue, a number of measures have been taken in order to afford equal, similar, or some protection to “self-employed” workers in precarious situations. These have included the creation of specific intermediate categories between the classic “employee”/“self-employed” distinction, and/or the extension to self-employed workers, through legislative action, of the protection usually afforded to employees. For instance, in Spain, the Own-account Workers Act of 2007 (*Estatuto del Trabajador Autónomo*), among other measures, extends social protection coverage to “self-employed” workers (Article 23 et seq.) and grants up to 18 days annual leave to those considered “economically dependent self-employed workers” (Article 14(1)). In the United Kingdom, the broad term “worker”, which comprises both employees and self-employed workers, has also been introduced in a number of labour Acts (for example, the Employment Rights Act 1996, Section 230(3) and the National Minimum Wage Act 1998, Section 54(3)) with the purpose of improving the protection of those who do not meet the definition of “employee”.

The limitation of the scope of labour laws to “employees” affects the right to collective bargaining as well. In cases where “self-employed” workers enjoy some form of associational right and collective representation (sometimes within the orbit of employers’ associations, since such workers may also be considered entrepreneurs), these do not always translate into a right of freedom of association and collective bargaining. Even in cases where both “employees” and “self-employed” workers within the same (or similar) sector of activity have managed to join the same trade union, this does not imply that they can bargain collectively together, or that the trade union can negotiate on their behalf. For instance, in Canada (Ontario) cases have been reported where “self-employed” workers had first to obtain recognition from the courts of their status of “employees” before being allowed to conclude collective agreements with their employers (Ouellet-Poulin, 2009). In the Republic of Korea, trade unions representing both “employees” and “self-employed” workers are simply banned, according to the Trade Union and Labor Relations Act, No. 5310 (as amended in 2010), Article 2(4)(d).

At the European Union (EU) level the situation varies from country to country. A detailed report on industrial relations and working conditions of “self-employed” workers indicates that while they can be members of trade unions (together or not with “employees”), comparatively few collective agreements have been concluded (Pedersini and Coletto, 2009). For instance in Germany, the Collective Agreement Act allows “self-employed” workers to conclude collective agreements when 50 per cent of their income – 30 per cent in the case of those in the media sector – derives from a single client/employer. The same report indicates that in the United Kingdom and Denmark, trade unions in the media, culture and entertainment sectors can negotiate collective agreements that cover “self-employed” workers with single employers or employers’ associations (Denmark only).

However, in other countries such as Ireland and Germany (for self-employed workers not included in the 50/30 per cent rule), collective agreements concluded by “self-employed” workers may trigger proceedings under competition law, as further explained below.

Hence, despite the trend to afford better statutory protection to “self-employed” workers, the developments with respect to collective bargaining seem to be very limited so far.

### Identifying the “employer”

The identification of the employer for the purposes of labour-related responsibilities has been a difficult task in past decades and continues to be so today. This is largely attributed, on the one hand, to the fragmentation of what was once the vertically integrated enterprise into other different entities such as subcontractors, franchisers, employment agencies, and, on the other, to the fact that legislation in general has not kept pace with these economic/organizational changes. Usually it continues to equate this complex multilateral setting with a plain bilateral relationship between a worker and an employer, where only the employer with whom the worker has a contract is responsible for the employment-related obligations (Fudge, 2006).

It is argued that the main risk associated with this multilateral setting – sometimes also referred to as a “triangular” or “tripartite” employment relationship – is basically that employers can use it to avoid the application of the law by shifting the inherent responsibilities derived from the employment relationship to third parties, where the risk is based on the assumption that temporary agencies and subcontractors are more likely to become insolvent (see Davidov, 2004). Therefore, workers employed by third parties who are in a commercial relationship with the “user” employer may lose all or some of their rights as a result of their “formal” employer’s insolvency.

To address this issue, national legislations have adopted a variety of approaches when attributing the responsibility derived from employment obligations. First, against the current trend to grant the status of employers to temporary work agencies,<sup>11</sup> legislation in countries such as Paraguay and Dominican Republic provides that an employer is the person or entity for which the work is performed, while those who recruit workers for the benefit of another person or entity are considered as mere intermediaries. Therefore, all the responsibilities derived from the employment relationship rest with the user of the labour force.<sup>12</sup>

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11. See for example the ILO Private Employment Agencies Convention, 1997 (No. 181); and EU Directive 2008/104/EC, 19 November 2008, on Temporary Agency Work.

12. Paraguay: Labour Code, Article 25; Dominican Republic: Labour Code, Article 7.

Where it is recognized that both the user and the provider of workers have the status of employers, legislation adopts different formulas to allocate the responsibility. In the case of workers placed by temporary work agencies, legislation in Croatia,<sup>13</sup> for instance, introduced a shared-responsibility rule by providing that the temporary work agency is responsible for the pecuniary obligations while the “user” employer will be considered as the employer with regard to obligations such as the protection of health and occupational safety and health. Regarding workers of subcontractors, legislation in Canada (Quebec) and Mexico establishes that the “user” employer is jointly and severally responsible for them with regard to pecuniary obligations.<sup>14</sup>

The particular difficulty with respect to collective bargaining is not whether the workers have the right/access to it, but mainly who they can/have the right to negotiate with. The importance of this issue rests on the fact that some workers may get a better salary and obtain a better package of benefits than others, depending on whether they are workers of the “user” employer or of the agency/subcontractor, no matter whether they work side by side and carry out work of equal or similar characteristics.

In this case too, the approaches adopted in different jurisdictions have been divergent. At the EU level, for instance, Arrowsmith (2009) indicates that there is no shortage of formal regulatory provisions and that workers placed by temporary work agencies are free to join the relevant trade union for the sector, occupation or workplace in which they are placed. On the contrary, a CFA report (ILO, 2011) concerning the Republic of Korea indicates that legislation does not recognize the “user” employer as a party to the employment relationship when it comes to subcontracted workers, which means that the subcontractor is the sole employer of the subcontracted workers and therefore the only one to negotiate with. In the United States, the National Labor Relations Board has adopted a mixed approach. Under the National Labor Relations Act, workers placed by temporary work agencies are able to organize in the same bargaining unit with the permanent workers of the “user” employer, subject to the consent of both the “user” employer and the temporary work agency providing the workers.<sup>15</sup>

Since it is not possible to expect a “one size fits all” formula applicable in all jurisdictions, clear regulations that determine and allocate the respective responsibilities of the employer in relation to collective bargaining in a triangular setting are needed. Such regulations should envisage mechanisms

13. Croatia: Labour Act 2009, Articles 29(5) and 30(1), respectively.

14. Canada: Labour Standards Act, Section 95; Mexico: Federal Labour Code (last amended 2006), Article 15.

15. *Oakwood Care Center and N&W Agency*, 343 NLRB No. 76 (2004). For an overview on how atypical workers are protected (or not) under different employment laws in the United States, see Stone (2006b).

allowing all workers who perform work of the same nature to obtain equal benefits, irrespective of whether they are employed by the “user” employer or the “formal” employer.

## Competition law

Although the apparent conflict between collective bargaining and competition law is not necessarily new, competition authorities have been particularly active lately, targeting some categories of workers which have concluded collective agreements on the grounds that they restrict competition.

The essential purpose which competition law is intended to serve is to protect the public from being deceived by (typically) large companies. To achieve this, competition laws prohibit agreements which distort competition. There are various types of agreements that have this potential; the most obvious are those aimed at price fixing – agreements made between manufacturers of goods that set the price at which each of them will sell their goods.

While collective agreements are not completely immune to the rules of competition law,<sup>16</sup> it is widely acknowledged that they are usually concluded in good faith, that they deal with subjects such as wages and working conditions, are in principle legal and therefore fall outside the scope of competition law (Bruun and Hellsten, 2000). However, there are no clear statutory exemptions removing collective bargaining from the scope of competition law, so it has been mostly a matter for the courts to harmonize this conflicting relationship. At the EU level, for example, the exemption was supported by the decisions of the European Court of Justice (ECJ) in the *Albany*, *Brentjens* and *Drijvende Bokken* cases. For instance, in *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie*, (1999) ECR 5751, the ECJ held that:

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty [now Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)] when seeking jointly to adopt measures to improve conditions of work and employment.

It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded

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16. See for example *Ayuntamiento de Torrelavega c/ Comisiones Obreras de Cantabria (CC.OO.) y la Asociación de Servicios de Ayuda a Domicilio de Cantabria (ASADC)*, Exp. 607/2006 (where the collective agreement for the home-care sector also stipulated the minimum fees that companies should charge their clients for the services rendered).

in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty. (paras 59–60)

Still, these decisions have been subject to a narrow interpretation by the competition authorities of some EU Member States, where collective agreements concluded especially (but not solely) in the media, culture and entertainment sector, and which intend to set a minimum remuneration for “self-employed” workers, have been under attack on the grounds that these are agreements between “undertakings” aimed at “price fixing”.

It can then be argued that it would be sufficient to acquire the status of “employee” to avoid the proceedings conducted by competition authorities. However, the issue of the employment relationship is crucial for these categories of workers, since where there is “work for hire” legislation in force (as in Ireland and the United Kingdom, for instance) the work undertaken in an employer/employee relationship means that they would automatically assign their intellectual property rights to the employer. Therefore, it is important for workers in these sectors to retain their “self-employed” status.

To clarify the point, it is useful to address two recent cases in more detail. First, in Ireland, by a Decision of the Competition Authority (No. E/04/002) of 31 August 2004, the collective agreement concluded between Irish Actors’ Equity (Equity) and the Institute of Advertising Practitioners in Ireland (IAPI), concerning the terms and conditions under which advertising agencies will hire actors, was deemed to infringe competition laws.

In its decision, the Competition Authority made a distinction between “self-employed independent contractors”, which are subject to competition law, and “employees”, who are not generally subject to these laws (para. 2.10), and examined whether the actors represented by Equity were “self-employed” or “employees”. The Authority considered this issue of paramount importance, since it was of the opinion that “[w]hile perfectly legal [for Equity] to represent employees in collective bargaining with their employers, its trade union mantle cannot exempt its conduct when it acts as a trade association for self-employed independent contractors” (para. 2.12).

The Authority concluded that the actors represented by Equity were “self-employed actors”, based on the following grounds: (i) actors providing advertising services generally are not obliged to work for a single advertising agency; (ii) they may work for several at the same time; (iii) such actors generally do not receive the benefits one usually associates with a contract for labour; for example, they generally do not receive holiday pay, health insurance, maternity leave and the like; (iv) such actors generally do not have employment security; (v) such actors are free to accept or decline a specific piece of work as they see fit; and (vi) actors generally are not thought of as employees of a particular agency (para. 2.16). Accordingly, they were “undertakings” subject to

competition law and – as a result – Equity was an association of undertakings (when it acts on behalf of “self-employed actors”) (para. 2.17).

However, the Competition Authority refrained from commencing enforcement actions (civil and criminal) since prior to the proceedings the parties “agreed” with the Authority’s concerns by signing an undertaking through which they committed not to enter into or implement any agreement that directly or indirectly fixes the fees to be paid to “self-employed” actors in return for services rendered (para. 4.1).

Another case with similar elements also arose in the Netherlands, this time involving orchestral musicians. In 2006, the Dutch Trade Union Federation (FNV) and the Dutch Musicians Union (NTB), on the one hand, and the Association of Foundations Substitutes Dutch Orchestras (VSR), on the other, concluded a collective agreement containing provisions stipulating a minimum rate for musicians’ substitutes, where the substitutes had the status of “independent worker without employees” (self-employed).

The Netherlands Competition Authority (NMA) conducted an (informal) inquiry in this regard and informed the parties that it was of the opinion that a stipulation for a rate for “independent workers without employees” might violate competition law. As a result, in November 2007, the parties decided to give notice of termination of the collective agreement as of August 2008.

In addition, on 5 December 2007, the NMA published *Collective Bargaining Agreement – rate stipulations for self-employed persons and the Dutch Competitive Trading Act* (the Vision Document), a policy document providing legal analysis on the issue under which conditions collective agreement stipulations may violate competition law. In the Vision Document, the NMA concluded that collective agreement stipulations for rates for self-employed persons do not fall outside the meaning of Article 81(1) of the EC Treaty (now Article 101(1) of the TFEU), and therefore the parties in such agreements would be liable under competition law (see NMA, 2007).

The FNV reviewed its position and later filed an action seeking – among other things – that the judiciary declare that collective agreement stipulations setting minimum rates for “independent workers without employees” are exempted of competition law, and that the publication by the NMA of the Vision Document was unlawful towards the FNV. The Court of First Instance, however, rejected the claims, basically on the grounds that the FNV had failed to demonstrate that the fees stipulated in the agreement directly contributed to the improvement of labour conditions of employees (one of the conditions set forth in *Albany*, *Brentjens* and *Drijvende Bokken* to exempt collective agreements from competition law).<sup>17</sup>

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17. *FNV Kunsten Informatie en Media v De Staat der Nederlanden (Ministerie van Economische Zaken, Nederlandse Mededingingsautoriteit)*, Case 343076/HA ZA 09-2395, para 4.7 (the case is pending on appeal).

Some assumptions can be made from these two cases. First, the competition authorities have targeted the collective agreements concluded by or on behalf of “self-employed” workers that set their remuneration (fees, rates), in the conviction that this amounts to an agreement between “undertakings” aimed at “price fixing”. This, however, does not exclude the possibility that other provisions of collective agreements concluded by or on behalf of “self-employed” workers, for example regulating working time or health coverage, will be applicable. In any case, the competition authorities (and the courts, in the case of the Netherlands) inferred the collective bargaining exemption established in *Albany*, *Brentjens* and *Drijvende Bokken* as applying to “employees” only. But nothing in these decisions suggests that the ECJ had the intention to adopt such a narrow approach. On the contrary, by stating that “agreements concluded in the context of collective negotiations between management and labour [...] by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty”, it is evident that the ECJ had no intention of drawing a line between “employees” and “self-employed” workers, the only condition being that the agreements arise from social dialogue and that they pursue “social policy objectives”.

Second, competition authorities have also adopted a very formalistic approach when assessing the status (“employee”/“self-employed”) of those benefiting from the collective agreements. No thorough analysis has been provided to evaluate the true nature of the (work) relationship between the parties. This, for instance, was done in an earlier case decided by the Competition Appeals Tribunal of Denmark, which found against the competition authority after establishing that the work performed by freelance journalists was of the same nature as that carried out by the permanent staff of media companies, only on casual basis.<sup>18</sup>

Third, even under the assumption that a collective agreement in the conditions described above is an agreement between “undertakings”, the other condition, as set forth in Article 81(1) of the EC Treaty (now Article 101(1) of the TFEU), is that it is aimed at “prevention, restriction or distortion of competition” in the market. It is not clear whether the competition authorities have examined (and proved) whether any of these conditions have been met when conducting their investigations. Moreover, Article 81(3) (now Article 101(3) of the TFEU) established another exception by stating that paragraph (1) may be declared inapplicable, even if an agreement between “undertakings” fulfils the conditions mentioned above, when such agreement (or practice) “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”. Had either of these two proceedings been discussed in more detail, it would perhaps have been

18. See the comments issued by the Danish Competition and Consumer Agency, available at: <http://www.kfst.dk/index.php?id=16242> (in Danish).

possible to assess whether the “social policy objectives” of collective agreements also fit within the “promotion of economic progress” referred to in Article 81(3) of the EC Treaty.<sup>19</sup>

## Conclusions

As anticipated, the review provided in this article is inevitably limited in scope. It addresses only one among the many barriers that workers, and in particular those at risk of precariousness, regularly face with respect to access to collective bargaining – the legal barriers to exercising collective bargaining rights. Despite this limitation, some initial conclusions can be extracted.

Based on the above, it is interesting to note that – at least theoretically – legislation in general does not exclude “precarious” workers from the right to collective bargaining. First, when considering the various forms of employment, an overview of the legislation in force seems to suggest that virtually no country excludes workers from access to collective bargaining based on whether they are in permanent full-time employment or not. This may also be supported by the different attempts to afford equal treatment to part-time, fixed-term and temporary workers through the adoption of specific legislation regulating these types of work arrangements. However, workers in a triangular setting, that is, workers of subcontractors and/or those placed by temporary work agencies, face some impediments given that in a number of cases they are legally prevented from joining the same organizations as those workers employed on permanent basis, and/or cannot negotiate together with the workers of the “user” employer. Whereas several countries have developed clear rules to allocate the responsibility of the employer(s) in a multi-employer setting, more explicit rules are also needed regarding collective bargaining at the workplace. In addition, legislation has yet to develop effective mechanisms that “enable” these workers to enjoy the right of collective bargaining.

Second, with respect to specific categories of workers, the number of countries where labour legislation excludes some of them from its application is very limited. However, consideration should be given to those countries where domestic workers are excluded. As mentioned above, the scope of domestic work has significantly expanded and consequently this activity involves not only housekeeping but also many other types of work carried out in or for the household, such as health care, nursing, babysitting and others. While there

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19. See the answer given by the European Commissioner for Competition to the question of whether there is any provision in European competition law that would prevent freelance journalists from forming a professional association or union to negotiate pay rates and terms and conditions with their employers, where she stated the procedure to be followed to assess whether an agreement that negotiates rates and conditions with the clients of freelance journalists violates Article 81(1) EC [now Article 101(1) of TFEU]. Available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-6260&language=EN>.



is now a wide consensus that domestic workers deserve decent working conditions, as evidenced by the adoption of the Domestic Workers Convention, 2011 (No. 189), this recognition still needs to translate into more concrete actions, such as the adoption of specific rules regulating the activities of domestic workers and – more importantly – rules that also make it possible for them to exercise their right to freedom of association and collective bargaining.

Different to some extent is the situation of the “self-employed”. The distinction between “employee”/“self-employed” worker that exists in almost all legislation usually results in a lack of protection by labour law of those falling outside the scope of its application; this also applies to collective bargaining. There have been some developments with the aim of offering more protection to “self-employed” workers (especially to “economically dependent self-employed workers”), either through the creation of intermediate categories or – in some cases – by adopting a broader definition that extends the coverage also for those qualifying as “workers”, rather than only “employees”. These, however, with some exceptions, have not resulted in a right to bargain collectively as well.

In addition, where “self-employed” workers enjoy some form of associational right and/or collective representation this is not comparable to freedom of association and collective bargaining. For instance, at the EU level, in cases where they have joined trade unions together with “employees”, the intervention of competition authorities has prevented them from concluding collective agreements, or resulted in the termination of those already concluded. While the case law provides for an exception that removes collective bargaining from the scope of competition law, this has been given a narrow interpretation by the competition authorities in the sense that it has only applied to agreements concluded between employers and “employees”. This has affected, in particular, those workers in the media, culture and entertainment sector, for whom the status of “self-employed” worker is essential to retain their intellectual property rights.

Thus, well-defined statutory provisions that clearly exempt collective bargaining from the scope of competition law are needed, and that in addition take into account the special characteristics of workers of some sectors. In the meantime, competition law itself seems to furnish some alternatives by providing for limitations that would exclude its application in cases of collective agreements concluded by “self-employed” workers. These alternatives should be explored and better arguments advanced to repel the proceedings initiated by the competition authorities. This would also contribute to a clarification of the boundaries of competition law for the benefit of workers.

In conclusion, there are a limited number of legal barriers to access by workers in precarious situations to collective bargaining. Most of the obstacles derive from the difficulties in exercising collective bargaining rights in practice. Future research might therefore focus on reviewing the functioning of collective bargaining machinery with a view to identifying the obstacles stemming from the prevalent architecture of industrial relations systems.

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# Precarious work: An international problem

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Precarious work is a social scandal of our times. It is the exact opposite of decent work, as promoted by the ILO. Precarious work is found in both the informal economy and the formal sector. It is a widespread, growing phenomenon of universal scope.

Huge numbers of under-resourced people head out into the streets every day to sell something or other, or to carry out all sorts of tasks for very little pay, as a way of surviving in a situation of widespread unemployment and few productive job openings. Another reason which explains why many people stay in the informal sector is that they have bad memories of poorly paid, monotonous jobs in firms that offered no career prospects. At least informal work provides them with a sense of feeling of freedom, despite the risks. In that sense, the informal sector is the result of both the lack of productive employment and the failure on the part of enterprises to offer respectable, attractive jobs.

So, in many instances, the informal sector is somewhat inevitable, and the measures taken to shrink it, or to improve the conditions of those working in it, do not seem likely to make it disappear.

Alongside the informal workers, ever-increasing numbers of wage-earners employed by private individuals or corporate entities are joining the ranks of the precariously employed. Everywhere, a pattern has been emerging in which a worker elite continues to enjoy “normal” labour conditions, including the rights laid down in the law, while a growing share of the workforce seems to be on the fringes of the law and is wholly or partially excluded from its benefits.

The reality of *dependent* precarious employment reproduces the problems raised in the discussion on the employment relationship, as conducted by the International Labour Conference in 1997, 1998, 2003 and 2006. So in tackling this subject, we need to draw some lessons from that debate. But the problem of precariousness is becoming increasingly broad and diffuse. Precarious employment can exist without but also within a clear employment relationship.

Two characteristics of present-day dependent precarious employment are particularly serious, and can often make it seem an unstoppable phenomenon. One is the ambivalent behaviour of private and public employers who use it as they see fit, on the fringes of legality. The other is the internationalization of the problem, through the action of multinational corporations and the transnationalization of employment. These characteristics run directly counter to the international labour standards and the ILO’s mandate, thus constituting a major challenge. Wherever precarious labour is used and abused, social rights take a back seat.

## The ambiguity of precarious work

A dependent job may be regarded as precarious for a number of reasons. It may be that a person's employment relationship is hidden, disguised by ostensible civil or commercial contracts. As a result, the person's labour rights will vanish into thin air or will simply be denied. It may also happen that an employee ends up in a triangular relationship, under contract to an employer to provide services to a third party, a user, and that this triangular relationship is not adequately protected. As became clear in the ILO discussions on the employment relationship, all sorts of labels are used from time to time in order to hide the labour link between the dependent worker and the public or private employer behind a screen of bogus self-employment. Or else the actual user of the worker's services may access them via a contractor or an employment agency or a real or bogus cooperative. In this way, the employment conditions can be kept below those that the user would have had to provide in the case of a direct contractual relationship with the worker, and there will also be fewer safeguards. Moreover, the responsibilities that the user would have to shoulder if directly employing the worker will instead be passed on to the third party who is serving as the employer.

Precariousness may also reside in the fact that working people are bound, against their wishes, by short-term employment contracts with low pay and poor working conditions, perhaps part time or on an hourly basis, thus keeping them in a situation of deficiency, uncertainty and insecurity as regards their working future. The indiscriminate use of fixed-term employment contracts, which the legislation usually tolerates for specific purposes, may sometimes serve as yet another device for keeping workers, often for long periods of time, in the destabilizing position of being on a contract whose renewal is either impossible or uncertain. This will lead to the creation of a certain population that is accustomed, for want of better alternatives, to hiring itself out for a fixed duration or at a set rate, by the half-day or the hour, without ever managing to consolidate this into a real employment situation.

In this sense, precariousness may also stem from the random way in which the workers hire themselves out – some days on, some days off, with variable hours, sometimes with no advance warning and on very modest pay.

However, this is just a static vision of various alternative kinds of precarious work. The really dramatic part is that in some firms, and indeed whole sectors, as well as in public services, precarious employment is being practised in a systematic and permanent way, with no escape route and no prospect of change. Also, many people have never known any other kind of employment. The situation of workers in New York City's retail trade, a thriving and expanding sector, is highly revealing in this regard, as is that of retail workers right across the United States.

A recent study shows that, in the big stores and national retail chains, these workers earn a mean hourly rate of US\$9.50. The majority of them

are on part-time or temporary contracts, and they are typically called in to work on very short notice if any at all. One in ten of such workers is informed weekly of the hours – maybe 15, maybe 20 – that will be required for that week. For two out of every five workers, the hours of work always or frequently change each week. This employment system, which mainly affects Latino and Black workers, means that many of them face serious difficulties in organizing their lives and attending to their family responsibilities, especially if they are holding down two jobs (as does one in six of these workers). Also, their earnings place them beneath the federal poverty line. Not only is their pay very low, their working hours are also scarce, and if they ever do get above 40 hours a week, one-third of these workers say they are not paid any overtime. Working hours are used as a sales incentive: if you don't sell enough, you don't get the hours, and the rotation is high. Only three in ten workers receive health insurance through their employer, less than half are entitled to sick pay, and many of them in any case prefer not to use this entitlement in case of illness, for fear of problems with the company. This situation has arisen from the sector's adoption of "just in time" planning practices, which enable it to maximize the adjustment of labour costs to demand, through extreme flexibility involving arbitrary changes to working hours and tasks. All of this is to the detriment of the workers, who are required to be available at all times or face the penalties (Luce and Fujita, 2012; see also Greenhouse, 2012; McGrath, 2012).

Another example, drawn from a description of a supermarket run by a multinational corporation, shows what can happen under a dual working conditions scheme, in which one strand is reserved for the company's direct employees and the other for those of its contractors, although the tasks required of them may be identical. The two groups are distinguishable, notably by the colour of their uniforms and other symbols worn, as also by their employment conditions and career structures; on the other hand, they may be required to do the same work. For instance, the checkouts were staffed by direct employees in the morning and indirect employees in the afternoon. So the indirect employees handled the store's busiest times – for less pay. Apart from this unequal pay for work of equal value, there were also complaints of anti-union discrimination in the case of indirect workers, at a time when there was no union presence within the company (Medina, 2007).

### **Precariousness and occupational risks**

Precariousness can crop up in any kind of employment and for any kind of working person, but it mainly affects certain groups, because of their nationhood, race, vocational qualifications, gender, age or social origins. There are precarious jobs in which a large concentration of migrants, or women, or workers coming from impoverished sections of society, has been observed.

In the New York retail sector, for instance, women and black people predominate. They hold mainly low-wage jobs and have to contend with higher barriers than white women in order to move up the ladder and gain equal benefits and pay (Luce and Fujita, 2012, pp. 2, 18). In general, there continues to be a “disproportionate concentration of women in part-time, informal and precarious work” (ILO, 2011a, p. 19).

Likewise, there are dangerous jobs in which precariousness is the rule. The tragedy in Fukushima on 11 March 2011, and the disaster at its nuclear plant, once again drew the world’s attention to the difficult situation of the nuclear maintenance workers employed by contractors.<sup>1</sup> The extremely serious safety and health problem created by the Fukushima nuclear incident provoked various reactions in Europe, where the European Union is proposing to review the state of nuclear sites (EC, 2011). A less well-known aspect of this drama is that the Fukushima site was making intensive use of contract labour and has continued to do so since the incident. Four months later, press reports (such as those in *The Guardian*, 2011a and 2011b; *The Washington Post*, 2011; *Naked Capitalism*, 2011) revealed that hundreds of inexperienced workers were being used by contractors there, and were being paid low wages. Some 9,000 workers are said to have entered the site over that period as part of the attempts to stabilize it. And the company that operates the Fukushima site is still using contract and agency staff at other plants.

Precarious work is a major problem, due to its scale and its extraordinary versatility and complexity, but also because it gives rise to ambivalent behaviour by companies and even by the State.

### Ambivalent attitudes to precarious work

One of the most surprising aspects of present-day labour realities is the growing tendency to employ workers in ways that are at the margins of the labour law or public service provisions, or with a reduced status. It is remarkable that, on the one hand, countries adopt standards to regulate work while, on the other, staff are hired at the margins of these standards, which is often what happens when there is recourse to precarious labour.

This is not just about controversies or individual isolated doubts concerning the existence of employment relationships in certain cases. It is about the systematic behaviour of public and private employers who resort to contract mechanisms for dependent workers who are on the fringes of the labour or public service legislation, or to triangular arrangements that lead to a reduction of the workers’ rights, and perhaps fewer safeguards for those rights,

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1. In 2003, a report to the International Labour Conference referred to the thousands of maintenance workers employed by subcontractors in the French and Slovenian nuclear industries and at the Dounreay nuclear installation in Scotland (ILO, 2003, p. 15).



as these arrangements also mean that the employer's role is transferred to a third person. In other words, this is about a deliberate wish to make labour arrangements in a way that differs from what the standard prescribes. At the very least, this implies an ambivalent attitude to the law and to the workers and the result, of course, is doublespeak. On the one hand, the legitimacy of workers' rights is proclaimed and national standard-setting instruments are adopted or international labour Conventions are ratified. On the other, action is taken at the margins of these standards, as if the labour protection system were being *dismantled*, but also as if violating labour legislation were not perceived as a socially serious wrong.

In the case of multinational corporations, signing up to declarations of principle such as the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, or to codes of conduct based on respect for workers' rights, or indeed to agreements with international workers' organizations for the same purpose, does represent progress in their consideration for workers. Nonetheless, these commitments, even supposing that they are fulfilled, may not be sufficient to prevent precariousness or do away with it. Respect for fundamental rights at work, labour freedom, the prohibition of child labour, equality of employment and vocational opportunity, freedom of association and collective bargaining, even if put into practice, bear no direct relation to the *terms* of a worker's contract, particularly as regards job security, working conditions and remuneration. On the contrary, precarious contract terms may make it impossible for a worker to exercise even the most basic labour rights. The New York study cited above (Luce, 2012) was based on interviews with non-union workers. Their working conditions, and the sometimes dramatic sacrifices they make in order to preserve their job opportunities, make it unthinkable that they could exercise their freedom to associate and bargain collectively.

All sorts of reasons are given to justify this practice of denying workers the rights attached to an employment relationship or of according them only a reduced status. Private firms cite the demands of new organizational structures, technological change, competencies and risks as valid grounds for handling the employment of workers within a context of "productive decentralization" and varying contractual commitments, whether embodied in labour contracts or not, so that they do not place a significant burden on the enterprise.

In public administrations, which have been permeated by similar management techniques, and possibly assisted by private companies or advised by international financial organizations, public spending adjustments and budget constraints have been the foreground considerations. But another underlying influence has been the quest for a way of handling employment without the restrictions traditionally imposed by labour law and public service regulations, as well as the growing privatization of sectors and services. It is surprising how public administrations in some States are being filled up

with staff who are artificially put on fees-based contracts, as though they were self-employed, or who are sent into the public services by private firms which are thus performing tasks that are inherently those of the administration, or who come from bogus cooperatives – the very ones specifically singled out by an international labour Recommendation.<sup>2</sup>

Sometimes, though, there is not even any attempt to justify precarious staffing contracts. The strategy is being taken forward in a seemingly inexorable manner, with no turning back – because, so it is said, that’s just the way we work these days.<sup>3</sup> This pattern of behaviour is being imposed as though the standards protecting workers did not exist, or as if they were voluntary and optional and could, on occasion, be set aside.

### **The internationalization of precariousness: Multinational corporations and transnational employment**

The seriousness of employment precariousness has grown, as it has turned into a universal phenomenon. Moreover, it has in a sense been internationalized by the action of multinational corporations and labour mobility across borders.

All over the world, the multinationals have imposed a way of acting and producing that is staggeringly uniform, and which ultimately tends to generate precarious jobs. Often, these companies act locally via other firms, on the basis of various contractual arrangements. As far as the workers are concerned, this typically leads to the establishment of triangular relationships linking the transnational enterprise, a local enterprise and that firm’s workers. The labour contracts that result from these agreements between companies will in many cases tend to be of limited duration and their renewal will be uncertain. They may also establish substandard working conditions and inadequate labour rights. The precariousness or dynamism of the commercial relations between a multinational and an allied firm may be particularly intense when the business between the two of them supposedly consists of the purchase and sale of goods, as does happen with major “brands”. In such cases, the multinational draws up “orders”, for which various contractors then compete, sometimes internationally.

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2. Promotion of Cooperatives Recommendation, 2002 (No.193): “National policies should notably: (...) ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers’ rights, by ensuring that labour legislation is applied in all enterprises.” (para. 8.1).

3. “Many of the assumptions about society that we take for granted are based on the notion that relatively stable employment relationships are the norm. When will our thinking catch up with the new reality?” (McGrath, 2012).

The Chinese electronics industry is one example of the massive creation of precarious employment in order to satisfy demand from multinationals in the form of successive “purchases” or “sales”. According to a report on the situation of the more than 200,000 employees working for ten producers in this sector, one of which employs more than 47,000 workers, the brand owners contract up to 75 per cent of the manufacture of electronic goods out to numerous factories abroad (China Labor Watch, 2012). To that end, they place orders with various different supplier factories and get them to compete with each other. The price paid governs the factory’s profit margin and the workers’ low wages. Moreover, the international chain contracting process makes it possible to circumvent strict labour legislation and use cheap labour in developing countries, given the lack of any system of supervision and monitoring across the whole of this process.

The report mentions that the Chinese electronics industry has recently drawn public attention due to a series of tragic events that have hit its workers, including an explosion that caused deaths and injuries and the suicides of a number of workers.

The report also flags serious violations of labour legislation and codes of conduct in that industry. Overtime of 36 to 160 hours per month is systematically required and the workers have to accept this, due to their very low wages. Work rates are extremely intense and are governed by high daily production quotas. Subtle forms of discrimination result in employment priority going to the youngest, healthiest candidates. There are non-standard employment contracts, and mistakes made at work can lead to sanctions and harassment. Serious difficulties face anyone who wants to officially resign from these jobs. There have also reportedly been fatal accidents and cases of suicide, as well as forced labour practices and irregularities in the workers’ contracts.

An ILO study (Better Work, 2010) had already made a critical appraisal of the labour situation in the electronics sector as a whole. It reported that labour relations in this sector are notably indirect, established as they are through agencies, contracting firms or temporary employment. Labour law is very imperfectly applied in this industry, in which women and migrant workers are the key groups and inappropriate use is made of the employment of adolescents, including excessive use of apprenticeship schemes and vocational training.

Another example of precarious employment generated by multinational corporations, through triangular relationships or relationships that have been given a commercial character, is that of Coca Cola in Colombia. An ILO report<sup>4</sup> shows how, in the course of just a few years, the operational processes

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4. The report (“Evaluation mission on Coca-Cola bottling plants in Colombia”), dated 3 October 2008, results from an ILO evaluation mission which looked at conditions of work and labour relations in certain Coca-Cola bottling plants in Colombia, at the request of Coca-Cola management and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF).

(packaging, shipment, distribution, pre-sales and sales) and certain maintenance engineering services, which used to be handled by workers employed directly by the company, are now performed by people who, technically, are not regarded as its own employees, but rather as agency or contract staff or as self-employed workers. This set-up has become common in industry, in this and other countries. In other words, the company itself used to take on all the workers it needed for its business, but now there are direct workers and indirect workers in the firm, with different types of links and different working conditions.

The internationalization of precarious employment can also be seen from the perspective of the person who provides services in another country, and here the figure of the migrant comes naturally to mind. These days, at least three situations can be distinguished that deserve to be studied in depth.

The first is the case of the person who provides services in one or several countries other than his/her country of residence, with or without travelling. Such people either work in enterprises located abroad or visit clients or are engaged in other activities there, or else they telework by phone or online, possibly as homeworkers. The second situation is that of the person who provides services for a contractor company or an employment agency that is active in a number of countries, and for this reason the person has to go abroad in order to work for third parties. And the third consists in working abroad within the framework of a cooperation agreement between two or more countries or with an international body. This third hypothesis could, for example, apply to the services provided by Cuban workers on mission in various countries. There is also the alleged situation of the North Koreans working in a firm located in Mongolia, where they produce garments labelled “Designed in Scotland” and sold by a British retail chain. The workers reportedly receive board and lodging, but their wages are paid to the Government. This aspect of the affair has, however, been denied by the company for which the garments are made. The same report alleges that there are other groups of North Koreans working in Mongolia, on premises controlled by officials of their government (Ostrovsky and Jones, 2011).

Under all three hypotheses, a number of questions can be asked. For instance, which national law is applicable to a particular case? Is the person in a dependent employment relationship or not? How can respect for the person’s labour rights be achieved – particularly the fundamental ones? Also, access to the labour inspectorate or the labour courts could be more difficult for workers in such cases than for others.

Systematic recourse to precarious forms of employment as a way of reducing staff costs has not prevented the great crisis now faced by many countries, including developed ones. This will in turn lead to a worsening of precariousness.

On the one hand, labour precariousness leads to growing social dissatisfaction, and it is not unconnected with the recent great social conflicts. It

does not produce happiness. It has certainly not prevented the disappearance of many firms amidst the unbridled competition of our times. And it has been devastating for the trade union movement. On the other hand, precariousness as a strategy appears less and less compatible with labour protection, as established by law, as it seems to create a situation of ambivalence that is legally unsustainable. The precarious forms of employment, used as a strategy, look very much like treating labour as a commodity, and they could lead to a form of dismantlement of labour legislation. This legislation is not actually being touched, and in some cases it is even being improved. But for many workers it is just a museum piece that sits prettily in its glass case while, in practice, forms of work are being accepted to which it applies as little as possible.

### International action against precariousness

Precarious employment at the service of corporate entities, the kind generated by the multinationals, as well as the unprotected services provided at the transnational level, are serious phenomena of such size and complexity that they seem impossible for States to control on their own through purely domestic policies. What is lacking is a drive to dialogue with States to persuade them to avoid these types of jobs in their administrations, to promote bi-national or regional agreements that protect workers abroad and to secure decent employment policies from the multinational corporations. The implementation of this drive represents a formidable challenge for the ILO.

### The standard-setting dimension

The International Labour Conference has in recent years adopted instruments focusing on groups of workers who are particularly in need of protection, such as the Work in Fishing Convention, 2007 (No. 188), and the Domestic Workers Convention, 2011 (No. 189).

For its part, the Employment Relationship Recommendation, 2006 (No. 198), opens up possibilities for clarifying employment relationships at the transnational level as well as within countries, and this is an important step forward against employment precariousness. Under this Recommendation, States are to formulate and apply a policy that makes it possible, when an employment relationship exists, to know who the employer is, what the worker's rights are and who is to be held accountable for them, especially in triangular relationships consisting of a worker, an employer and a user. This policy should combat the concealment of employment relationships. States should also establish or strengthen mechanisms that facilitate action by workers in defence of their rights deriving from the employment

relationship. The Recommendation pays particular attention to the most vulnerable workers. But apart from drawing up, implementing and following up on this policy, the cooperation of the most representative employers' and workers' organizations should be secured. The ultimate aim of the Recommendation is that workers should be able to seek wage employment freely and with the appropriate protection or engage in self-employment if they prefer. And that entrepreneurs or anyone else needing paid services from a person should provide that person with a contract in the form that best matches the person's activity, but in any and every case respecting the law, avoiding deceit and abiding by the rights of the person with whom the contract is signed. If this is adhered to, nobody should lose out.

This message from the Recommendation has been picked up both internationally and in a number of countries.

Within the ILO itself, the Declaration on Social Justice for a Fair Globalization, adopted in 2008, notes that global economic integration has confronted many countries and sectors with challenges which, among other problems, relate to increases both in unprotected labour and in the informal economy. It goes on to emphasize that, in the global context, the importance of the employment relationship should be recognized, as it is a means of ensuring that workers are legally protected. It stresses that social dialogue and tripartism are the most appropriate means of making labour law and institutions effective, especially as regards recognition of the employment relationship (Preamble, and para. I.A(iii)).

The Global Jobs Pact of 2009 includes, in its list of the ILO instruments relevant to its aims, those concerning the employment relationship. For its part, the Domestic Workers Convention, 2011 (No. 189), mentioned above, cites Recommendation No. 198 as one of the instruments that are particularly relevant for these workers. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977,<sup>5</sup> which is very important to the aims analysed here, is currently interpreted with reference to Recommendation No. 198.<sup>6</sup>

Outside of the ILO, two European texts point to the ideas contained in the Recommendation and call for it to be promoted in the EU Member States: the Green Paper on modernizing labour law (EC, 2006), and the European Parliament's 2007 resolution on this proposal.

The Green Paper stresses the need to approach workers' employment protection not so much from the point of view of a specific job but rather

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5. The Declaration was adopted by the Governing Body of the International Labour Office at its 204th session (Geneva, November 1977), and in amended versions at its 279th (November 2000) and 295th (March 2006) sessions. See also ILO (2011b).

6. The subject of the employment relationship is also addressed, in line with the spirit of the Recommendation, by monitoring bodies such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA).

by taking account of the worker's career path and possible transition from one job to another, whether through dependent employment or through self-employment. The Paper welcomes the adoption of the Recommendation and asks: if "greater clarity" is needed in Member States' "legal definitions of employment and self-employment" in order to "facilitate *bona fide* transitions from employment to self-employment and *vice versa*"; if there is a need "for a 'floor of rights' dealing with the working conditions of all workers", regardless of the form of their work contract; if the responsibilities of the different parties within triangular relationships should be clarified to determine who bears the responsibility for labour rights; if there is a need to clarify "the employment status of temporary agency workers"; and how the employment rights of workers operating in a transnational context, particularly border workers, can be assured throughout the Community. In this regard, the Green Paper asks whether there is "a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work" (EC, 2006, pp. 12–14 and note 32).

Through its consultation, the Commission demonstrated the need for better cooperation, greater clarity or quite simply more and better information and analysis in fields such as "the prevention and combating of undeclared work, especially in cross-border situations; (...) the interaction between labour law and social protection rules in support of effective employment transitions and sustainable social protection systems; the clarification of the nature of the employment relationship to promote greater understanding and facilitate cooperation across the EU; the clarification of the rights and obligations of the parties involved in subcontracting chains, to avoid depriving workers of their ability to make effective use of their rights" (EC, 2007).

In response to this consultation, the European Parliament identified as priorities for labour law reform within Member States:

- (a) facilitating the transition between various situations of employment and unemployment;
- (b) ensuring appropriate protection for workers in non-standard forms of employment;
- (c) clarifying the situation of dependent employment and the grey areas between self-employment and employees with a dependent employment relationship;
- (d) taking action against undeclared work.

The Parliament reiterated its position "in compliance with the employment guidelines laid down by the Court of Justice, according to which the definition of worker should be based on the *de facto* situation at the place and time of work"; called on Member States "to promote the implementation of the

2006 ILO Recommendation on the employment relationship” and asked the Member States “to note that the above mentioned ILO Recommendation provides that employment law should not interfere with genuine commercial relationships” (European Parliament, 2007, paras 5, 39, 40 and 41).

The OECD *Guidelines for Multinational Enterprises* also reflect the relevant provisions of the abovementioned ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and indirectly those of Recommendation No. 198, as expressed in the Commentary on Employment and Industrial Relations.<sup>7</sup> Thus, the terms “workers employed by the multinational enterprise” and “workers in their employment” are taken to mean workers who are “in an employment relationship with the multinational enterprise”. This Commentary states that the non-exhaustive list of indicators set out in paragraphs 13 (a) and (b) of Recommendation No. 198 is useful guidance for determining the existence of an employment relationship. It also recognizes that working arrangements change and develop over time and that enterprises are expected to structure their relationships with workers so as to avoid supporting, encouraging or participating in disguised employment practices.

At the national level, there have been a large number of standard-setting texts, practical guidelines and collective agreements in the same spirit as Recommendation No. 198. Some actually mention it or develop points contained in the Recommendation, such as those concerning a worker’s dependent or self-employed status, or the very existence of an employment relationship; or triangular relationships, particularly work for contractors or temporary employment agencies. These texts are a response to concrete problems that crop up in different countries, thus once again confirming the crucial importance of the employment relationship issue, which seems to be growing within the context of globalization.

### Concerted action

While driven forward by the ILO, international action against precarious employment should nonetheless go beyond a purely standard-setting approach to the issue.

With its authority and experience, the ILO should launch a major policy operation based on concertation at the highest level regarding precarious

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7. The *Guidelines* are addressed to the 42 member governments of the OECD, representing all regions of the world and 85 per cent of foreign direct investment. The commentaries were drawn up by an expanded session of the Investment Committee in order to provide information and explanations about the text of the *Guidelines*, and the Council’s decision on this. These commentaries are not part of the Declaration on International Investment and Multinational Enterprises nor of the Council Decision on the *Guidelines*. See the Commentary on Employment and Industrial Relations, pp. 37–38.



work and how to tackle it. The ILO should invite its member States, the multinational enterprises and the most representative workers' and employers' organizations to hold a frank, constructive, balanced debate in order to identify the problems surrounding precarious employment, its causes and the possible remedies to be applied, bearing in mind the needs of workers and their organizations, enterprises and society, as well as the possibilities available to States.

Freedom of enterprise need not suffer from such ILO action, and neither should enterprises' scope to act, nor the legitimate benefits that States and workers derive from inward investment. But at the same time, entrepreneurial activity must not be exercised by curbing workers' rights. Still less should it be designed to make systematic use of precarious employment. And the same goes for the activities of States.

It would be a great service to humanity if the ILO launched a campaign against precarious work with the same daring that it took to create this unique tripartite organization in 1919, and which also made possible the campaign against child labour, particularly its worst forms. Drawing on these examples, an agenda should be drawn up for the fight against precariousness, with well-defined milestones and deadlines.

### Going back to the spirit of 1919

Workers' rights are not a luxury to be granted only in times of plenty. We cannot wait for the crises to pass and the economic situation to improve before we get those rights recognized and respected. On the contrary, in 1919 the international community decided on a programme to improve workers' conditions as a way of achieving lasting peace.

The standard-setting programme that the ILO drew up in 1919, when it was founded in the midst of a deep worldwide crisis, aimed to improve workers' conditions as an act of justice but also in order to bring about a lasting peace, to the benefit not only of the workers but also of enterprises, States and society as a whole, in the firm conviction that the unjust conditions existing at the time were a threat to world peace.

Today's outlook is one of widespread malaise, due to the systematic use of precarious work, the erosion of workers' rights and the weakening of the trade union movement, leaving workers defenceless. As we survey this landscape, the lessons of 1919 still hold true: as long as States, and these days multinationals too, fail to adopt "humane conditions of labour", this omission (in the words of the Preamble to the ILO Constitution) will be "an obstacle in the way of other nations which desire to improve the conditions in their own countries".

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