COMPARATIVE LABOR LAW DOSSIER OUTSOURCING AND SUPPLY CHAINS

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Abstract

The Comparative Labor Law Dossier (CLLD) in this issue 1/2019 of *IUSLabor* is dedicated to Outsourcing and supply chains. We have had the collaboration of internationally renowned academics and professionals from France, Germany, Italy, Portugal, Spain, the UK, Brazil, Peru, Uruguay, Costa Rica, Panama, China and India.

El Comparative Labor Law Dossier (CLLD) de este número 1/2019 de IUSLabor está dedicado a la subcontratación y cadenas de suministro. Se ha contado con la participación de académicos y profesionales de prestigio de Alemania, España, Francia, Italia, Portugal, Reino Unido, Brasil, Perú, Uruguay, Costa Rica, Panamá, China e India.

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OUTSOURCING AND SUPPLY CHAINS IN FRANCE

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Introduction

Outsourcing is an operation whereby an entity, known as the user company, entrusts another, known as the subcontractor, the task of executing, according to pre-established specifications, a part of the acts of production and services for which the user company retains its responsibility¹. This operation is carried out according to an outsourcing contract between the user company and the subcontractor. This contract's object is the performing of work requested in exchange of remuneration².

Indeed, a contract must be considered to be an outsourcing contract when a company (the subcontractor) offers to the user company (the company that outsources its production) a service carried out by the subcontractor's employees, who remain under the direction and responsibility of the subcontractor. Therefore, outsourcing involves that the subcontractor must carry out a work determined in return of remuneration³.

The concept of outsourcing also encompasses transfer of undertakings pursuant to article L. 1224-1 and following of the French Labour Code⁴. In this context, a company (transferor) transfers to another company (transferee) a part of its business. Under certain conditions, the employment contracts attached to the business transferred by the user company are automatically transferred to the subcontractor on the same terms and conditions.

By contrast, the purpose of temporary workers and temporary employment agencies is to place one or more employees at the disposal of another company, generally for a fixed period. This activity is strictly ruled by 63⁵ articles of the Labour Code. All lawful cases of outsourcing or temporary placement are characterized by a tripartite relationship between a provider company, a user company and workers.

It is noteworthy to precise that new forms of legal temporary placement have recently

¹ Article 1 of the law n° 75-1334 of 31 December 1975 (as amended).

² Court of Appeal of Toulouse 11 April 2005 n° 04/03168: Bull. inf. C. cass. 2005 n° 2069.

³ CJCE 23 April 2009 aff. 533/07: D. 2009.1489.

⁴ Labour Division (*chambre sociale*) of the Court of Cassation, 16 March 1999 n°96-44.843.

⁵ Article L. 1251-1 to L.1251-63 of the French Labour Code.

emerged in France. The main new forms of employment are umbrella companies (*portage salarial*), grouping of employers and independent workers providing their services through IT platforms.

1. Is outsourcing a legal form of production organization?

French regulation considers outsourcing as a legal form of production organization. Firms –except in some cases addressed below– can partly or totally externalize their production by contracting other companies.

The Constitution of the French Republic does not contain any clause relating to prohibitions of competition. But the French *Déclaration des droits de l’Homme et du Citoyen* (Declaration of rights of Man and of Citizen) of 1789 provides in its article 4 that liberty consists in being free to do anything that does not harm other people, and its article 17 that property is a sacred and inviolable right. A Decree of 2 and 17 March 1791 also provided that any person would be free to do such business, or to practice such occupation, craft or job they saw fit to them. The French Constitutional Council (*Conseil Constitutionnel*) held in 2001 that the principle of freedom of commerce and industry is of constitutional value. In the Decision n° 2000-439 DC of 16 January 2001 the same Council stated that the legislator is allowed to introduce limitations to the freedom of undertakings for constitutional requirements or if justified by the general interest, provided that they do not result in disproportionate restraints regarding the objective envisaged. The Council also recognized the freedom of contract as a principle of constitutional value. First, indirectly (Decision n° 98-401 DC of 10 June 1998) in this case the criterion was that a severe damage to the economy of the contract would realize a violation of the general liberty set by the Declaration of 1789⁶. Then directly in 2003 (Decision n° 2002-465 DC of 13 January 2003) ruling, regarding the “*liberté contractuelle*” (freedom to contract), that the legislator should not breach contracts legally concluded, unless justified by a sufficient general interest.

This principle is expressly included in the reform of Title III of Book III of the Civil Code on contracts (*Des contrats ou des obligations conventionnelles en general*) which became Law on 1 October 2016. With minor exceptions, all contracts concluded prior to its entry into force will remain subject to the previous regime as “underpinning French contract law”. It is stated as follows: “[e]veryone is free to contract or not to contract, to choose the person with whom to contract, and to

⁶ “*Considérant, enfin, que le législateur ne saurait porter à l’économie des conventions et contrats légalement conclus une atteinte d’une gravité telle qu’elle méconnaisse manifestement la liberté découlant de l’article 4 de la Déclaration des droits de l’homme et du citoyen de 1789*”.

determine the content and form of the contract, within the limits imposed by legislation” (article 1102 Civil Code as amended).

In the construction and development sector the use of subcontractors is strictly regulated under French law. Subcontractors and the method of their payment must be approved individually by the owner before the conclusion of any agreement with the main contractor⁷.

In the public sector, the subcontractor in the construction area must be paid directly by the owner⁸. In the private sector, the contractor must either provide the subcontractors with a bank guarantee covering all sums due or ask the owner to pay the subcontractors directly. Subcontractors regularly approved by the owner have a direct action against them if the contractor fails to pay within one month of service of a formal notice.

If the owner has knowledge of the presence on the construction site of a subcontractor they have not approved, they must serve the contractor with a formal notice to seek approval. The owner may be liable in tort to the subcontractor.

If the subcontractor is approved by the owner and the payment terms are agreed by the owner, the subcontractor is legally entitled to bring its claim directly against the owner if the contractor fails to pay.

Transfer of undertakings are regulated by article L. 1224-1 to L. 1224-4 of the French Labour Code:

“In the event of a change in the employer’s legal situation, notably, as a result of

⁷ In the construction and development sector the main parties involved include the:

- Owner or developer known as the *maître d'ouvrage*. The owner often delegates part or all of his responsibilities to a *maître d'ouvrage délégué* to manage the project on his behalf.
- Architect (*maître d'oeuvre de conception/d'exécution*) and consulting engineers (*bureau d'études techniques*) (BET), which are in charge of the design phase of a project and of monitoring the construction phase of the project.
- Health and safety protection coordinator (*coordonnateur de sécurité et de protection de la santé*) (CSPS) appointed by the owner, in accordance with mandatory rules, to monitor and manage health and safety risks during the life of the project. (cf. for these parties Article L. 4531-1 of the French Labour Code)
- Contractor(s) in charge of the construction of the project.
- Subcontractors appointed by the contractor(s) with the approval of the owner in accordance with mandatory rules regulating subcontracting.

⁸ Law n° 75-1334 of 31 December 1975, Articles 4, 6 (as amended).

inheritance, sale, or merger of the undertaking, a change in its legal form or its incorporation, all employment contracts in force on the date of this change in the employer's legal situation continue between the new employer and the undertaking's staff".

2. Are there limits and/or prohibitions to outsourcing?

Outsourcing and contracting out part or the entire production of a company are in principle legal as part of the contractual and entrepreneurial freedom.

Although outsourcing is permitted, there are relevant conditions defined by the jurisprudence of the Court of Cassation which limits outsourcing. In fact, the performance of the task clearly determined in the outsourcing contract must constitute the main obligation of the contract⁹.

A noteworthy condition is that the performance of the subcontractor's task must be conducted independently of instructions of the user company¹⁰.

The resort to outsourcing is equally regulated by articles L. 2312-17, L. 2312-24 and L. 2312-58 of the French Labour Code. These articles require in any case of transfer or contracting out both the user company and the subcontractor to inform and consult with their respective social and economic committee (*Comité social et économique, CSE*) in respect of the proposed transfer or resort to contracting out. "Consultation" means that the members of the *CSE* will be asked to give their opinion on the prospective project. However, the opinion issued by the *CSE* is not binding on the user company's decision.

There are also specific limits for the transfer of undertakings. Indeed, the French Court of Cassation states that employment contracts are automatically transferred only where the operation involves the transfer of "*an autonomous economic entity which retains its identity and where the activity is continued or renewed*".

Courts look at the circumstances as a whole to determine whether there is a transfer of an autonomous economic entity, such entity being defined as "*an organized grouping of individuals and tangible or intangible assets that enables the continued running of an economic activity with its own objective*"¹¹.

⁹ Commercial Division (*chambre commerciale*) of the Court of Cassation, 20 June 1989: D.1990.246.

¹⁰ Labour Division (*chambre sociale*) of the Court of Cassation, 29 January 1970 n° 60-40.029.

¹¹ Labour Division (*chambre sociale*) Court of Cassation, 7 July 1998, n° 96-21.451, Bull. civ. V, n° 363.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

A specific chapter under the title “Obligations and liability of the client and principal contractor” (article L.8232-1 to L.8232-3) of the Labour Code establishes a system of joint liability between a user company and its subcontractor for the payment of salaries, holidays and Social Security contributions for the benefit of the subcontractor's workers. This legislation must be seen in the context of combating bogus subcontracting and trafficking.

Any contractor entering into a contract for the performance of work, the provision of services or the performance of a business transaction (you can hardly imagine a broader scope) must make sure that the other contracting party complies with its obligations as employer, particularly its obligations related to the declaration and payment of social- related contributions.

This “duty of vigilance” must be performed at the date of signature of the contract and every six months until the effective termination of the contractual relation. The contractor has to obtain the communication of a number of documents from the other party and verify that such documents are authentic, valid and consistent. Subcontractors have to provide a certificate, provided by Social Security bodies, to show they fulfil their legal obligations to their employees and pay Social Security contributions¹².

These rules apply to every entrepreneur who has recourse to a national or foreign subcontractor for the supply of work or services, outside the legal framework of temporary agency work.

Where the subcontractor defaults on the payment of salaries and Social Security contributions, the entrepreneur, having had recourse to the subcontractor's services, is liable for the payment of workers' salaries and Social Security contributions – irrespective of any contractual provisions to the contrary. If the work or services are provided in the entrepreneur's place of business or in its dependencies, their liability in respect of the subcontractor's workers extends to their salaries, annual holiday, social insurance benefits, family allowances and accident or sickness compensation. By contrast, if work or services are provided in a different location or in

¹² Art. D. 8222-7 n° 1 b) of the French Labour Code, Art. L. 243-15 and D. 243-15 of the French Social Security Code.

the context of home working, the entrepreneur's liability is limited to the salaries, annual holiday payment, (double) Social Security contributions and family benefits of the subcontractor's workers (article L. 8232-2 Labour Code). The territorial scope of these legal provisions is not explicitly limited to national subcontractors. As a result, it can be said that they equally apply to national and foreign subcontractors, even though established abroad.

The entrepreneur is subject to a number of obligations in respect of the subcontractor's workers. These obligations include making sure that legal provisions are being complied with –more specifically, regarding hours of work, daily rest breaks, holidays, health and safety, and maternity leave (article L.8232-1 of Labour Code). They may have a preventive effect on the liability of the entrepreneur. The offence of bogus subcontracting is punishable by two years' imprisonment and a fine of 30,000€. The client/principal contractor who failed to comply with the prohibition directly or through an intermediary is also punishable by one year's imprisonment and a fine of 12,000€ (article L.8234-1 of Labour Code). Four other sanctions against employers committing the labour law offences of undeclared work, illicit negotiation, lending of labour and employment of undocumented workers: administrative closure of the business; exclusion from government contracting; denial of government subsidies; and reimbursement in part or in full of subsidies. As an example, the Social Security inspecting agency URSSAF can cancel the reduction or waiver of Social Security contributions from which the principal had benefited¹³.

Also, there is a special regulation for the construction sector, as article L. 4532-2 of the French Labour Code provides for the following:

“Worker safety and health coordination shall be organized for all building site involving several undertakings including subcontractors, in order to prevent the risks arising from their simultaneous or successive operations”.

The Code imposes a security and protection coordinator in the building site involving several undertakings. This coordinator must be appointed by the user company. The coordinator must present specific health and safety skills in the construction sector¹⁴.

To ensure the safety and protect the health of employees working on a construction project, the owner, the architect and the health and safety protection coordinator (CSPS) must apply the general principles of prevention set out in article L.4121-2 of

¹³ Article L. 133-4-5 of the French Social Security Code.

¹⁴ Articles R 4532-17 to R 4532-19 and R 4532-23 to R 4532-37 of the French Labour Code.

the French Labour Code¹⁵.

These provisions impose an obligation on the owner, the architect and the CSPS to, for example, coordinate the works also of subcontracting companies to ensure maximum safety on site; create a health, safety and working conditions committee (*Comité d'hygiène, de sécurité et des conditions de travail, CHSCT*) which is also competent for subcontracting companies on construction sites and develop a general coordination plan to promote health and safety (*Plan général de coordination en matière de sécurité et de protection de la santé, PGCSS*) including the subcontractors activities. Any breach of these obligations may result in both tortious liability and criminal penalties.

Moreover in cases of undeclared work, the Labour Code establishes obligations and liability of the client and principal contractor (article L. 8222-1 to L. 8222-7) as well as every person contractually linked to the resort of undeclared work. Indeed, every employer which has resorted to undeclared work as well as every employer which contracts directly or indirectly with this person using undeclared workers face joint liability.

Also, article L. 8222-2 of the Labour Code states that the user company and its subcontractors are jointly liable for:

- Social Security obligations, especially, to pay social insurance contributions.
- Payment of remuneration, allowances and charges due towards the employees.

In the event of a transfer of undertakings, article L. 1224-2 of the Labour Code provides that the transferee will be liable for all obligations for which the transferor was responsible at the date of the transfer, except in limited circumstances (e.g. insolvency proceedings). As a consequence, employees can make claims to the transferor for amounts due before the transfer, but they can also choose to make claims against the transferee.

According to article L.1224-2 of the Labour Code, the transferor must reimburse the transferee with any amounts paid by the transferee for debts arising before the transfer, unless the costs were taken into account in the transfer agreement.

As a result of the aforementioned provisions, if the subcontractor defaults, its workers can take a direct action in court against the principal contractor (article L.8232-3 of the Labour Code). In addition, an action on behalf and for the benefit of the

¹⁵Article L. 4532-4 of the French Labour Code.

subcontractor's workers can be exercised by a representative trade union without having to justify express authorization. However, trade unions need to notify the relevant worker of their intentions and can only proceed with the court action if the worker involved does not oppose the action within two weeks of the date they have been notified of the union's intentions (article L.8233-1 of the Labour Code).

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

In principle, the collective bargaining agreement applicable to the employment relationship is the one applicable to the operation in which the work is carried out. However, this principle does not apply in cases where workers are made available to other companies¹⁶.

In case of subcontracting, the collective bargaining agreement that is in place at the subcontractor during the contractual relationship with the main company is the collective bargaining agreement applicable to the workers of the subcontractor.

For temporary workers, the collective bargaining agreements applicable to their temporary employment agency will remain applicable, with the exception of collective bargaining regulations mentioned in Article L. 1251-21 of the French Labour Code relating especially to remuneration and working times¹⁷. For these topics, the respective collective bargaining regulations at the user company are applicable.

Where workers are being posted not for profit, they continue to fall under the collective bargaining agreements applicable at the contractor who is hiring out the workers¹⁸.

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

In principle, there is no duty for subcontractors to recognize its employees the same conditions than those recognized to workers in the user company. In any case, the user company or subcontractor must pay its workers the legal minimum wage¹⁹.

In the event of a transfer of undertakings, the employment contract concluded by the transferor is transferred without any modifications to the transferee.

¹⁶ Editions Francis Lefebvre, Série KA - Conventions et accords collectifs, Division III, 16800.

¹⁷ Articles L3221-3, L. 1251-18, L. 1251-21 of the French Labour Code.

¹⁸ Article L8241-2 of the French Labour Code.

¹⁹ Article L. 3231-2 of the French Labour Code.

With respect to the collective status however, i.e. the rights and benefits applying collectively to the employees, the situation is different, since employees transferred in application of article L.1224-1 of the French Labour Code benefit from the collective status in force within the transferee as from the transfer date (and at the same time continue to benefit, for a temporary period, from the collective status in force within the transferor).

Article L. 3221-2 of the French Labour Code establishes the principle of “equal pay for equal work” (employees performing the same exact work should receive the same pay). This is a relevant rule in cases of transfer of undertakings with the automatic transfer of all the transferor’s workers to the transferee.

Indeed, workers transferred must benefit from its application: the same essential work and employment conditions that they would have benefited from, had they been directly hired by the user company to occupy the same position have to be applied to them.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

Outsourcing is considered fraudulent in any cases where the subcontractor is bound by the instructions of the user company or when the subcontractor is not independent in the performance of its tasks.

Therefore, outsourcing is considered fraudulent when:

- The only aim of the contract between the user company and the subcontractor is for the latter to hire workers and lend them to the user company.
- The subcontractor is not a real firm, in the sense that it does not exert an activity or does not possess any infrastructure or enough means to perform the hired activity.
- The subcontractor does not carry out the tasks of direction, organization and control of its workers in the provision of services.

The judges often fear that through the outsourcing, the user company could try to avoid the employer’s labour or Social Security obligations, especially to pay social insurance contributions.

For example, a company has employees whose function is to give training courses. The company decides to dismiss all its employees. It then proposes to them to continue to work for the company but as subcontractor and not as employee. The former employees create their own company and work for their former employer by

an outsourcing contract between their company and their former company. In fact, the former company organizes the work teams, establishes the daily tasks that must be carried out, controls possible absences from work, organizes holidays etc. In this example, the company created by the former employer is a company empty of any authority or normal employer's prerogative whereas the performance of the subcontractor's task must be conducted independently of instructions of the user company.

Indeed the legal employer of the subcontractor's workers (the subcontractor) must be the only holder of employer's prerogatives.

In this example, the consequences will be a requalification of the outsourcing contract to employment contracts between the user company and the subcontractor's workers. The user company will be recognized as the employer, and therefore the only debtor of the employer's labour or Social Security obligations, especially to pay social insurance contributions.

7. Is the hiring of workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

Hiring out workers in order to make a profit is an activity regulated and strictly reserved for the Temporary Employment Agencies or in a system of umbrella companies (*portage salarial*).

The operation of hiring out workers for profit outside of a temporary agency is forbidden and engages a criminal liability²⁰. By exception, temporary placement is lawful if it is a non-profit operation.

The concept was defined in the Law of 28 July 2011, n°2011-893²¹ and codified at the end of article L. 8241-1 of the French Labour Code:

“The hiring out of workers is a non-profit operation if the lending company invoices to the user company merely the wages, social insurance contributions and professional fees relating to the workers lent”.

In other words, the invoice of the lending company to the user company must strictly

²⁰ Article L. 8241-1 of the French Labour Code.

²¹ Law n° 2011-893 of 28 July 2011 for the development of alternation and the securing of professional process.

reflect the employee's pay slip²². In this case, the lending company is a non-profit operation and is lawful.

Through the ordonnances n° 2017-1387 of 22 September 2017, an exception of this definition of "not for profit" has been introduced. It aims at facilitating the lending of workers to startups/young companies (less than 8 years of activity) or small or medium sized companies of up to 250 employees. If the lending company (or its company group) has more than 5,000 employees, and lends workers to such a young or small user company, it will be considered to be "not for profit", even if the invoice to the user company is lower than the wages, social insurance contributions and professional fees paid to the workers, or even zero²³.

As far as Temporary Employment agencies are concerned, hiring workers through them is allowed but strictly regulated by law.

Pursuant to article L. 1251-1 of the French Labour Code, temporary placement must be a triangular relationship between the temporary placed employee, a Temporary Employment Agency (*Entreprise de Travail Temporaire - ETT*) and a user company.

It involves two simultaneous contracts, first a commercial "availability" contract between the temporary employment agency and its customer, i.e. the user company. Second, an employment contract based on so-called "assignments" concluded between the temporary employee and their employer, i.e. the temporary employment agency. Both contracts must include some compulsory provisions, especially the duration and conditions of execution of the worker's employment²⁴.

As a general rule, the worker must be assigned to the user company for a fixed-term duration. Article L. 1251-11 para. 1 of the Labour Code imposes that the duration must be fixed when the contract is concluded. Moreover article L. 1251-12-1 provides for a maximum duration of 18 months in principle. However, there is an exception to the rule of having to specify the duration in advance. Article L. 1251-11 para. 2 allows for a temporary employment contract to be concluded without specifying a duration in cases where:

- An absent employee is being replaced,
- An employee whose employment contract is suspended is being replaced,
- The effective entry into service of an employee recruited on a permanent contract is

²² Labour Division (*chambre sociale*) of the Court of Cassation 29 October 2008, n°07-42379.

²³ Article L. 8241-3 of the French Labour Code.

²⁴ Article L. 1251-16 and article L. 1251-43 of the French Labour Code.

pending,

- The temporary employment is for a seasonal job according to Article L. 1242-2 or for certain sectors of activity in which it is a constant practice to not use indefinite employment contracts due to the nature of the activity and the temporary nature of the job,
- An artisanal, industrial or commercial entrepreneur or a farm operator is being replaced.

In these cases the temporary employment contract is concluded for a minimum period of time and terminates with the end of the absence of the person replaced or the achievement of the goal of the contract²⁵.

Finally, running a Temporary Employment Agency implies notifying the administrative authority and obtaining a financial guarantee²⁶.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

Article L. 1251-6 of the French Labour Code defines the cases where lending temporary employment through an agency is possible:

“Firstly, to replace an employee of the user company, who is: absent; in a transitional part-time; in suspension of their employment contract; leaving before the abolition of their employment; waiting for the arrival of an employee on an indefinite-term contract.

Secondly, to ensure the continuity of the activity of the company in case of: temporary increase of the activity; seasonal employment; the replacement of an artisanal, industrial or commercial entrepreneur or a farm operator.”

The resort to temporary employment agencies is equally possible to encourage the recruitment of unemployed persons encountering particular social and professional difficulties or to provide additional vocational training to the employee²⁷.

The hiring of workers through agencies is prohibited in certain cases:

- Temporary placement cannot have the objective or effect of filling permanently a

²⁵ Article L. 1251-11 para. 3 of the French Labour Code.

²⁶ Article L. 1251-45 of the French Labour Code.

²⁷ Article L. 1251-7 of the French Labour Code.

position connected with the normal, on-going activity of the undertaking²⁸.

- In principle, lending temporary employment through an agency is prohibited until 6 months after a redundancy²⁹
- To replace workers on strike in the user firm³⁰.
- To perform tasks especially dangerous for the health and safety of workers. Specifically, activities in which employees are exposed to radiation, cancerous or toxic agents, and biological agents.

Hiring workers through Temporary Employment Agencies in any of these cases may be deemed an illegal transfer of workers.

9. What labor and Social Security liabilities do Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

The temporary employment agency is the legal employer and therefore the only debtor of the employer's labor or Social Security obligations, especially, to pay social insurance contributions. The employment agency is liable for fulfilling labor and Social Security obligations with regard to the workers hired.

However, with respect to work-related accidents:

- The degree of danger of the employment in the user company is taken into account to calculate social contributions of the temporary employment agency (article L. 412-3 of the Social Security Code)
- The user company must inform the temporary employment agency (article L. 412-4 of the Social Security Code).
- The user company's liability may be engaged in lieu of the temporary employment agency's liability in case of reckless misconduct (article L. 412-6 of the Social Security Code).

Also, the temporary employment agency must have proof of a financial guarantee in case of failure to pay, in order to ensure that wages and social insurance contributions related to the temporary worker will be paid³¹.

²⁸ Article L. 1251-5 of the French Labour Code.

²⁹ Article L. 1251-9 of the French Labour Code.

³⁰ Article L. 1251-10 of the French Labour Code.

³¹ Article L. 1251-49 of the French Labour Code.

In case of insolvency of the employment agency and in the absence of a financial guarantee, the user company will be considered liable for the payment of salary, Social Security contributions and severance with respect to the workers used by the user company³².

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

The general principle is that the employer is in fact the temporary employment agency. It is fully responsible for paying and training temporary employees and for exercising disciplinary powers regarding them.

But responsibility during the performance of the work (in particular for working conditions: working hours, night work, weekly breaks, hygiene and safety) lies with the user company.

Indeed article L. 1251-21 of the French Labour Code states:

“Through the duration of the assignment, the user company is responsible for the conditions under which the work is carried out (...), including the application of provisions concerning: hours of work; night work; weekly rest; health and safety at work; the work of women, children and young workers”.

Temporary workers have access to all collective facilities, in particular any canteen, transport services or restaurant vouchers, on the same terms as workers employed directly by the user company.

Also, articles L. 3221-2, L. 3221-3 of the French Labour Code establish the principle of “*equal pay for equal work*” (employees performing the same exact work should receive the same pay). In accordance with article L. 1251-18 of the Labour Code, equal treatment of agency workers and permanent workers in a user company is a general principle which covers all the employee's individual and collective rights.

In other words, a temporary worker must benefit from the same essential work and employment conditions that they would have benefited from, had they been directly hired by the user company to occupy the same position.

³² Article L. 1251-52 of the French Labour Code.

11. Other relevant aspects and personal assessment of the regulation regarding outsourcing and supply chains

Hiring out employees for a profit is legal for temporary employment agencies but also for French umbrella companies (*entreprises de portage salarial*).

Portage salarial was established in France in the 1980s with the aim of facilitating the employment of senior unemployed persons. It is now regulated under article L.1254-1 of the French Labour Code and according to an order of 2 April 2015³³.

This system can be defined as a set of contractual relationships between an umbrella company, an independent contractor, and a client company. Two contracts are concluded: first, a service contract between the umbrella company and the client company, and second a temporary employment agreement between the independent contractor and the umbrella company.

When the independent contractor completes the project, the client company pays the fees to the umbrella company which subsequently pays a salary to the independent contractor.

The independent contractor is entitled to a minimum wage fixed by a national collective agreement³⁴.

The particularity of this temporary placement is that the umbrella company is not required to provide work to its “employees”, i.e. the independent contractors. Moreover the independent contractor must have a specific expertise, a qualification and be autonomous, so as to be able to search for clients personally and to agree with them on the terms and conditions (including the price) of the mission³⁵. The resort to *portage salarial* is legal only if the mission is concluded for an occasional task and a limited duration (maximum 36 months³⁶). This mission must not be part of the normal and permanent activity of the customer company³⁷. *Portage salarial* cannot have the objective or effect of filling permanently a position connected with the normal, on-going activity of the customer undertaking.

Breaches of the regulations on *portage salarial* can be punished with a fine of 3,750

³³ Order n° 2015-380 du 2 April 2015 relating to French “portage salarial”.

³⁴ Article L. 1254-2 of the French Labour Code.

³⁵ Article L. 1254-2 of the French Labour Code.

³⁶ Article L. 1254-4 of the French Labour Code.

³⁷ Article L. 1254-3 of the French Labour Code.

€³⁸.

In conclusion, *portage salarial* is an innovative form of temporary placement in France, which can be viewed as a halfway house between self-employment and regular employment.

³⁸ Article L. 1255-1 et seq. of the French Labour Code.

OUTSOURCING AND CHAIN SUPPLY IN GERMANY

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Introduction

Outsourcing is an area of increasing importance in Germany. According to the 2013 *Outsourcing in Europe* report, 15 percent of services are outsourced in Germany, which is above average in comparison to other European countries.³⁹ Measured by the Annual Contract Volume, the German outsourcing market is the second largest in Europe.⁴⁰ The IT-sector is dominating with a volume of 8 – 10 billion euro.⁴¹ However, the outsourcing activity has slowed down slightly in recent years. This is explained by the fact that a lot of big companies already have outsourced large parts of their infrastructure. Furthermore, many companies prefer smaller contracts with several specialized subcontractors over a big contract with a generalist.⁴² The main objective of outsourcing is to reduce certain costs, like non-core business expenses, taxes or collective-agreement wages. Therefore, outsourcing has been widely criticized in Germany, because it is associated with cutting costs at the expenses of the employees. However, the acceptance seems to have increased in recent years.⁴³ Temporary work is also gaining economic importance, particularly after the controversial labor market reform “Agenda 2010”. The supply chain branch in Germany is characterized by a complex and rapidly changing world market. Independent transportation and warehousing companies increasingly encounter problems responding to the accelerating pace of business and expanding networks resulting from the global trade. From a legal perspective, outsourcing and supply chains taken in isolation are not of a primary importance in Germany. So far, as of February 22, 2019, 667 judicial decisions explicitly deal with outsourcing. For comparison purposes, 1.417 judicial decisions deal

³⁹ [http://www.ey.com/Publication/vwLUAssets/Outsourcing_in_Europe_2013/\\$FILE/EY-outsourcing-survey.pdf](http://www.ey.com/Publication/vwLUAssets/Outsourcing_in_Europe_2013/$FILE/EY-outsourcing-survey.pdf). The other investigated countries were Denmark (9 percent), Finland (19 percent), The Netherlands (13 percent), Norway (10 percent), Sweden (9 percent), Spain (17 percent) and the United Kingdom (17 percent).

⁴⁰ <http://www.heise.de/newsticker/meldung/Bericht-Outsourcing-Markt-in-Europa-sackt-um-20-Prozent-ab-1856632.html>.

⁴¹ Compare the study of PricewaterhouseCoopers, IT-Sourcing-Studie – die Perspektive der Anbieter, 2015.

⁴² <https://www.channelbiz.de/2014/04/23/outsourcing-markt-in-deutschland-ruecklaeufig>.

⁴³ Business Process Outsourcing in Deutschland. Eine Trendanalyse von EDS und Pierre Audoin Consultants, 2006, p. 10.

with compliance, and 7.384 deal with the transfer of undertakings.⁴⁴ A coherent regulation of outsourcing does not exist. Rather, the various aspects are governed by several statutes which are spread over different fields of law.

1. Is outsourcing a legal form of production organization?

In this point, the German law allows outsourcing as a legal form of production organization. Companies can partly or totally externalize their production and services by contracting other companies. The German Constitution guarantees entrepreneurial freedom, in dispute is only whether this freedom is anchored in article 2 (1), which recognizes the general freedom of action, or in article 12 (1), which recognizes the freedom to engage in an occupation.⁴⁵ Regardless of this rather theoretical debate, the companies are guaranteed an adequate margin to work toward the company's success which undisputedly includes outsourcing measures. Limitations of this freedom therefore require a constitutional justification.

2. Are there limits and/or prohibitions to outsourcing?

Specific prohibitions regarding outsourcing do not exist in Germany. However, the implementation of concrete measures is limited by various statutes and triggers certain obligations respectively.

The Bundesdatenschutzgesetz, which in its new revision is in accordance with the General Data Protection Regulation of 25 May 2018, places limitations to outsourcing measures that require the collection, processing or use of personal data. A lawful use of personal data requires five measures: (1) The registration of all data processing operations, (2) the determination of the legal basis, (3) the obtaining or monitoring of the approval, (4) the design of technology in a data protection friendly way, and (5) the assessment of the impacts of data protection. With regard to measure (2), the legal basis for employee data is § 26 Bundesdatenschutzgesetz. Furthermore, violations of professional secrecy would be liable to prosecution according to § 203 Strafgesetzbuch. § 26b Kreditwesengesetz places specific limitations to outsourcing measures by credit institutions and financial service institutions.

After the outsourcing, the company typically no longer needs the employees who performed the outsourced activity. Therefore, the dismissal of those employees is a firm component in the outsourcing measure. Germany is known for its high level of dismissal protection. The Termination for operational reasons has several legal

⁴⁴ This results from an evaluation of the data base *juris*

⁴⁵ *Di Fabio*, in: Maunz/Dürig, Grundgesetz-Kommentar, 2018, Art. 2 point 126.

requirements. However, in the light of the constitutional guarantee of the entrepreneurial freedom, the labor courts are not allowed to judge whether the entrepreneurial decision is useful, but only if it is arbitrary. Hence, the German Federal Labor Court has approved a dismissal on the grounds of an outsourcing measure.⁴⁶

Finally, it is important to bear in mind the codetermination rights of the works council. According to § 111 (1) Works Council Constitution Act (Betriebsverfassungsgesetz), companies with more than 20 employees are obliged to inform the work council timely, effectively and comprehensively about a plant modification (Betriebsänderung) that can produce major disadvantages for the workforce. Furthermore, the employer has to try to reach an agreement on a reconciliation of interests (Interessenausgleich) and a social compensation plan (Sozialplan). According to § 111 (1) sentence 3 number 4 of the Works Council Constitution Act, plant modifications shall be regarded as fundamental changes in the company organization. Therefore, outsourcing measures are plant modifications in this sense if they affect at least 5 percent of the workforce.⁴⁷ In this case, the work council can demand a social compensation plan, § 112 (4) Works Council Constitution Act. If an economic committee (Wirtschaftsausschuss) exists, it also has to be informed in due time, effectively and comprehensively about the outsourcing measures, § 106 (2) Works Council Constitution Act. Otherwise, § 80 (2) Works Council Constitution Act at least states a general information requirement, whereby the work council has to be informed in a manner that it may properly execute its tasks. In companies with more than 500 employees, the work council can exact the formulation of selection guidelines, § 95 (2) Works Council Constitution Act.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

As a basic principle, in Germany only the contractual employer has any labor or Social Security responsibility. Therefore, the outsourcing company generally does not have such responsibility in relation with the subcontractor's workers if their employment contracts exist with the subcontractor. An important exception results from § 613a (2) Bürgerliches Gesetzbuch. This provision states that in the case of a transfer of undertakings, the previous employer is liable alongside the new owner of the business in respect of obligations which arose from the labor relation before the date of transfer and become due to a maximum of a year after this date. If such obligations become due after the date of transfer the previous employer is liable just to the extent that equates to

⁴⁶ German Federal Labor Court, decision of 13 March 2008 – 2 AZR 1037/06, Neue Zeitschrift für Arbeitsrecht 2008, p. 878 point 30.

⁴⁷ *Kania*, in: Erfurter Kommentar zum Arbeitsrecht, 19th edition 2019, § 111 BetrVG point 17.

the part that as already lapsed at the time of the transfer. This provision represents a compromise: The previous owner shall neither be completely discharged from liability nor continue to be liable for an indefinite period of time.

The term ‘transfer of undertakings’ shall not only be interpreted in the light of the national provision, but also in the light of the underlying directive 2001/23/EC. According to article 1 (1) (b) of this directive, a transfer of undertakings means a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity. Against this background, outsourcing measures can constitute a transfer of undertakings, but they always require the examination of the particular case. A simple functional succession is not sufficient, as the European Court of Justice has made clear.⁴⁸ Further indications are necessary, like the assumption of existing means of production or of a substantial part of the workforce in terms of number and expert knowledge. If the subcontractor does not assume any means of production or employees of the outsourcing company, a transfer of undertakings is to negate.

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

In German law there is no variation in terms of the applicable collective agreement in cases of outsourcing. That means the applicability of a collective bargaining agreement requires that the worker and the employer are members of the parties to a collective bargaining agreement, thus member of the union and the employer’s association respectively (§ 3 Subsection 1 Tarifvertragsgesetz). If the worker is employed by the contractor company, the applicability of a collective bargaining agreement depends on this companies’ membership in an employer’s association.

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

According to § 613a (1) Bürgerliches Gesetzbuch, in the case of a transfer of undertakings, the new owner enters into the ‘rights and duties arising from the existing employment relationship’. Therefore, the subcontractor is legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company if the outsourcing measure complies with the aforementioned requirements of a transfer of undertakings.

⁴⁸ European Court of Justice, decision of 11 March 1997, C-13/95, Ayse Süzen, point 16.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

In the German legal system, § 1 (1) sentence 1 Arbeitnehmerüberlassungsgesetz states that commercially hiring workers and transferring them to another company requires an official permit, otherwise it is illegal. Therefore, outsourcing is fraudulent when a) the only aim of the contract between the user company and the subcontractor is for the latter to hire workers and lend them to the user company; b) when the subcontractor is not a real company, in the sense that it does not exert an activity or does not possess any infrastructure or enough means to perform the hired activity; and c) when the subcontractor does not carry out the tasks of direction, organization and control of its workers in the provision of services.

For example, a factory outsources the surveillance service to a surveillance company. However, it is not the surveillance company, but rather the factory that interviews candidates to be hired by the surveillance company, organizes the shifts and execution of the duties and approves vacation of the surveillance personnel. In this example, the surveillance company is the contractual employer, but is it the factory that performs the entrepreneurial functions. As a result, there is a case of illegal transfer of workers, because the surveillance company does not have the required permit, and of fraudulent outsourcing.

The main consequences are: a) The contract between the factory and the surveillance company is void, as well as the contract between the surveillance company and the employees, § 9 Subsection 1 number 1 Arbeitnehmerüberlassungsgesetz; b) an employment contract is deemed concluded between the employees and the factory on the basis of the content of the void contract, § 10 Subsection 1 Arbeitnehmerüberlassungsgesetz.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

The German regulation allows hiring workers through Temporary Employment Agencies, provided they have the required permit. The permit is issued on application and shall be refused if the applicant is not reliable or unable to deal with the employer obligations. The transfer of a worker to the user company is limited to 18 consecutive months, § 1 Subsection 1b sentence 1 Arbeitnehmerüberlassungsgesetz. Further requirements, like a temporary work need of the user company, do not exist. Hence, the transferred workers may be occupied by the user company to perform permanent tasks.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

Hiring workers through Temporary Employment Agencies is prohibited in companies in the construction sector with regard to work activities which are usually performed by workers, § 1b sentence 1 Arbeitnehmerüberlassungsgesetz. § 1b sentence 2 Arbeitnehmerüberlassungsgesetz provides narrow exceptions.

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

Under German law, the Temporary Employment Agencies are the contract employers of the workers. Hence, they are the sole and fully subject of labor and Social Security liabilities. Only if the Temporary Employment Agencies fail to comply with Social Security contributions, the user company shall be liable as absolute guarantor, § 28e Subsection sentences 3, 4 Sozialgesetzbuch IV. This liability is limited to the period of the transfer.

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

§ 8 Subsection 1 Arbeitnehmerüberlassungsgesetz states the principle of equal pay, which gives effect to the Directive 2008/104/EC. In accordance with this provision, the Temporary Employment Agencies are obliged to grant its employees for the period of the transfer the same essential working conditions, including the same salary, as a similar employee within the user company is entitled to. A contract between the Temporary Employment Agency and its employer that provides worse conditions for the period of the transfer is void, § 9 number 2 Arbeitnehmerüberlassungsgesetz. However, varying conditions can be agreed in collective agreements.

References and judicial decisions

- German Federal Labor Court, decision of 13 March 2008 – 2 AZR 1037/06: A dismissal on the grounds of an outsourcing measure is generally not arbitrary.
- German Federal Labor Court, decision of 23 November 2016 – 5 AZR 53/16: With regard to the principle of equal pay, the activity that the temporary worker is assigned to by the hirer either expressly or by implication is decisive.

- European Court of Justice, decision of 11 March 1997 – C-13/95, Ayse Süzen: A simple functional succession is not sufficient for a transfer of undertakings. Further indications are necessary, like the assumption of existing means of production or of a substantial part of the workforce in terms of number and expert knowledge. Only under those conditions an outsourcing measure can be regarded as a transfer of undertakings.

OUTSOURCING AND CHAIN SUPPLY IN ITALY

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Introduction

Supply chain fragmentation is today a usual feature of Italian productive organization. The data published by the Italian Institute of Statistics⁴⁹ show that firms especially externalized transport, distribution and storage activities, as well as legal and accounting services. Between 2012 and 2014, outsourcing has significantly increased in the manufacturing sector, also with regard to functions which were not traditionally involved in this practice, such as research and development, marketing, post-sales services and ICT. Although more recently business strategies seem to be primarily focused on the products quality improvement, outsourcing is still considered by some Italian companies as a means to increase their economic competitiveness⁵⁰.

1. Is outsourcing a legal form of production organization?

Italian regulation allows outsourcing as a legal form of productive organization. Therefore, in general, firms can partly or totally externalize their production by contracting with other companies. This possibility of outsourcing can be considered as an expression of entrepreneurial freedom, recognized by Article 41 of the Italian Constitution.

2. Are there limits and/or prohibitions to outsourcing?

For a long time, Italian regulation had been characterized by important restrictions to outsourcing. Specifically, *Legge* no. 1369/1960, on one hand, forbade mere supply of workers (the so called *marchandage du travail*) and, on the other, imposed relevant limits to firms that contracted out works or services. That is, companies could not simply lend their workers to other companies, while they could commission a more complex activity, which should have been performed by the whole contractor's entrepreneurial organization. The difference between these two cases is that, in the last one, the contractor did not only provide its workers, but it was required to carry out a work or a service, at its own risk, by using its employees and means. Therefore, in this case, the contractor was legally obliged to grant its workers the same labour conditions

⁴⁹ ISTAT, *Rapporto sulla competitività dei settori produttivi*, 2015, pp. 48-49, available on the website: <http://www.istat.it/it/files/2015/02/Rapporto-competitivita-C3-A0-2015.pdf>

⁵⁰ See ISTAT, *Rapporto sulla competitività dei settori produttivi*, 2017, p. 47, available on the website: <https://www.istat.it/storage/settori-produttivi/2017/Rapporto-competitivita-2017.pdf>

as the user company's employees. Furthermore, both companies were jointly liable for labour and Social Security rights regarding contractor's workers.

As will be explained below, a lot of these limits have been gradually eliminated, starting from *Legge* no. 196/1997 ("Pacchetto Treu") and especially from the successive *Decreto Legislativo* no. 276/2003 ("Biagi Act").

Nowadays, specific restrictions remain in some particular sectors. For instance, in accordance with Article 60 of Insurance Supervisory Authority (IVASS) Regulation no. 38/2018, insurance companies can externalize services, provided that it does not lead to the emptying of their activity. Anyway, outsourcing cannot concern risk-taking activity and shall meet some special conditions.

Moreover, in any sector, limits and prohibitions to outsourcing can be introduced by collective bargaining. In this regard, it should be noted that many collective agreements lay down special procedures aimed at ensuring the continuity of existing employment relations, in case of change of contractor.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

According to Article 29, paragraph 2 of *Decreto Legislativo* no. 276/2003, when a company outsources an activity, it is responsible for labour and Social Security rights of the employed contractor's workers. Specifically, such liability concerns Social Security contributions and insurance premiums due to public authorities and, of course, wages – including the percentage of the employee severance indemnity ("Trattamento di Fine Rapporto - T.F.R.") – owed to the hired firm's workers, for their activity during the performance of the contract. Furthermore, as stated in Article 26, paragraph 4 of the Italian Act on safety and health at work (*Decreto Legislativo* no. 81/2008), both companies are jointly liable for the contractor's employees' damages which are not indemnified by the National Institute against Accidents at Work. Therefore, workers can address claims either against the user firm or against the contractor, in order to get a full payment of all those entitlements. However, the user firm's liability does not legally include obligations regarding civil penalties, which must be paid by the responsible party.

The recent *Decreto Legge* no. 25/2017 repealed the rule laid down in Article 29, par. 2 of *Decreto Legislativo* no. 276/2003 that gave to the user company the right to raise the *beneficium excussionis*. It compelled workers to prosecute firstly the contractor and the

potential subcontractor so that the user firm would only have to pay if these latter were insolvent.

Pursuant to the current regulation, workers cannot sue the user firm after two years from the end of the contract. Notwithstanding, after this lapse of time, the outsourcing company may still be held liable, in accordance with the most general rule of Article 1676 of the Italian Civil Code. Nevertheless, in this case, contractor's workers are not enabled to obtain from the user firm the payment of all their credits. As a matter of fact, the one who outsources an activity is not obliged by this provision to pay more than the amount of debts it (eventually) has with the contractor at the time of workers' demands.

The regulation stated by the mentioned Article 29, par. 2 is applicable not only to companies, but also to individual employers. An exception to the principle of joint liability regulated by this norm concerns outsourcing natural person who does not exercise a professional or business activity. Moreover, Article 29, par. 2 is not applicable to procurement contracts concluded by public administrations (see Article 9, par. 1 of *Decreto Legge* no. 76/2013; Italian Supreme Court decisions no. 29407 of November 15th, 2018; no. 20327 of October 10th, 2016).

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

Generally speaking, in the Italian legal system, the contractor is not obliged to apply the the collective agreement of the main company, during the performance of the contract. As a consequence, pursuant to the general principles, working conditions of the contractor's workers are determined in accordance with the collective agreement applicable to the same contractor and not with the one that is relevant for the main company.

However, it is worth noting that peculiar rules must be respected in some specific cases. For example, if the contractor is a cooperative society, working partners must be given an economic treatment not inferior than the one fixed, for the concerned productive sector, by the national collective bargaining agreements concluded by the "*comparatively most representative*" trade unions and employers' associations (see Article 7, par. 4 of *Decreto Legge* no. 248/2007; Article 3, par. 1 of *Legge* no. 142/2001; Italian Constitutional Court decision no. 51/2015).

Moreover, in case of public procurements, special provisions shall be applied. Among these, it could be mentioned Article 30, par. 4 of the recent Public Contracts Code (*Decreto Legislativo* no. 50/2016), which establishes that the workers employed for the

performance of the contract are subject to the (national and territorial level) collective agreement signed by the “*comparatively most representative*” trade unions and employers’ associations (see also the following answer).

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

Since the abrogation of *Legge* no. 1369/1960, in the Italian legal system, the contractor is not obliged to recognize its workers the same labour conditions of the user company’s employees. Therefore, nowadays, the economic convenience of this kind of outsourcing can peacefully consist in the lower labour cost resulting from the fact that contractor is subjected to a collective regulation less onerous than the one applied by the user firm.

Nevertheless, as explained in the previous answer, specific rules exist for public procurements. For instance, it is important to highlight that, pursuant to article 36 of the Italian Workers’ Statute, tender dossiers must contain a clause that binds contractors to apply or enforce labour conditions which are not lower than those established by the collective agreements of the sector and of the zone. Non-compliance with this norm may determine the revocation of the tender and, in the most serious cases, the exclusion from any procurement procedure up to five years.

Moreover, the Public Contracts Code provides for specific rules to prevent an unfair competition only based on the labour costs reduction. For example, it is to be noted that, contracting authorities should exclude from the procurement procedure the applicants’ tenders that are abnormally low. To this end, wage levels established by collective agreements represent an important point of reference (see Articles 97 and 23, par. 16 of the Code; *Consiglio di Stato* decision no. 1409 of February 28th, 2019; Administrative Court of *Lazio* decisions no. 5899 of May 18th, 2017; no. 12873 of December 30th, 2016).

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

As anticipated above (answer no. 2), the abrogated *Legge* no. 1369/1960 forbade mere supply of workers. Consequently, in the past, no company could simply lend its workers to other firms, which would have exercised the employer’s powers. In this perspective, according to Article 1 of *Legge* no. 1369, there was an illegal transfer of workers when the user firm was the owner of “*capitals, machines and equipments*” used for performing the contract. In essence, the fact that the contractor did not have the

necessary means of production was seen as an indication of lack of a real entrepreneurial capacity to carry out the work or service commissioned.

Over the years, under the pressure of technological transformations, courts gradually gave an evolutionary interpretation of this rule. As a matter of fact, on one hand, judges revisited the meaning of “*capitals, machines and equipments*”, including in this expression also software and know-how. On the other hand, they increasingly attached importance to the circumstance that contractor really organized labour and productive functions.

Considering this jurisprudence, *Decreto Legislativo* no. 276/2003 abrogated the previous regulation and, specifying the general rule stated by Article 1655 of the Italian Civil Code, codified some conditions under which contract is lawful. According to Article 29 of *Decreto Legislativo* no. 276/2003, these conditions are *a)* the fact that contractor organizes the necessary means to perform the activity and *b)* the circumstance that the same contractor acts at its own entrepreneurial risk. Moreover, the latter provision clarifies that, considering the features of the work or service required, the first condition can also subsist when contractor directs and organizes the workers employed for performing the contract. It means that, nowadays, especially in labour-intensive activities, the contractual relationship can be considered legal even if contractor does not have any infrastructure or enough means to perform the hired service. For example, imagine a company (Company C), which outsources to another company (Company D) the cleaning services of its premises. In this case, there will not be a fraudulent transfer of workers, if Company D performs the entrepreneurial functions with regard to direction, organization and control of its employees. Conversely, the contract will be considered illegal, if it is not Company D, but rather Company C that really organizes the work teams, establishes the daily tasks that must be carried out by the cleaning personnel, controls possible absence from work, etc. However, as will be explained in the following answer, in the latter case, outsourcing will be lawful if Company D is an employment agency.

Pursuant to Article 29, paragraph 3-*bis* of *Decreto Legislativo* no. 276/2003, the consequence of an illegal transfer of workers is that the affected employees have the right to obtain an employment contract with the user company. Furthermore, both companies are subject to the criminal penalties established by Article 18 of *Decreto Legislativo* no. 276/2003. In addition, if firms take advantage of workers' state of need and apply exploitative labour conditions, their conduct may constitute the crime provided for in Article 603-*bis* of the Italian Penal Code. Finally, administrative sanctions can be applied for the violation of the rules regarding agency work.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

Agency work has been allowed in Italy by *Legge* no. 196/1997, which modified the previous regulation stated in the mentioned *Legge* no. 1369/1960. Therefore, in the Italian legal system, agency workers can legally be assigned to a user company to work under its supervision and direction.

Nowadays, the regulation is established by *Decreto Legislativo* no. 81/2015 (from Article 30 to Article 40), which has been recently amended by *Decreto Legge* no. 87/2018. In accordance with these provisions, it is possible to hire workers through employment agencies to perform any task or activity in the user company and also to attend permanent needs. However, it is important to remark that employment agencies must be registered by the Ministry of Labour, after a procedure aimed at verifying if they fulfill specific requirements, which essentially reflect a good economic strength and a serious organization.

On the other hand, Article 31 of *Decreto Legislativo* no. 81/2015 sets out specific quantitative limits, which shall be respected by user firms. In this respect, it is to be noted that the 2015 reform modified the previous regulation, which allowed agency work only in some cases or to attend specific needs in the user company.

In detail, nowadays, the number of agency workers assigned to a company *indefinitely* (“staff leasing”) cannot exceed 20 per cent of the number of its permanent employees, calculated with reference to the 1st of January of the year in which the contract with the agency has been concluded. In the event that the user firm starts its activity during the year, this limit shall be determined referring to the day of the conclusion of the contract with the employment agency. However, the limit can be modified by the collective agreements applied by the user company. Anyway, it is clearly stated that only agency’s permanent workers can be assigned indefinitely to a user firm.

Conversely, before the enactment of *Decreto Legge* no. 87/2018, the number of agency workers who can be employed by a user company *temporarily* was determined only by the collective agreements applied by the user. Things have changed since the last reform, which introduced a new legal limit concerning these workers. Indeed, unless otherwise stated by collective agreements, user companies can hire an overall number of fixed-term workers and temporary agency workers up to 30 per cent of their permanent employees. Nevertheless, temporary agency work is not subject to any quantitative limit, when it concerns workers who have been made redundant, who are unemployed and have received for at least six months the relative allowance or who are considered

“disadvantaged” or “very disadvantaged” according to specific criteria set by the Ministry of Labour.

If the aforementioned limits are not respected, the affected workers can obtain an employment contract with the user firm. To this end, they have to sue the user company in sixty days since the end of the activity for which they have been assigned at the same user. If the judge admits the claim, he/she condemns the company to pay a compensation which shall not be lower than 2,5 or exceed 12 months’ salaries, with regard to the last pay of reference for calculating the employee severance indemnity. This compensation should repair the whole damage suffered by the workers, during the period between the conclusion of the activity and the judge’s decision. In addition, the user company is also subject to administrative sanctions provided for by Article 40 of *Decreto Legislativo* no. 81/2015.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

According to Article 32 of *Decreto Legislativo* no. 81/2015, in the Italian legal system, there exist activities in which hiring workers through employment agencies is banned. Specifically:

- a. To replace workers on strike in the user firm.
- b. To fill a position that was deleted as a result of collective redundancies, in the previous six months, except in the event that the contract is concluded in order to replace absent workers or that it has an initial term no longer than three months.
- c. To fill a position that is suspended or affected by a reduction of working hours, with the application of wages guarantee fund system (CIG).
- d. If the company did not carry out the risk assessment, required by the Act on safety and health at work.

If workers are hired through employment agencies in any of these prohibited cases, the affected workers are entitled to get an employment contract with the user firm, in accordance with the regulation explained above (answer no. 7). At the same time, administrative sanctions are imposed on the responsible user company.

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transferred to user firms? And the user firm?

Pursuant to Article 35, paragraph 2 of *Decreto Legislativo* no. 81/2015, employment agencies and user companies are jointly liable for labour and Social Security obligations regarding transferred workers. That is, the agency, as formal employer, is obviously liable for fulfilling employed workers' labour and Social Security obligations. However, agency workers can also pretend the full payment of these entitlements from the user firm. If the latter satisfies workers' claims, it can refer to the employment agency in order to recover the paid amount.

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

Italian regulation establishes an equal treatment principle between transferred workers and user company's employees. Specifically, for the duration of their assignment at a user company, agency workers must be given a labour treatment "*on the whole not inferior*" than the one that would apply if they had been recruited directly by that company for the same position. Furthermore, Article 35, paragraph 3 of *Decreto Legislativo* no. 81/2015 specifies that workers are entitled to benefit from the same social and welfare services as the user's permanent employees.

Moreover, specific rules are established with regard to agency workers' safety and health. In detail, the user company shall take the same prevention and protection measures stated for its employees. On the other hand, the agency is obliged to inform workers about the risks for their safety and to train them to use the equipments needed to perform the activity for which they are hired. However, the contract between the agency and the user firm may provide that this latter shall fulfill such obligations.

Article 36 then clarifies that agency workers have the same rights as the end user's employees, also regarding to collective employment relations. Therefore, agency workers may exercise all the rights recognized by the Italian Workers' Statute in the user company's premises. To this end, every twelve months, user firm shall provide information on the use of agency workers to employees' representatives. Administrative sanctions are imposed if the user company does not comply with this obligation. The same sanctions shall be applied to both companies in case of infringement of the abovementioned equal treatment principle.

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OUTSOURCING AND CHAIN SUPPLY IN PORTUGAL

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Introduction

In Portugal, outsourcing practices are widely allowed without legal constraints and with no relevant restrictions or consequences regarding employees, whose labor status is not protected against these new forms of productive organization, with the exception of the transfer of undertaking regime as a result of Directive 2001/23/EC and the corresponding ECJ case-law. As a consequence, outsourcing has become very common in all productive sectors.

As a rule, the employee must work directly for the employer who exercises exclusively the directive and disciplinary powers: generally, the employee's activity must directly benefit their employer. However, there are two main exceptions which are legally regulated: the so-called temporary agency work and the occasional assignment to another employer.

Moreover, since 2003, the Portuguese Labor Code allows for a single contract between one employee and several employers at once and contains a specific legal provision regulating this sort of employment relationship. This is the so-called contract with a plurality of employers. Such a contract is possible if various companies (employers) are in a corporate relationship of reciprocal ownership, control or group or simply have a common organizational structure, which may include different forms of organizational frameworks. The legal relation arising out of the contract with a plurality of employers is characterized by the existence of a single contractual relationship between the employee and a plurality of entities that assume joint ownership of the employer position and subsequent joint and several liability. The main objectives of this legal regulation are, on the one hand, to solve the problems arising from the identification of the employer in relations between a plurality of actors and to establish the corresponding responsibilities. Therefore, this regime could lead to a "re-internalization" of corporate responsibilities instead of the usual externalization, improving employees' protection.

Temporary Employment Agencies are allowed since 1989, but in order to operate legally there is a number of demanding requirements that must be met (v.g., the need of a permit for this kind of economic activity, the number of staff of the agency itself, their level of expertise, the absence of criminal record, and a public registry)⁵¹. If a Temporary Employment Agency operates without the permit all the contracts signed with users will be null and void and, as a result, the employee will be deemed to have an open-ended employment contract with the agency itself⁵² (regrettably not with the user).

The temporary employment legal regime has suffered some changes over the years which have introduced some additional flexibility. A Temporary Employment Agency (which, by the way, is not necessarily a corporation, since it can be simply a single person) may hire employees to transfer to users either through a fixed-term or an open-ended employment contract. Still, in 2016, a law aiming to combat modern forms of forced labor⁵³ extended liability in cases of temporary work. This latter trend is confirmed by recent draft laws and a Government bill which aim to amend the Labor Code in order to limit the use of temporary agency work, to reinforce employees' protection⁵⁴ and to submit outsourcing to the legal labor regime applicable to temporary agency work⁵⁵.

According to the Green Book of Labor Relations (2016), although the number of employees hired through Temporary Employment Agencies is not high, it has been increasing over time. Thus, in 2014, 2.8% of employees were employed under this scheme while, in 2002, the proportion was only 1.3%.⁵⁶ In fact, the increase in temporary agency work follows the trend towards an expansion of non-permanent/temporary employment contracts in the context of the Portuguese labor market, which assumed historically high proportions in 2014, when more than 30% of employees in the private sector had non-permanent contracts⁵⁷.

⁵¹ See Decree-Law No. 260/2009 of September 25th, modified by Law No. 5/2014 of February 12th, Law No. 146/2015 of September 9th and Law No. 28/2016 of August 23th.

⁵² See [article 173/3 of the Labor Code](#).

⁵³ Law No. 28/2016 of August 23th (<https://dre.pt/application/file/75171218>).

⁵⁴ Draft law 912/XIII (3.^a) *Diário da Assembleia da República - Separata* No. 95, 12 June 2018, available at: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=42742>; Bill No. 136/XIII, *Diário da Assembleia da República - Separata* No. 94, 12 June 2018, available at: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=42733>.

⁵⁵ See article 192-A of Draft law No. 904/XIII (3.^a), *Diário da Assembleia da República*, 12 June 2018, available at <http://debates.parlamento.pt/catalogo/r3/dar/sep/13/03/095/2018-06-12?pgs=&org=PLC>.

⁵⁶ Ministério do Trabalho, Solidariedade e Segurança Social, *Livro Verde sobre as Relações Laborais*, Guilherme Dray (eds.), December 2016, pp. 174-175, available at http://cite.gov.pt/pt/destaques/complementosDestqs2/LIVRO_VERDE_2016.pdf.

⁵⁷ *Id.*, *ibidem*.

1. Is outsourcing a legal form of production organization?

The Portuguese regulation allows outsourcing as a legal form of productive organization. Firms can partly or totally externalize their production by contracting other companies. This freedom in outsourcing is regulated in [article 61 of the Portuguese Constitution](#), which recognizes entrepreneurial freedom.

2. Are there limits and/or prohibitions to outsourcing?

There are no restrictions or prohibitions to outsourcing in the private sector.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

The Portuguese regulation does not have a rule such as article [42 of the Spanish Estatuto de los Trabajadores](#). The company that partly or totally outsources its production does not have any labor responsibility in relation to the subcontractor's employees.

However, according to [article 551/4 of the Labor Code](#), the contractor, their managers, as well as the companies in a corporate relationship of reciprocal ownership, control or group with the contractor, are joint and severally liable for the compliance with the law and for any offences committed by the subcontractor, including administrative responsibility.

The same applies to safety and security obligations ([art. 16/5 of Law No. 102/2009, September 10th](#)).

The (sub)contractor or the outsourcer that, in the same civil year, benefits from more than 50% of the activity of an independent worker, who is obliged to contribute to the Social Security System and earns an annual income of at least 6xIAS (Social Support Index, which, in 2019, is €475,76), has to pay a Contribution Rate of 10%, if the economic dependency is higher than 80%, or 7% in the other cases (economic dependency between 51% and 80%) (arts. 140 and 168/7 of [Law No. 110/2009, September 16th](#)). To this effect, companies that have a control or group relationship are considered the same (sub)contractor or outsourcer (article 140/3 of [Law No. 110/2009](#) and [Circular de Orientação Técnica No. 1 of March 28th, 2011](#)).

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

In the case of the Portuguese regulation, the collective agreement applicable to the contractor during its relationship with the main company is the collective agreement (sector or company level) applicable to the contractor. That is, in other words, there is no specialty whatsoever regarding the determination of the applicable collective agreement in cases of subcontracting. Therefore, the working conditions of the workers of the contractor company that provide services in execution of the contract with the main company are determined in accordance with the collective agreement applicable to the contractor company and not to the main company.

Nevertheless, one of the previously mentioned draft laws amending the Portuguese Labor Code that are being discussed in Parliament (see Introduction) intends to submit outsourcing to the legal labor regime applicable to temporary agency work⁵⁸. Consequently, if such draft law is adopted, this situation will change accordingly (see question 10).

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

In the Portuguese legal system, the answer is negative. There is no duty for subcontractors to recognize the contractor company's employees the same conditions recognized to employees in the user company.

Again, this situation will change if the previously mentioned draft laws (see Introduction) are adopted by the Parliament, thus applying the legal regime of temporary agency work (see question 10).

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

As we previously mentioned, outsourcing is allowed in the Portuguese regulation. However, it is illegal to hire employees and to transfer them to another company. There are two exceptions, though: (i) Temporary Employment Agencies (following question); and (ii) what is called the "occasional assignment to another employer" (articles 288 to 293 of the [Labor Code](#)).

⁵⁸ See article 192-A of Draft law No. 904/XIII (3.^a), *Diário da Assembleia da República*, 12 June 2018, available at <http://debates.parlamento.pt/catalogo/r3/dar/sep/13/03/095/2018-06-12?pgs=&org=PLC>.

In general, the assignment of occasional employees is illegal. Nevertheless, it is legal when five cumulative requirements are observed: (i) the employee has an open-ended contract; (ii) the transfer takes place between associated companies (companies in corporate relationships of reciprocal ownership, control or group) or between employers who share common organizational structures; (iii) the employee agrees with the assignment; (iv) the assignment duration does not exceed one year (although it can be renovated until the maximum limit of 5 years); and (v) a written contract between the companies has been signed. The transference will be illegal if one of the abovementioned requirements does not occur (articles 289, 290 and 292 of the Labor Code). The terms of the occasional assignment can be regulated by collective agreement, except for the need of the employee's agreement (article 289/2 of the Labor Code). Note that the transferor cannot have, as principal or secondary activity, the transference of employees as business, because this is only allowed to temporary work agencies. Apart from these cases, the transference of employees between companies is illicit.

Although there is no specific rule in the Portuguese Labor Code, both outsourcing and cession of occasional employees are considered illicit, because fraudulent, in the cases specifically mentioned in the Spanish regulation: (a) when the only aim of the contract between the user company and the subcontractor is for the latter to hire employees and lend them to the user company; (b) when the subcontractor is not a real firm, in the sense that it does not exert an activity or does not possess any infrastructure or enough means to perform the hired activity; and (c) when the subcontractor does not carry out the tasks of direction, organization and control of its employees in the provision of services.

For example, if a fixed-term employee of company AAA (which is not a temporary work agency) agrees with his transference to company BBB (which has with company AAA a corporate relationship of reciprocal ownership, control or group, or both share common organizational structures), there is an illegal transfer of employees, because, as we said, for it to be a licit cession it is necessary that the employee has an open-ended contract.

Another example: if an employee of company AAA (which is not a temporary work agency) works in company BBB, because of a service contract between the two companies (outsourcing), but receives orders and is controlled by BBB, it is clear that it is BBB who performs the entrepreneurial functions with regard to the direction, organization and control of the employees, and not company AAA. As a result, in this example, there is a case of fraudulent outsourcing and company BBB will be considered the employer.

The consequences of illegal assignment of occasional employees are that the affected employees acquire an open-ended contract with the company of their choosing and, in addition, there is an administrative offense. The consequence for illegal outsourcing is that the real employer (the one who performs the entrepreneurial functions with regard to the direction, organization and control of employees) shall be recognized as the employer, instead of or together with the formal one.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

The Portuguese regulation allows hiring employees through Temporary Employment Agencies ([articles 172 ff. of the Labor Code](#)). However, pursuant to [article 175 of the Labor Code](#), it is only possible to hire employees through such agencies in some of the circumstances in which fixed-term contracts are allowed (to attend temporary needs that are exhaustively listed) and in some additional situations where there is a temporary need which does not expressly allow fixed-term contracts (also listed exhaustively). That is, only when the user company has a temporary work need in the company. Companies can never hire employees through Temporary Employment Agencies for the fulfillment of needs which are not of a temporary nature.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

In the Portuguese regulation, although hiring employees through such agencies is legal, there are some specific cases and some activities where it is forbidden. Specifically:

- a. To replace employees on strike in the user firm ([article 535 of the Labor Code](#)).
- b. To perform tasks especially dangerous for the health and safety of employees, except when that task corresponds to the professional qualification of the employee ([article 175/4 of the Labor Code](#)).
- c. To fill in a position that was amortized by collective redundancy or dismissal by extinction of the work post in the previous 12 months ([article 175/5 of the Labor Code](#)).
- d. To transfer them to another Temporary Employment Agency, which in turn will transfer them to a user company ([article 173/2 of the Labor Code](#)).

In case of hiring employees through Temporary Employment Agencies in any of these prohibited cases, the consequences can be, depending on the situation: a) administrative responsibility; b) criminal responsibility (in the first situation mentioned above); and c) the establishment of an open-ended contract with the user company.

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

In the Portuguese legal system, the Temporary Employment Agencies, as sole (formal) employers, are the entities liable for fulfilling labor and Social Security obligations with regard to the employees hired.

As a rule, the Temporary Employment Agency and the user company are not jointly liable for the payment of salary and social security obligations to the employee, since these remain the duty of the employer (the Temporary Employment Agency).

Nevertheless, there are some cases where the user company may become liable vis-à-vis the employee: a) to begin with, if a user company contracts with a Temporary Employment Agency that is not legally allowed to operate, then both are jointly and severally liable for any debts to the employee arising from the employment contract, its breach or termination during the last three years, as well as for the corresponding social security obligations ([article 174/1 of the Labor Code](#)); b) on the other hand, the Temporary Employment Agency, the user, their managers and members of the board of directors, as well as companies in a corporate relationship of reciprocal ownership, control or group with the Temporary Employment Agency or with the user, are considered subsidiary liable for those obligations and also for all administrative responsibility ([article 174/2 of the Labor Code](#)).

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

The status of the employee who is hired by a Temporary Employment Agency and transferred to a user is rather complex in Portuguese law.

On the one hand, the Temporary Employment Agency has the exclusive power to sanction the employee with disciplinary measures. On the other hand, the working time and holidays are established by the user and the employee must obey all the rules of the user in matters concerning, namely, health and safety at work, place of performance and the way the work must be done ([article 185/2/3/4 of the Labor Code](#)).

Portuguese regulation establishes an equal treatment principle concerning salary and other monetary attributions between transferred employees and employees of the user company ([article 185/5/6 of the Labor Code](#)). Although the duty to pay the salary remains an exclusive duty of the Temporary Employment Agency, the employee is

entitled either to the wages stated in the collective agreement binding the Temporary Employment Agency or in the collective agreement binding the user itself, depending on which is higher. As a rule, the temporary employee must, at least, receive the same wages as the employees of the user company for the same job. In practice, though, the courts have allowed for differences in salary, taking into account, as a relevant factor to justify the differences, the seniority of the employees.

After a 60-day period of working for the benefit of a certain user, the employee, even if not affiliated to a union, will still be entitled to invoke the collective agreement that binds the employees of the user who perform the same job. The Government bill previously mentioned, as well as the other draft laws, will eliminate the 60-day period, thus applying the collective agreement from the start.

11. Other relevant aspects and personal assessment of the regulation regarding outsourcing and supply chains

The Portuguese regulation has evolved in the last years in order to consider other forms of productive organization that – if not explicitly considered – could erase some of the protection given to employees by the Labor Code, namely the number of labor rules considering the groups of undertakings has been rising in several domains.

Nevertheless, the outsourcing and supply chains not connected to groups of undertakings or Temporary Employment Agencies have been almost completely disregarded by the Portuguese labor legislator, leaving the employees without any protection. In the absence of legal provisions, the Portuguese case-law, which traditionally holds a very positivist approach, does not provide for adequate protection based for instance on the civil regimes of abuse or fraud. Still, this situation has been slowly changing (v.g., Decision of the Supreme Court of Justice of June 20th, 2018, mentioned below).

The legal regulation of the Temporary Employment Agency can be considered fairly adequate, although there are some cases in which the consequence for the infringement of the legal requirements should be the establishment of an open-ended contract with the user instead of an open-ended contract with the Temporary Employment Agency. Still, if the previously mentioned draft laws are adopted, this situation will also change.

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<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/45efa2f02cc4e0d2802582bf003097b6?OpenDocument&Highlight=0,outsourcing>

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<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a0375968c49b3739802582590042f176?OpenDocument&Highlight=0,outsourcing>

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Other relevant judicial decisions on temporary work are available at http://www.cej.mj.pt/cej/recursos/ebooks/trabalho/e-book_Trabalho_temporario.pdf.

⁶¹ <https://dre.pt/application/dir/pdf1sdip/2013/03/04500/0125301268.pdf>

⁶² <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b56400b8fb658706802575bd0038a6e0?OpenDocument&Highlight=0,08S2315>

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⁶⁷ <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/8b43977a5922e83d8025826b005a52c8?OpenDocument&Highlight=0,outsourcing>

⁶⁸ <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/058c6df22060d70880257bea003bbe22?OpenDocument>

OUTSOURCING AND CHAIN SUPPLY IN SPAIN

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The development of global production networks and open markets changed the way companies produced goods and rendered services. From old local ways of production based on Fordism, global world has facilitated international value chains, which permitted specialisation and competitiveness between manufacturing companies through outsourcing. However, two things should be considered as well regarding this competitiveness related to outsourcing: 1) international value chains have also moved competition among countries, which try to attract private resources with more attractive employment (and fiscal) regulations in detriment of other territories. Evidence here in Spain are the closing of factories in Leon, A Coruna and Almeria by multinational corporations such as Vestas, Alcoa and Cemex to transfer its production to other countries⁶⁹; 2) it would be a mistake to limit disruption of outsourcing only to international value chains in manufacturing companies when outsourcing is far used in service sector. Furthermore, new ways of disruption in production and service models are appearing with artificial intelligence and cyber technology. Additionally, undoubtful is that, at least in the short-term, the main party affected by these kinds of alterations are employees.

For these reasons, outsourcing is currently one of the most controversial topics in the Spanish labour legal system. Indeed, the socialist Government suggested several times its aim to reform the contemporary employment regulation on this matter. However, no legal action was taken while in power. At the end, after calling for snap elections, the caretaker Government has ascertained that the potential new reform would come in case future elections entitled them to reach office⁷⁰. Statistics on numbers of outsourcing agreements are very difficult to find since it is not an industry itself but an entrepreneurial private decision. Still, some studies consider that the 10% of the industrial Spanish GDP comes from outsourcing activities⁷¹.

⁶⁹ CRUZ PEÑA, JUAN. “Alcoa, Cemex, Vestas, La Naval, Gamesa... Se oscurece el futuro de la industria española”. *El Confidencial*, October 21st, 2018. (https://www.elconfidencial.com/empresas/2018-10-21/alcoa-cemex-vestas-siemens-gamesa-se-oscorece-el-futuro-de-la-industria-espanola_1633353/).

⁷⁰ JORRÍN, JAVIER. “El Gobierno renuncia a la ‘contrarreforma laboral’ antes de las elecciones”. *El Confidencial*, March 3rd, 2019. (https://www.elconfidencial.com/economia/2019-03-08/gobierno-renuncia-contrarreforma-laboral-elecciones_1870382/).

⁷¹ “Subcontratación Industrial” Cámara de comercio. (<https://subcontex.camara.es/subcontratacion-industrial>).

Regarding Temporary Employment Agencies, the other main topic of this article, controversies do not lie in its regulation, but in the protection included in its regulation, as it will be seen in the following questions. Additionally, it must be stated that temporary employment agencies are also a very demanding activity. In fact, according to the provisional data of the Spanish Statistics National Institute, in 2018, 4.294.907 availability contracts were signed between user companies and temporary employment agencies, being the manufactory industry the sector where most contracts were signed (almost a 27% of them) followed by the hotel industry with 802.677 availability contracts. Both sectors made 45% of availability contracts in 2018. This also means that in Spain, last year, there were 4.294.907 short-term declared contracts, a piece of information that does not give good references of the quality of our employment system⁷².

Having put the readers in context, the aim of this article is to respond some doubts and introduce some knowledge on outsourcing and temporary agencies in the Spanish legal regime as to compare with their own legal system. However, as it may be deduced from previous paragraphs, the future of the validity of some of these questions may lie on the following snap elections, since changes are knocking on the door.

1. Is outsourcing a legal form of production organization?

In Spain, outsourcing is a legal form of productive organization. Therefore, companies can partly or totally externalise their production by contracting other companies. In fact, outsourcing is both protected by the entrepreneurial freedom of article 38 of the Spanish Constitution (hereinafter, SC) and regulated by article 42 of the Employees' Statute (hereinafter, ES). Consequently, *"the procurement of works and services (...) is not only a tolerated action (...) but a legally regulated activity, on the grounds of the entrepreneurial freedom constitutional principle"* (Decision of the Spanish Supreme Court of December 17th, 2001 [Rec. num. 244/2001]).

2. Are there limits and/or prohibitions to outsourcing?

According to the Supreme Court in its Decision of November 20th, 2015 (Rec. num. 104/2015) *"the legal system does not contain any general prohibition preventing the employer to resort to outsourcing in order to integrate its productive activity, and thus is recognised by article 42.1 ES"*. Despite this affirmation, in Spain there are some limits to outsourcing in the construction sector.

⁷² All information regarding this point might be found here (<http://www.mitramiss.gob.es/estadisticas/Ett/welcome.htm>)

It is broadly known that before the economic crisis the bulwark of the Spanish economy was the construction sector. However, although the Law 31/1995 on Labour Risk Prevention was passed, the legislator was still concerned about “*a very notorious labour sinistrality on numbers and seriousness*”⁷³ in this sector. Consequently, this situation led to the approval of the Law 32/2006, on October 18th, on the regulation of outsourcing in the Construction Sector, with the aim of “*improving the working conditions in this sector, in general, and the security and health conditions of workers of the same, in particular*”⁷⁴. Concretely, this regulation allows outsourcing, but article 5 of the same provides the following limits and prohibitions:

- Outsourcing is permitted but up to the limit of the third-subcontracting party. Therefore, the third subcontractor shall not be entitled to outsource its services. Nevertheless, this prohibition may be lifted in duly justified fortuitous events, such as work specialisation requirements, technical difficulties of production or force majeure situations in the construction. However, two things need to be highlighted:
 - a. The fortuitous events must be approved and motivated by the project management of the construction. Art 2.1.f) of the Royal Decree 1627/1997 defines as project management the “*competent technician or technicians appointed by the promoter, in charge of the direction and control of the execution of the construction*”.
 - b. The prohibition may only be lifted to allow one more subcontractor. Therefore, there can only be four subcontracting parties at most.
- Independent contractors are not entitled to outsourcing irrespective of which subcontracting party they are.
- Subcontracting parties whose productive organisation in the construction chiefly consist of workforce are forbidden to outsource, irrespective of which subcontracting party they are. The reason why this prohibition exists is because this subcontracting agreement “*already edges with illegal transfer of workers*” and therefore “*a new outsource is not tolerated*” (Decision of the Superior Court of Justice of Madrid num. 287/2009, of April 27th).

In the circumstances of independent contractors and subcontracting parties the prohibition cannot be lifted but in cases of force majeure.

⁷³ Memorandum of the Law 32/2006, of October 18th, on the regulation on outsourcing in the Construction Sector.

⁷⁴ Article 1.1 of Law 32/2006

Moreover, it must be highlighted that is possible for collective bargaining agreements to add prohibitions on outsourcing (Decision of the Superior Court of Justice of the Canary Islands, Tenerife, February 22nd, 2016 [rec. num. 623/2015]).

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

The different kind of responsibilities that stem from an outsourcing are provided in article 42 ES. However, the responsibilities of the main contracting party will depend on the kind of activity outsourced as it has been stated by the Supreme Court that *“the liability of the main entrepreneur in contractor and subcontractor agreements (regarding article 42 ES) is limited to the outsourcing agreements signed for the realisation of works and services corresponding to the “own activity” of the company”* (Decision of the Supreme Court of February 21st, 2018 [Rec. num. 251/2016]). Therefore, it is necessary to know what is understood by *“own activity”* according to case law.

This debate was held when article 42 was firstly introduced in the Spanish regulation. At that time, there were mainly two theories on the interpretation of this legal term: the production cycle theory and the indispensable activities theory. The Supreme Court analysed specifically both theories on its Decision of October 29th, 1998 (Rec. num. 1213/1998):

- The production cycle theory means that intrinsic to the concept of own activity are *“all those activities related to the production of specific goods or services that the company pretends to provide to the public or place in the market”*. This theory is also known as the core-business theory. For example, a company in the sector of garment manufacture contracts out the manufacture of the summer line to another garment manufacturer.
- The indispensable activities theory suggests that the term *“own activity”* includes *“all activities, specific and unspecific, that a concrete productive organisation must develop to perform properly its functions”*. For instance, the same garment manufacturer that hires another company to provide the cleaning services.

As the reader may see, the former is more restrictive than the latter. The Supreme Court found for the production cycle theory and its application has been unanimous since then. The reason was given in the Decision of the Supreme Court of January 18th, 1995 (Rec. num. 150/1994) and it has been ratified continuously (Decision of the Supreme

Court of July 21st, 2016 [Rec. num. 2147/2014]): *“if it is required that the works and services contracted out or subcontracted must correspond to the own business activity of the principal party is because the legislator is thinking in a reasonable limitation that excludes a favourable interpretation to any type of entrepreneurial activity”*. Hence, going back to previous examples, employees of the contractor cleaning services company cannot claim the user garment company for labour nor Social Security debts.

Once we know that the liabilities of article 42 might only apply to core-business outsourcing agreements, it should be known which kind of liabilities foresees that article regarding the externalisations of core-business activities.

Regarding the scope of the liability of article 42 there are controversies among the doctrine. A part of the doctrine, based on reports of the Social Security General Treasury and the decision of the Supreme Court, administrative chamber, on October 28th, 2001 considers that article 42 ES determines two kind of liabilities:

1. The first paragraph would foresee a subsidiary liability regarding contributions to Social Security of the contracting or subcontracting parties previous to the outsourcing agreement (paragraph 1 of article 42 ES). At the same time, they consider that this liability may be avoided if the main entrepreneur has obtained a certification of the Social Security regarding the inexistence of debts of the contracting or subcontracting parties with the Social Security.
 - If the main company has obtained a negative certification of the Social Security, this means that the contracting or subcontracting parties have not failed to pay their social security contributions. In that case, subsidiary liability might not apply.
 - If the main company obtains a positive certification of the Social Security, then the other outsourcing parties have debts with the Social Security. Thus, if judicially required, the main entrepreneur might be obliged to pay subsidiary those contributions in case it enters into an outsourcing agreement.
2. Whereas the second paragraph would determine a joint liability regarding Social Security obligations and salary obligations of the contractors and subcontractors incurred during the outsourcing agreement (paragraph 2 article 42 ES).
 - Regarding the Social Security obligations, the principal party shall be liable up to the three following years to the termination of its outsourcing agreement.

- Regarding the salary obligations, the principal party shall be liable up to the first year following the termination of its outsourcing agreement.

Consequently, employees of the contractor or subcontractors are entitled to file a lawsuit against both the main company and its own employer for Social Security or salary obligations, if they do it in due course.

However, another part of the doctrine upholds that there is not such a difference among liabilities and that article 42 ES only determines a joint liability for all the debts incurred during the outsourcing agreement whether social security contributions or wage debts with subcontracted employees. At the same time, this doctrine considers that article 42.1 establishes a vigilance duty to the main entrepreneur, which is obliged to request monthly the Social Security certificate exemption for the potential Social Security debts in which the subcontractor may have incurred. One of the most representative decisions regarding this doctrine is the Decision of the Superior Court of Justice of the Valencian Community, administrative chamber, on June 20th, 2007 (Rec. num. 1457/2001).

Additionally, it must be said that, according to article 168 of the Social Security General Act, in any outsourcing situation, whether core-business activity or not, the main party shall be ancillary liable of a benefit if the other outsourcing parties are declared both liable of that benefit and insolvent.

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

In the Spanish legal system, there is no provision setting the obligation to apply the working conditions of the collective bargaining agreement of the main entrepreneur. In fact, this is one of the reasons why outsourcing is attractive: the bargaining agreements of subcontracting companies are entitled to foresee lower labour conditions than the foreseen in the bargaining agreements of main entrepreneurs. Consequently, instead of assuming the organisation and costs of a service, if they are externalised, the organisation shall be assumed by a third party and the costs of those services shall be lower. Hence, it is a win-win for the main entrepreneur.

The Spanish Government and the most representative unions set their eyes on this issue. Both parties reached a draft agreement by which the working conditions of subcontracted employees would be harmonised with the conditions of the employees of

the main entrepreneur⁷⁵. However, this agreement did not have the approval of the business associations and the Government did not have the majority in Congress to pass such law. Nevertheless, a snap general election has been called and the caretaker Government has promised a counter reform of the Employees' Statute that might include the previous modification⁷⁶.

Despite what mentioned before, there are some sectorial bargaining agreements that require the application of certain conditions of the collective agreement of the main entrepreneur when outsourcing. For instance, the interprovincial collective bargaining agreement of the hospitality sector of Catalonia does foresee in its 60 provision that the salary conditions of that bargaining agreement shall be applicable to subcontracting parties as well.

Additionally, it has to be highlighted that article 122 on Contracts in the Public Sector contemplates the obligation to tender companies to pay its employees according to the sectorial collective bargaining agreement, instead of the company collective bargaining agreement.

5. Is the subcontractor legally obliged to recognize its workers the same labour conditions applicable to the workers of the user company?

Contrary to what happens with Temporary Employment Agencies, there is no Directive nor national law demanding the harmonisation of working conditions between employees of the main entrepreneur and the subcontracting parties when outsourcing. Therefore, as explained above, there are powerful incentives to externalise as much production or services as considered optimal.

However, it should be highlighted that when outsourcing core-business activities, the same sectorial collective bargaining agreement might apply. Hence, the basic working conditions of the companies involved could be the same. Still, article 84.2 ES specifically foresees that, for some conditions, company bargaining agreements shall have priority applicability over sectorial bargaining agreements. Among those conditions are: the basic salary, overtime, and timetable... Hence, it is very easy to undermine the working conditions through externalisation.

⁷⁵ PASCUAL CORTÉS, R.. "Los sindicatos y Trabajo pactan una contrarreforma laboral sin los empresarios". *Cinco Días, El País*, December 14th, 2018. (https://cincodias.elpais.com/cincodias/2018/12/13/economia/1544699625_672422.html).

⁷⁶ JORRÍN, JAVIER. Opt. cit.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

As it will be seen in the following question, the transfer of employees is prohibited in the Spanish legal system, except when done through Temporary Employment Agencies. The issue is that outsourcing agreements are likely to be an illegal transfer of employees as the Supreme Court has stated that in some cases “*outsourcing agreements (...) are not easy to differentiate from transfer of employees; this differentiation is aggravated because in practice outsourcing agreements are used as a formal way to articulate an interposed agreement on facilitation of employees between assignor and assignee*” (Decision of May 18th, 2016 [Rec. num. 3435/2014]).

Article 43 ES specifically provides both in which cases and what consequences entail an illegal transfer of employees. According to the second paragraph of this provision, there will be an illegal transfer of employees when:

- a. The only aim of the contract between the main entrepreneur and the subcontractor is for the latter to hire employees and lend them to the main company. For example, the construction company CEMENT contracts out with the construction company CONCRETE, but the only thing that CONCRETE provides to CEMENT is workforce, and it is not a Temporary Employment Agency.
- b. When the subcontractor is not a real firm, in the sense that it does not exert an activity or does not possess any infrastructure or enough means to perform the hired activity. For instance, the electric company SPARK signs a contract of provision of services with the company VOLT, but the latter is only a front company used by the parent company to provide employees with lower working conditions.
- c. When the subcontractor does not carry out the tasks of direction, organization and control of its employees in the provision of services. For example, the company OFFICE contracts out with the company MOP. The latter compromises to send its employees to clean the workplace of OFFICE. However, the HR Director of OFFICE is the individual who demands a dress code, indicates the timetable of the cleaners, and is to be informed in case of delays.

However, it must be stated that those criteria are not a *numerus clausus*, but *apertus*. And that Courts have been applying additional criteria such as the technical justification of the contract and the autonomy of its object.

The consequences of an illegal transfer of employees are:

- a. Joint liability regarding obligations incurred with the employees and Social Security related with the outsourcing (article 43.3 ES). Consequently, both companies shall be jointly liable of these obligations.
- b. The employees of the assignor shall be entitled to choose to become permanent employees in one of the companies involved, the assignor or the assignee (article 43.4 ES).
- c. Administrative liability. According to article 8.2 of the Law on Infractions and Sanctions in the Social Regulation an illegal transfer of employees shall be considered a very serious administrative infraction.
- d. Criminal liability. In some reduced cases, an illegal transfer of employees might be deemed a criminal offence if it is understood that entails illegal traffic of people (article 321.1 of the Penal Code).

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

The Spanish regulation allows hiring employees through Temporary Employment Agencies. Indeed, is the only way in which transfer of employees is permitted in our legal system.

When the user company enters into an agreement with a temporary employment agency a triangular relationship is made.

- The user company and the temporary employment agency shall sign an availability contract by which the latter commits itself to send employees to the former.
- The temporary employment agency and the employee shall sign an employment agreement. This employment agreement might be permanent or fixed-term coinciding with the availability contract.
- The employee shall render its services for the user company, who will organise and control its work, but the salary and the disciplinary prerogative shall belong to the agency.

However, pursuant to article 6.2 of the Temporary Employment Agencies Act (TEAA), it is only possible to hire employees through such agencies in the same circumstances in

which fixed-term contracts are allowed. That is, only when the user company has a temporary work need it will be entitled to sign an availability contract with an agency. Therefore, it is not permitted for companies to hire employees through Temporary Employment Agencies to develop an activity that is permanent or ordinary.

Specifically, the situations in which user companies are entitled to attend to temporary employment agencies are provided in article 15.1 ES:

- a. When the employee is hired to the realisation of a determined job or service.
- b. When it is requested by circumstances of the market, accumulation of work or excess in requests.
- c. When the hiring consists of the substitution of employees with reserved right to their job.

Additionally, article 6 TEAA foresees that user companies may attend to temporary employment agencies in the same cases in which the user company would be entitled to sign formative contracts according to article 11 ES.

Illustratively, the Decision of the Superior Court of Justice of Catalonia of November 23rd, 2018 (Rec. num. 4877/2018) declared fraudulent the procedure of a famous airline in the airport of Barcelona. From February 2014 to March 2015, this company signed 322 availability contracts for accumulation of work with a temporary employment agency. During that time, the airline did not have any permanent employee in its airport staff. Hence, the Superior Court of Justice declared that this performance was fraudulent as the company “*needed a fix and permanent workforce to develop its activity*” in the airport.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

The Spanish regulation specifically foresees in article 8 TEAA in which cases hiring employees through temporary employment agencies is prohibited. Those cases are:

- a. Replacing employees on strike in the user firm.
- b. Performing tasks especially dangerous for the health and safety of employees. Specifically, activities in which employees are exposed to radiation, cancerous or toxic agents, and biological agents.

- c. Filling a position that was amortized in the previous 12 months.
- d. Transferring employees to another Temporary Employment Agency.

Regarding the consequences of hiring an employee in the previous cases, article 16.3 TEAA specifically foresees that in case companies involved in an availability contract infringe the previous prohibitions, several liability applies. However, the Supreme Court has stated that article 43 ES also applies to the prohibitions foreseen in article 8 TEAA (Decision of the Supreme Court of November 3rd, 2008), and, therefore, the consequences of an illegal transfer of employees (seen in question 6).

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

According to article 2 TEAA, Temporary Employment Agencies must guarantee the fulfilment of the Social Security, salary and compensatory obligations. To this end, Temporary Employment Agencies are obliged to constitute a financial guarantee. This guarantee shall only be returned when the temporary employment agency ceases its activity.

Therefore, the primary entity liable of these obligations is the temporary employment agency and that those obligations may be easily fulfilled since there is the obligation to constitute a financial guarantee. However, the user company shall be subsidiary liable of the Social Security, salary and severance debts generated during the availability contract with the transferred employees.

The subsidiary liability of the user company shall turn into severe liability in cases of infringement of the exclusions of legal transfer of employees (seen in question 8) and where the cause of the contract was permanent instead of temporary.

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

Article 11.1 TEAA specifically foresees that employees provided by a temporary employment agency shall be recognised the same essential working conditions as employees of user companies. This provision is a transposition of article 5 of Directive 2008/104/EC on temporary agency work that sets the principle of equal treatment among employees of temporary employment agencies. Second paragraph of article 11.1

TEAA concretises what is to be understood by “*essential working conditions*”. It defines it as the conditions “*referred to pay, duration of working time, overtime, rest periods, night work, holidays and public holidays*”.

Consequently, temporary employment agencies are entitled to negotiate with their employees’ representatives all conditions different from the conditions mentioned before and those conditions too, if they are improved. Therefore, it is possible to negotiate collective bargaining agreements to the extent that they do not lessen the working conditions of the collective bargaining agreement of the user company.

Additionally, a controversial decision has been issued by the Superior Court of Catalonia. This tribunal considers that the term “pay” of article 3 of 2008/104/EC Directive has to be interpreted broadly, as derived from the decisions of the European Court of Justice. Hence, “*pay*” also includes voluntary Social Security improvements provided in the collective bargaining agreement of the user company (Decision of January 17th, 2019 [rec. num. 6677/2018]).

References and judicial decisions

Decision of the Supreme Court of October 29th, 1998 (Rec. num. 1213/1998)

Decision of the Supreme Court of December 17th, 2001 (Rec. num. 244/2001).

Decision of the Supreme Court of November 20th, 2015 (Rec. num. 104/2015).

Decision of the Superior Court of Justice of the Canary Islands, Tenerife, February 22nd, 2016 (rec. num. 623/2015).

Decision of the Superior Court of Justice of Catalonia of November 23rd, 2018 (Rec. num. 4877/2018).

OUTSOURCING AND CHAIN SUPPLY IN THE UNITED KINGDOM

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Introduction

In the UK, the use of outsourcing has been a growing trend in both the private and public sectors. With regard to the latter, it has been increasingly used by Governments of all political persuasions since the 1980s, with ‘contracting out’ generally seen ‘as a way to reform public services and improve value for money’ and to ‘significantly reduce costs and help to improve public services.’⁷⁷

As a result, it is estimated that in 2013 the UK ‘outsourcing sector’ was responsible for some 3.3 million jobs: that is, ‘equivalent to 10% of all UK workforce jobs (employee plus self-employed jobs), or 11.75% of UK employee jobs’.⁷⁸ At the same time, total turnover in the outsourcing sector was said to be ‘in the region of £263 billion, equivalent to 8¾% of total economy-wide output’.⁷⁹ In the public sector alone, the National Audit Office suggested that ‘a sensible estimate’ of the contracting market in 2012/13 was ‘around half of the £187 billion that the Government [spent] on all goods and services.’⁸⁰ This latter figure was expected to rise to around £100 billion in 2014–15⁸¹ and it is reasonable to assume that the overall long term trend towards the ever greater use of outsourcing in both public and private sectors has continued in the intervening period.

1. Is outsourcing a legal form of production organization?

Outsourcing is an entirely legal form of production organization in the UK.

⁷⁷ See, for example, National Audit Office, *Government contracting: the role of major contractors in the delivery of public services*, Memorandum for Parliament, HC 810, Session 2013-14, 12 November 2013.

⁷⁸ Oxford Economics, *The UK Market for Business Services: the national, regional and constituency picture in 2013*, January 2015.

⁷⁹ Ibid.

⁸⁰ See 1 above.

⁸¹ Trades Union Congress and the New Economics Foundation, *Outsourcing Public Services*, 2015. See also Nick Davies, Oliver Chan, Aron Cheung, Gavin Freeguard & Emma Norris, *Government procurement: The scale and nature of contracting in the UK*, Institute for Government, 2018.

2. Are there limits and/or prohibitions to outsourcing?

There are effectively NO legal or other regulatory limitations or prohibitions in the UK on the use of outsourcing (or contracting out) in relation to either the ‘core’ or ‘ancillary’ activities of either public or private sector organizations. In the public sector, outsourcing has been used to a greater or lesser extent across almost the whole spectrum of central government, local government and National Health Service activities, including prisons and most of the probation service. It would appear that the only activities/services that have hitherto been politically (but not necessarily legally) immune from outsourcing are frontline defence and policing functions.

However, there have been a number of high profile incidents in recent times that cast doubt on the efficacy and viability of public sector contracting. Not least amongst these was the collapse of the Carillion group of companies in early 2018. An official National Audit Office (NAO) Report found that:

‘At the point of liquidation Carillion had around 420 contracts with the UK public sector including direct contracts, sub-contracts and special purpose vehicles to deliver private finance schemes. These included services for hospitals, schools, the armed forces, prisons and transport. Some of these contracts were joint ventures with other companies.’⁸²

In another example, the Ministry of Justice’s privatisation and outsourcing of probation services for low and medium risk offenders at a projected cost of £2.3 billion has proved to be a failure.⁸³

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor’s workers? What responsibilities?

An organization (‘the transferor’) that wholly or partly outsources/contracts out production, services and/or functions/activities bears **NO** ongoing liability or

⁸² NAO, Investigation into the government’s handling of the collapse of Carillion, HC 1002 SESSION 2017–2019 7 JUNE 2018

⁸³ NAO, *Transforming Rehabilitation: Progress review*, HC 1986 SESSION 2017–2019 1 MARCH 2019. Faced with the risk of multiple provider failures, the Ministry of Justice decided to terminate private contracts 14 months early, in December 2020. In June 2018, the Ministry commissioned work to understand private providers’ financial positions through to 2021-22 and to develop options for terminating the contracts. It found that, as at March 2018, private providers faced collective losses of £294 million over the life of the contracts compared to expected profits of £269 million when they made their original bids, a difference of £563 million.

responsibility in UK law for any labor, social security or other debts in relation to the incoming contractor (or sub contractors) employees.

Such limited protection as there is derives from the *Transfer of Undertakings (Protection of Employment) Regulations 2006* ('TUPE'), which implement the EU *Acquired Rights Directive*.⁸⁴ These provisions apply where either a traditional 'transfer of an undertaking'⁸⁵ or a 'service provision change' ('SPC')⁸⁶ occurs, and principally protects the employees in (or deemed to be) employed in the undertaking/activity or (or assigned to the) part of the undertaking/activity transferred immediately *before* the transfer or change to the incoming employer/contractor ('the transferee'). In principle, liabilities in respect of such employees transfer [almost] entirely to the transferee (see Qs.4 and 5 below) and this is the entity against which any claims by employees will be made. There is, therefore, no statutory concept of joint liability in this area and any distribution of risk (financial or otherwise) between the parties to a transfer or change will be entirely dependent on their private contractual arrangements and any indemnities contained therein.

It follows from the above that an organization that outsources/contracts out production, services, functions or activities also bears NO ongoing liability or responsibility for obligations regarding contributions to pension funds as regards the incoming contractor (or sub contractors) employees.

Furthermore, provisions in contracts of employment or collective agreements affecting transferred employees that relate to *occupational pension schemes* do not transfer to the transferee, nor does any right, power, duty or liability relating to such schemes (TUPE,

⁸⁴ 2000/78/EC.

⁸⁵ That is, a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity (TUPE, reg.3(1)(a)). An 'economic entity' means 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary' (reg.3(2)). The provisions cover both public and private sector undertakings engaged in economic activities whether or not they are operating for gain.

⁸⁶ The concept of the SPC was introduced in reg.3(1)(b), 2006 Regulations specifically to deal with the outsourcing/contracting out of especially labour intensive functions or activities in the light of the uncertainties caused by the ECJ's decision in *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] IRLR 255. It covers the initial outsourcing/contracting out, subsequent changes in contractors and insourcing/contracting back 'in house' where immediately before the SPC: (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and the activities are 'fundamentally the same' as the activities carried out by the person who has ceased to carry them out (and do not consist wholly or mainly of the supply of goods for the client's use).

Reg.10). In this context, the Court of Appeal has confirmed that neither TUPE nor the Acquired Rights Directive *currently* impose an obligation on transferees to provide equivalent pension benefits to those provided by the transferor to employees who are transferred. The Directive imposes a duty only on Member States, to protect specified pension interests that have accrued at the time of transfer.⁸⁷

However, from April 2005 there has been some limited pension protection on the transfer of an undertaking. Under provisions contained in the *Pensions Act 2004* and related regulations, transferee employers are required to offer transferred employees who previously had access to an occupational pension scheme with an employer contribution a *minimum* (but not comparable) level of pension provision. This may be access to an occupational pension scheme or to a defined contribution (ie money purchase) scheme or stakeholder pension. In the case of the latter two options, the transferee will be obliged to match employee contributions up to 6% of salary.

It is also important to note that rights under a scheme that is *not* an occupational pension scheme *do* transfer – for example, rights under a group pension scheme, or employer contributions to a pension scheme which an individual holds with a private pension provider. And any provisions of an *occupational* scheme which do *not* relate to “benefits for old age, invalidity or survivors” are *not* treated as part of the scheme and consequently *do* transfer (TUPE reg.10(2)). This includes *early* retirement benefits and accelerated/enhanced redundancy terms.⁸⁸

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

Terms *previously* incorporated (by *whatever* means) into a contract of employment with the transferor as a result of a collective agreement will remain part of the individual contract unless and until they are removed, either by agreement or under a specific right found within the contract, and will be transferred to the transferee under reg.4(1) of TUPE (see Q.5 below). But express terms referring to the setting of terms and conditions by reference to collective bargaining machinery/agreements to which the transferee is not party will *not* survive a TUPE transfer.⁸⁹ Regulation 5 of TUPE, which provides for the transfer of collective agreements in respect of transferring employees,

⁸⁷ *Adams and others v Lancashire County Council and BET Catering Services Ltd* [1997] IRLR 436.

⁸⁸ On this, see the crucial ruling of the ECJ in *Martin and others v South Bank University* [2004] IRLR 74.

⁸⁹ See *PARKWOOD LEISURE LTD v. ALEMO-HERRON and others* [2011] IRLR 696 (CA) and [2013] IRLR 744 [ECJ].

in reality has little meaning as collective agreements in the UK are subject to a *statutory* presumption that they are not legally binding.⁹⁰

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

Generally, the answer is again no *except in relation to those employees of the transferor employer identified in Q.3 above*.

Thus, TUPE, reg.4(1) overrides UK common law principles by providing that a transfer does not terminate the contracts of employment of such employees. Any contract which would otherwise have been terminated by the transfer has effect after the transfer as if originally made between the employee and the transferee. All the transferor's rights, powers, duties and liabilities under or "in connection" with the contracts of these employees are transferred to the transferee. The effect is to make the transferee *exclusively* responsible for their contracts and any connected liabilities: the Regulations do not provide for joint liability as between transferor and transferee. Where it is impossible for the transferee to replicate a pre-existing term, the entitlement is to "substantially equivalent" provision.⁹¹

In principle, the transferee employer is not permitted to vary these contractual terms (even with the employee's consent) if the sole or principal reason for the variation 'is the transfer' itself. But changes are permissible if the sole or principal reason for the change is an economic, technical or organizational reason entailing changes in the workforce ('ETO') and are either consensually agreed or an employee's contract permits such a variation (TUPE, reg.4(4) and (5)). An ETO is a reason that entails a change in the numbers or essential job functions of transferred employees and can now also include a change to the place where such employees are employed. It does not, however, cover mere changes in or simple harmonization of the transferred employees' contractual terms and conditions with a transferee's existing workforce.⁹²

⁹⁰ See ss.179 & 180 of the *Trade Union and Labour Relations Act 1992*.

⁹¹ See, for example, *Mitie Managed Services Ltd v French* [2002] IRLR 512, where the EAT held that was "impossible, unjust and absurd" to suggest that transferee employees could continue to participate in transferor's profit sharing scheme.

⁹² See the Court of Appeal decisions in *Delabole Slate Ltd v Berriman* [1985] IRLR 305 and most recently *The Manchester College v Hazel and anr (No.2)* [2014] IRLR 399. Perhaps rather worryingly, in *Enterprise Managed Services Ltd v Dance and ors* [2011], the EAT has suggested held that this does *not* preclude variations *intended* to effect productivity changes (by the transferee applying its existing Profit Related Pay system to transferred employees) even if this has the *effect* of harmonizing terms.

A variation of contract is also permitted in so far as it varies a term or condition incorporated from a collective agreement, provided that: (a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and (b) following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.

Finally, anything done before the transfer is completed by or in relation to the transferor, in respect of the transferred contracts or the employees (bar criminal liabilities), is deemed to have been done by or in relation to the transferee. This may include:

- a transferor's liability in tort – for example, negligence or breach of statutory duty causing personal injury to an employee;
- liability for the transferor's unlawful acts in relation to the employee when he or she was employed under a previous contract, including for example an equal pay claim;⁹³
- the transferor's duties and liabilities in respect of failures to consult and inform collectively on impending redundancies; or
- liability for the automatically unfair dismissal of such employees if the sole or principal reason for dismissal 'is' the transfer.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

The terms 'fraudulent' outsourcing or 'illegal' transfer of workers has no particular significance or resonance in UK labor law.

Under TUPE, the only question is whether a transfer or SPC has occurred in order to determine responsibility and liability. A particular issue may arise when changes occur under the veil of corporate identity. In *Print Factory London 1991 Ltd v Millam* [2006] IRLR 923, the EAT stated that the courts and tribunals are not permitted to pierce the corporate veil to look behind the legal form, unless there is strong evidence that this is a 'sham or façade'. However, in the same case, the Court of Appeal ([2007] IRLR 526) suggested that while "*the legal structure is of course important, . . . it cannot be conclusive in deciding the issue of whether, within that legal structure, control of the business has been transferred as a matter of fact.*"

⁹³ See, for example, *Guttridge v Sodexo* [2009] IRLR 721, Court of Appeal.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

As with outsourcing/contracting out more generally, the hiring of workers through temporary employment agencies is entirely legal in the UK in virtually all and any circumstances, whether carrying out or covering permanent or fixed/short term etc functions.⁹⁴ Office for National Statistics figures for the period July-September 2016 indicate that some 302,000 workers described themselves as undertaking ‘agency temping’.⁹⁵ If, however, those employed on *permanent* agency work and those who for some reason identify as self-employed are included, the figure rises to some 865,000.⁹⁶

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

Regulation 7 of *Conduct of Employment Agencies and Employment Businesses Regulations 2003* prohibits the use of agency workers to carry out duties normally carried out by a worker ‘who is taking part in strike or other industrial action’, unless the action is ‘unofficial’. There was a proposal to repeal this provision but it was ultimately not acted upon.

9. What labor and Social Security liabilities do the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

In the UK, this depends on whether the workers are directly employed by the agency as ‘employees’ under ‘contracts of employment’. If so, in theory normal labor and social security responsibilities and liabilities will apply (including, for example, the payment of employers’ national insurance contributions). However, agency workers who are so employed will face particular problems in respect of rights that depend on significant periods of continuous employment - for example, entitlements to statutory unfair dismissal protection and redundancy payments require two years’ continuity. It also restricts access to other minimum statutory or social security payments such as

⁹⁴ The sector is generally somewhat lightly regulated by the *Employment Agencies Act 1973* and the *Conduct of Employment Agencies and Employment Businesses Regulations 2003*.

⁹⁵ Office for National Statistics, *EMP07: Temporary Employees*, November 2016. As at October-December 2018 this figure was 318,000 (see EMP07 March 2019).

⁹⁶ Judge, L & Tomlinson, D, *Secret Agents: agency workers in the new world of work*, Resolution Foundation, December 2016.

Statutory Maternity Pay ('SMP') and Statutory Sick Pay ('SSP'), which require minimum periods of continuous employment and/or minimum levels of income.⁹⁷

Agency workers generally are entitled to the National Minimum Wage and protection under the *Working Time Regulations 1998* (including statutory minimum annual paid holiday entitlement), even if they are *not* regarded as 'employees' or 'workers' of *either* the client/user company or the employment agency.⁹⁸

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

Under the *Agency Workers Regulations 2010* ('the AWR'),⁹⁹ after 12 continuous calendar weeks in the same role during one or more assignments with the same hirer (client/user), *temporary* agency workers¹⁰⁰ in principle enjoy the right to equality of treatment in relation to pay, working time, night work, rest periods, rest breaks and annual leave with comparable directly employed employees.

However, there has been concern in the UK over an increasing reliance by agencies on what is known colloquially as the 'Swedish Derogation'. This is built into *the AWR* and, briefly, provides that the principle of *pay* equality does not apply if agency workers are *directly* employed by an agency under a 'permanent contract of employment'. But this 'permanent' contract is potentially extremely limited. Thus, the agency needs only to pay such 'employees' for at least four weeks *between* assignments with a 'hirer' at 50% of the 'highest level of pay received' in the last 12 weeks (at maximum) of their previous assignment. Crucially, these contracts can be entered into prior to *any* assignment and not just before a worker's first assignment on 'joining' an agency.¹⁰¹ It is, however, now proposed that this derogation will cease to apply from April 2020.

⁹⁷ SMP, for example, requires 26 weeks' continuous employment up to the 15th week before the expected week of childbirth and average earnings of £112 per week.

⁹⁸ In these cases, responsibility for compliance lies with whichever of the agency or the client/user/principal is responsible for paying the agency worker or, if neither has such clear responsibility, whichever actually pays the worker. For further information on this question see generally <https://www.gov.uk/agency-workers-your-rights/basic-information-you-should-receive>.

⁹⁹ Implementing the *EU Directive on Temporary Agency Work*, No. 2008/104/EC.

¹⁰⁰ In *Moran and others v Ideal Cleaning Services Ltd and anr* [2014] IRLR 172, the EAT concluded that in principle agency workers working on indefinite assignments are *not* protected by these provisions.

¹⁰¹ See *Bray & others v Monarch Personnel Refuelling UK Ltd*, *Employment Tribunal Case No. 1801581/2012*.

11. Other relevant aspects and personal assessment of the regulation regarding outsourcing and supply chains

In summary, there is little or no limitation on the use of outsourcing/contracting out in the UK and such protection as there is limited only to a small group of employees or workers who may be transferred. And there is no protection for workers subsequently engaged or employed in the same entity or activity.

Similarly, the widespread and apparently inexorable growth in the use of employment agencies feeds into wider concerns about a general increase in a variety of forms of ‘precarious’ employment.¹⁰² Interestingly, even the current Conservative Government seems perhaps to at least have started to recognize the potential problems that may arise as a result. Accordingly:

*‘The Independent Review of Employment Practices in the Modern Economy was commissioned by the Prime Minister on 1 October 2016. Matthew Taylor (the Chief Executive of the Royal Society of the Arts) will lead the review to consider how employment practices need to change in order to keep pace with modern business models. The review will consider the implications of new forms of work, driven by digital platforms, for employee rights and responsibilities, employer freedoms and obligations, and our existing regulatory framework surrounding employment.’*¹⁰³

That review has ultimately resulted in a number of relatively limited Government proposals for legislation including the abolition of the ‘Swedish Derogation’ for agency workers noted above. There will also be, among other things, a right for ‘all workers’ to request ‘a more predictable and stable contract’ after 26 weeks of ‘service’.¹⁰⁴ Reference should also be made to the provisions of the *Modern Slavery Act 2015* and, in particular, those that require any ‘commercial organisation’ with a turnover of more than £36 million to prepare an annual ‘slavery and human trafficking statement’. This is a statement of the steps the organisation has taken to ensure that such activity is not taking place in any of its supply chains and/or in any part of its own business.¹⁰⁵

¹⁰² See most recently Grimshaw, D, Johnson, M, Keizer, A and Rubery, J, *Reducing Precarious Work in Europe Through Social Dialogue: The Case of the UK*, European Commission, Employment, Social Affairs and Inclusion DG, November 2016 (available at <http://www.research.mbs.ac.uk/ewerc/Portals/0/Documents/UK-final-report.pdf>).

¹⁰³ See <https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy> for full remit and details.

¹⁰⁴ HM Government, *Industrial Strategy: Good Work Plan*, December 2018.

¹⁰⁵ See s.54 of the Act.

EXTERNALIZACIÓN Y CADENAS DE PRODUCCIÓN EN BRASIL

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Introducción

En Brasil, en 31 de marzo de 2017, fue sancionada la Ley 13.429¹⁰⁸, que alteró la Ley 6.019/74¹⁰⁹ para permitir la externalización productiva/tercerización en actividades “específicas y determinadas” de las empresas (expresión literal de la ley). Posteriormente, en junio de 2017, fue aprobada la Ley 13.467¹¹⁰ (la denominada Reforma Laboral), con vigencia a partir de noviembre del mismo año, que permitió la externalización productiva para todas las actividades de la empresa, inclusive la principal (artículo 5º-A, Ley 6.019/74), lo que se pasó a conocer como tercerización irrestricta.

Antes de dicha reglamentación, el Tribunal Superior del Trabajo (TST) entendía que la externalización era ilícita, formándose vínculo laboral directamente con la empresa que recibe los servicios (Sumula 331 del TST¹¹¹), con algunas excepciones como el Trabajo Temporario, los servicios de vigilancia, de limpieza (aseo y conservación) y los servicios especializados relacionados con la actividad-medio (contabilidad, informática, etc.), pero la cuestión queda superada.

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¹⁰⁸ Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/Ato2015-2018/2017/Lei/L13429.htm

¹⁰⁹ Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/leis/L6019.htm

¹¹⁰ Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/Ato2015-2018/2017/Lei/L13467.htm

¹¹¹ Para acceso a las Súmulas del Tribunal Superior do Trabalho (TST): <http://www.tst.jus.br/sumulas>

La subcontratación, todavía, es permitida desde 1974, por la Ley 6.019, pero solamente en el caso del Trabajo Temporario, contratado por medio de Empresas de Trabajo Temporario (ETT) para atender a la necesidad de sustitución transitoria de personal permanente o a demanda complementar de servicios.

Con relación a las cadenas de producción, no hay, en Brasil, reglamentación acerca del tema. En la práctica, las empresas lo hacen. No hay amparo legal en el ordenamiento jurídico laboral brasileño para la responsabilización de la empresa que se encuentra en la última posición en la cadena de producción. Todavía, la jurisprudencia ya reconoció, en algunos casos, la responsabilidad subsidiaria o solidaria de todas las empresas pertenecientes a la cadena de producción¹¹².

En investigación realizada por el Instituto Brasileiro de Geografia y Estadística (IBGE y por el Suplemento de Relaciones de Trabajo y Sindicalización de la PNAD (Pesquisa Nacional por Amostra de Domicilios), hecha en 2017, 18,9% dos empleados brasileños son tercerizados. Las regiones norte y nordeste son las que más contratan por ese tipo de régimen.¹¹³

El grafico más reciente¹¹⁴ es de 2014, en investigación hecha por el Ministerio del Trabajo y Empleo, mostrando la evolución, entre 2007 e 2014, del total de vínculos formales de empleo en las actividades típicamente tercerizadas y típicamente contratantes.

En 2014, había 12,5 millones de vínculos activos en las actividades típicamente tercerizadas.

¹¹² A título de ejemplo, tenemos los siguientes juzgados: TRT-4 - RO: 00200065420165040382, TRT-1 - RO: 00112369820145010035. Ementa de las decisiones al final deste trabajo.

¹¹³ Disponible en: <https://noticias.r7.com/economia/189-dos-empregados-brasileiros-sao-terceirizados-diz-ibge-26042017>

¹¹⁴ Fuente: Ministerio del Trabajo y Empleo. Caged; Rais. Elaboración: DIEESE.

GRÁFICO 1
Evolução dos vínculos formais de emprego nas atividades
tipicamente terceirizadas e tipicamente contratantes
Brasil, 2007-2014 (em milhões de vínculos)

Fonte: Ministério do Trabalho e Emprego. Caged; Rais

Elaboração: DIEESE. Subseção CUT Nacional

Nota: (*) Informação com saldo do Caged de janeiro a dezembro de 2015 (extração 27/04/2016). Incluídas declarações fora do prazo

Obs.: Não inclui a agropecuária

1. ¿Es la descentralización productiva o subcontratación una forma lícita de organización de la producción?

Si, hoy la externalización productiva irrestricta es una forma lícita de organización de la producción, desde la reglamentación traída por la Ley 13.429/17 y posteriormente por la Ley 13.467/17, pero desde que no haya subordinación directa de los trabajadores tercerizados con la empresa principal (contratante). Es decir, las empresas pueden externalizar su producción, inclusive de su actividad-fin (principal), mediante la contratación de otras empresas (interpuestas/contratistas), pero sin dirigir directamente las actividades de los trabajadores tercerizados, como coordinarles los horarios, remuneración y forma de trabajo. Eso porque, en la externalización, la relación de empleo se hace entre el trabajador y la empresa prestadora de los servicios y no con la principal. Cualquier que sea el ramo de la empresa tomadora de los servicios, no existe vínculo de empleo entre ella y los trabajadores tercerizados (§ 2º artículo 4º-A de la Ley 6.019/1974). Todavía, si se caracteriza la subordinación directa, hay vínculo de empleo directo con la tomadora. En la externalización, el contrato es de la actividad, del servicio, y no de un empleado específico.

Ya la subcontratación de un trabajador, con subordinación directa a la empresa principal, solamente es permitida en Brasil en el Trabajo Temporario, que es el prestado por una persona física contratada por medio de una Empresa de Trabajo Temporario

(ETT), creada específicamente para alquilar empleados por cierto tiempo a otras empresas, para atender la necesidad de sustitución transitoria de personal permanente o a demanda (artículo 2º, Ley 6.019/74). Aquí, la empresa principal puede coordinar directamente la actividad del empleado, sin caracterizarse vínculo de empleo directo con ella. El vínculo directo se da con la Empresa de Trabajo Temporario. Esa siempre fue permitida, desde antes de la reglamentación arriba explicada, pero sufrió algunas alteraciones puntuales con el advenimiento de dichas leyes.

2. ¿Existen límites y/o prohibiciones a la descentralización productiva?

En la externalización, debe haber la ausencia de prestación personal y de subordinación en la prestación de los servicios del trabajador con la empresa que recibe el servicio (contratante).

Habiendo la presencia constante de poder directivo de la empresa beneficiada con los servicios sobre la prestación personal de servicios del empleado de la empresa contratista, el reconocimiento de la relación debe ocurrir directamente con la primera, quedando considerada esa tercerización como ilegal o fraudulenta.

Además, la Ley 6.019/74, con las alteraciones de la Ley 13.429/17 y la Ley 13.467/17, traen otros límites/prohibiciones, como: a) la prohibición de que la contratante utilice los trabajadores tercerizados en actividades distintas de las que fueron objeto del contrato con la empresa prestadora del servicio (§ 1º, artículo 5º-A); b) la prohibición de figurar como contratada una persona jurídica cuyo titulares o socios tengan, en los últimos 18 meses, prestado servicios a la contratante en la calidad de empleado o trabajador sin vínculo de empleo, excepto se fueren jubilados (artículo 5º-C); c) el empleado que sea despedido no podrá prestar servicios para esta misma empresa en la calidad de empleado de la empresa prestadora de servicios antes del decurso del plazo de 18 meses, contados a partir de la dispensa del empleado (artículo 5º-D).

3. La empresa principal que externaliza una parte o la totalidad de su producción, ¿mantiene alguna responsabilidad laboral o de Seguridad Social respecto los trabajadores de la empresa contratista? ¿Cuáles?

El impago laboral de la empresa contratista indica responsabilidad subsidiaria de la empresa principal, es decir, primero responde la empresa contratista, y en el caso de no cumplimiento, responde la empresa beneficiada con los servicios (principal), tanto para la externalización (tercerización de servicios) como para el caso de los Trabajadores Temporarios (artículo 5º-A, § 5º y artículo 10, § 7º, Ley 6.019/74, respectivamente).

Así, los trabajadores de la empresa contratista (Empresa B) pueden dirigirse contra la empresa principal (Empresa A) para reclamar deudas laborales y de Seguridad Social.

4. ¿Cuál es el convenio colectivo aplicable a la empresa contratista durante su relación con la empresa principal?

El convenio colectivo aplicable a la empresa contratista durante su relación con la empresa principal es el convenio colectivo de la categoría de la empresa contratista. Así, las condiciones laborales de los trabajadores de la empresa contratista que prestan servicios a la principal se determinan en atención al convenio colectivo aplicable a la empresa contratista y no a la empresa principal.

Ya en el caso de los Trabajadores Temporarios, cedidos por medio de las ETT (Empresas de Trabajo Temporario), se sigue lo mismo convenio colectivo de la principal.

5. ¿Existe la obligación legal de la empresa contratista de reconocer a sus trabajadores condiciones laborales aplicables a los trabajadores de la empresa principal?

En el caso de la externalización, hay la obligación legal de la empresa contratista de reconocer a sus trabajadores algunas de las mismas condiciones laborales que aquellas aplicables a los trabajadores de la empresa principal. El artículo 4º-C de la Ley 6.019/74 determina que, cuando y mientras los servicios fueren ejecutados en la dependencia de la principal, son aseguradas las mismas condiciones relativas a:

- a. Alimentación garantizada a los empleados de la contratante, cuando se ofrece en comedores;
- b. Derecho de utilizar los servicios de transporte;
- c. Atención médica o ambulatoria existente en las dependencias del contratante o local por ella designado;
- d. Entrenamiento adecuado, proporcionado por la contratada, cuando la actividad lo requiera;
- e. Sanitarias, de medidas de protección de la salud y de seguridad en el trabajo y de instalaciones adecuadas para la prestación del servicio.

El artículo 5º-A, § 4º de la Ley 6.019/74 también afirma que la empresa contratante podrá extender al trabajador de la empresa contratista la misma atención médica, ambulatoria y de alimentación destinado a sus empleados, existente en las dependencias de la contratante o local por ella designado (artículo 5º-A, § 4º-Ley 6.019/74).

Todavía, con relación al salario, jornada y demás condiciones, no hay la obligatoriedad de igualdad con los trabajadores de la empresa contratante. Se así lo quieren, pueden la contratante y la contratista establecer que los empleados de la contratista tengan salario equivalente al pago a los empleados de contratante, además de otros derechos (§ 1º, artículo 4º-C, Ley 6.019/74).

En lo caso de los trabajadores temporarios de las ETT (Empresas de Trabajo Temporario), hay la obligación legal de la ETT reconocer a sus trabajadores las mismas condiciones laborales que aquellas aplicables a los trabajadores de la empresa contratante con relación al salario y jornada y otras condiciones, de conformidad con el artículo 12 de la Ley 6.019/74:

- a. Remuneración equivalente a la percibida por los empleados de la misma categoría de la empresa tomadora o cliente calculados a la base horaria;
- b. Jornada de ocho horas, remuneradas las horas extraordinarias no excedentes de dos, con un aumento del 20% (veinte por ciento);
- c. Vacaciones proporcionales
- d. Descanso semanal remunerado;
- e. Adicional por trabajo nocturno;
- f. Indemnización por despido sin justa causa o término normal del contrato, correspondiente a 1/12 (un doceavos) del pago recibido;
- g. Seguro contra accidente laboral;
- h. Protección previsional en los términos de la Ley Orgánica de la Seguridad Social.

Además, la empresa contratante debe asegurar a los trabajadores temporarios las mismas condiciones de seguridad, higiene y salubridad de los trabajadores, cuando el trabajo se realiza en sus dependencias o en el lugar designado por ella (§ 1º del artículo 9º, Ley 6.019/74).

En el caso de la externalización productiva realizada por la Administración Pública, la contratación irregular de trabajadores (o sea, con subordinación directa) no crea vínculo de empleo de ellos con el ente de la Administración, pero los empleados tercerizados tendrán derecho a las mismas verbas laborales legales y normativas aseguradas a aquellos contratados por la Administración directamente (los servidores públicos), desde que presente la igualdad de funciones, por el principio de la isonomía. (Orientación Jurisprudencial n. 383 del TST)

6. ¿En qué supuestos existe una descentralización productiva fraudulenta o cesión ilegal de trabajadores? ¿Qué consecuencias se derivan de esta situación?

Existe una descentralización productiva fraudulenta cuando subsista en el trabajador tercerizado la personificación y la sujeción al poder directivo de la empresa donde los servicios son prestados, de forma directa. Con eso, el vínculo del empleo se forma directamente con la empresa que recibe los servicios, quedando esta responsable de todos los derechos legales y negociados colectivamente por la categoría del trabajador.

Si hay una cesión ilegal de trabajadores (recordándose que tal solamente es posible, en Brasil, por medio de las ETT) cuando las condiciones establecidas por la Ley 6.019/74 para estas empresas no son cumplidas, como ausencia de contrato escrito, ausencia del motivo justificador de la demanda temporaria de trabajo, ausencia de plazo para la prestación de servicio (que no puede exceder 180 días, consecutivos o no).

Resaltase que el trabajador que cumple 180 días, consecutivos o no, de trabajo temporario, solamente podrá ser colocado a disposición a la misma tomadora de servicios en un nuevo contrato temporario después de 90 días del término del contrato anterior. Caso eso no sea cumplido, se caracteriza vinculo directo con la tomadora (artículo 10, §§ 5º e 6º).

7. ¿La contratación de trabajadores mediante Empresas de Trabajo Temporal está permitida en su país? ¿En qué supuestos?

Sí, está permitida, de acuerdo con la Ley 6.019/1974, el llamado Trabajo Temporario. Esta es una relación “triangular”, pues existen (i) la empresa que recibe los servicios o cliente, (ii) la empresa que presta o alquila, llamada de Empresa de Trabajo Temporario (ETT) y (iii) el trabajador temporario.

La ley establece algunas condiciones para esta modalidad. Primero, la empresa prestadora de servicios y alquiladora de mano de obra necesita ser autorizada por el Ministerio del Trabajo. Segundo, la empresa que recibe los servicios o cliente solamente puede contratar trabajador temporario para: (i) atender a una necesidad transitoria de sustitución de su personal regular y permanente o (ii) a un incremento extraordinario de servicios. En otras palabras, debe existir una justificativa, prevista en ley, para la contratación extraordinaria y transitoria. Tercero, esta contratación debe ser formalizada, en contrato escrito para la relación empresarial y para la relación con el trabajador, no siendo posible estipulación de plazo superior a 180 días, consecutivos o no, con relación al mismo empleado. Es posible una prorrogación del plazo por 90 días,

consecutivos o no, cuando queda comprobada la existencia de las condiciones que dieron origen.

En estos casos de trabajo temporario, según la legislación brasileña, por lo tanto, el trabajador es empleado de la ETT, pero no es empleado de la empresa donde efectivamente el trabajador labora. Es la única forma de subcontratación permitida en nuestro ordenamiento jurídico. Aquí, la empresa principal puede coordinar directamente la actividad del empleado, sin caracterizarse vínculo de empleo directo con ella.

8. ¿Existen supuestos o actividades económicas en los que la contratación de trabajadores mediante Empresas de Trabajo Temporal está prohibida?

Como se ha dicho, la contratación de trabajadores mediante Empresas de Trabajo Temporal es permitida solamente para atender a una necesidad transitoria de sustitución de su personal regular y permanente o a un incremento extraordinario de servicios.

En cualquier actividad económica se pueden contratar trabajadores temporales desde que se obedezcan los requisitos legales dispuestos en la Ley 6.019/1974, como son la formalización del contrato, la autorización legal de funcionamiento de la empresa prestadora, la justificativa extraordinaria y transitoria de la contratación y la observancia de la limitación temporal para cada trabajador.

No obstante, la Ley 6.019/74 trae algunas prohibiciones de contratación de trabajadores temporarios: (i) es prohibida la contratación de trabajo temporario para sustitución de trabajadores en huelga (art 2º, § 1º) y la contratación de extranjeros con visado provisorio de permanencia en el país (artículo 17).

9. ¿Qué responsabilidades laborales y de Seguridad Social mantiene la Empresa de Trabajo Temporal respecto de los trabajadores cedidos a empresas usuarias? ¿Y la empresa usuaria?

La empresa usuaria es responsable subsidiariamente por las obligaciones laborales y de Seguridad Social no pagas por la ETT referente al periodo que ocurrir el trabajo temporario (artículo 10. § 7º, Ley 6.019/74).

Aún, en caso de quiebra de la empresa de trabajo temporario, la empresa usuaria será responsable solidariamente, por el tiempo en que el trabajador estaba en sus órdenes, por los salarios, pagos y otros derechos no cumplidos (artículo 16, Ley 6.019/74).

10. ¿Cómo se determinan las condiciones laborales aplicables a los trabajadores contratados mediante Empresas de Trabajo Temporal y cedidos a empresas usuarias?

La Empresa de Trabajo Temporal mantiene la responsabilidad de reconocer a sus trabajadores las mismas condiciones laborales que aquellas aplicables a los trabajadores de la empresa contratante con relación al salario, jornada y otras condiciones, de conformidad con el artículo 12 de la Ley 6.019/74:

- a. Remuneración equivalente a la percibida por los empleados de la misma categoría de la empresa tomadora o cliente calculados a la base horaria;
- b. Jornada de ocho horas, remuneradas las horas extraordinarias no excedentes de dos, con un aumento del 50% (veinte por ciento);
- c. Vacaciones proporcionales
- d. Descanso semanal remunerado;
- e. Adicional por trabajo nocturno;
- f. Indemnización por dispensa sin justa causa o término normal del contrato, correspondiente a 1/12 (un doce avos) del pago recibido;
- g. Seguro contra accidente laboral
- h. Protección previsional en los términos de la Ley Orgánica de la Seguridad Social.

Además, la empresa contratante debe asegurar a los trabajadores temporarios las mismas condiciones de seguridad, higiene y salubridad de los trabajadores, cuando el trabajo se realiza en sus dependencias o en el lugar designado por ella (§ 1º del artículo 9º, Ley 6.019/74).

Con relación a las normas colectivas aplicables, los trabajadores temporarios tendrán los mismos derechos colectivos asegurados a los trabajadores de la usuaria.

11. Otras cuestiones relevantes y valoración de la regulación en materia de externalización y cadenas de producción en su país.

Con la llegada de la Ley 13.467/17 (Reforma Laboral), que alteró la Ley 13.429/17 y, consecuentemente, la Ley 6.019/74 para permitir la externalización productiva para todas las actividades, incluyendo la principal de la empresa, surgirán varios procesos en el Superior Tribunal Federal (STF) brasileño, corte constitucional, discutiendo tal innovación. Antes de eso, ya había algunos procesos cuestionando la validez del entendimiento del TST acerca de la externalización, que solamente era considerada lícita caso fuese para la actividad-medio de la empresa.

En agosto de 2018, el STF decidió, al juzgar la acción de Acusación de Incumplimiento de Precepto Fundamental (ADPF) n. 324 y el Recurso Extraordinario (RE) 958252, por 7 votos a 4, que la externalización productiva (tercerización) de las actividades-fin (principales) de la empresa es constitucional. La decisión tuvo repercusión general reconocida.

Para la mayoría de los ministros, la opción por la tercerización es un derecho de la empresa, que puede elegir el modo más conveniente de su negocio, en respeto al principio constitucional de la libre iniciativa, no llevando, la tercerización, a la precarización de las relaciones laborales, como se sustentaran algunos individuos.¹¹⁵

Mucho se habla que la externalización productiva significa precarización del trabajo, despido de empleados de las empresas principales, vulnerabilidad del trabajador tercerizado, etc. Además, hay estudios que muestran que hay más accidentes de trabajo con los tercerizados¹¹⁶, entendiéndose que las empresas contratistas no tienen compromisos éticos y de seguridad con los trabajadores. Las empresas contratistas, en su general, son pequeñas y puede cerrar sus puertas sin pagar sus funcionarios.

No se niega que eso todo puede ver a ocurrir. Todavía, para evitar esas situaciones, lo ideal sería que la reglamentación brasileña estableciese dos cuestiones: (i) igualdad de derechos entre los trabajadores de la contratista y los de la principal (contratante) y (ii) responsabilidad solidaria entre las empresas contratista e contratante.

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¹¹⁵ Disponible en: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=388429>

¹¹⁶ Revelan que a partir del 20º centésimo de remuneración (hasta 1,3 salario mínimo), la participación de los alejamientos por accidentes de trabajo típicos es más elevada en las actividades típicamente tercerizadas, llegando a ser dos veces más alta, en algunos casos. Fuente: http://repositorio.ipea.gov.br/bitstream/11058/8258/1/Terceiriza%C3%A7%C3%A3o%20do%20trabalho%20no%20Brasil_novas%20e%20distintas%20perspectivas%20para%20o%20debate.pdf

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Recurso Extraordinario (RE) 958252 por el STF.

TRT-4 - RO: 00200065420165040382, Fecha: 04/10/2018, 11ª Turma)¹¹⁷

TRT-1 - RO: 00112369820145010035 RJ, Relator: Sayonara Grillo Coutinho Leonardo Da Silv A, Sétima Turma. Fecha de publicación: 18/04/2017)¹¹⁸

¹¹⁷ Traducción libre:

RESPONSABILIDAD SUBSIDIARIA. CADENA DE PRODUCCIÓN. Es responsable el que elige a una determinada empresa para realizar tareas afines a determinada etapa de producción de mercancías que, fríjese, llevarán su propia marca. En tales situaciones, se tiene una cadena de empresas, todas integrando la misma producción. La condena de las demandantes encuentra amparo en la aplicación del Principio de la Valorización Social del Trabajo, pues, aunque no hayan establecido contrato de trabajo con la reclamante, se beneficiaron de forma directa por sus servicios.

¹¹⁸ Traducción libre: RESPONSABILIDAD EMPRESARIAL EN LA CADENA PRODUCTIVA. Con la reestructuración productiva, el instituto de la responsabilidad solidaria necesita ser reinterpretado para comprender los nexos relacionales que hoy se desarrollan con el surgimiento de las cadenas productivas y de la interdependencia empresarial frente al parcelamiento de las fases de producción y venta de un mismo producto o servicio, interconectados. Por lo tanto, el Código de Defensa del Consumidor, por ejemplo, admite que las sociedades vinculadas respondan solidariamente cuando hay culpa (artículo 28, § 4º), siendo cierto, a mi juicio, que el incumplimiento de las normas laborales es una modalidad de ilícito capaz de atraer la obligación de las diversas empresas ante la culpa del violador de la regla. Sin

embargo, tales cuestiones no fueron traídas en los autos, limitando sobremanera, la cognición del juicio, el análisis sobre la configuración o no del grupo económico laboral.

EXTERNALIZACIÓN Y CADENAS DE PRODUCCIÓN EN PERÚ

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Introducción¹¹⁹

La *tercerización de servicios* –denominación usada preferentemente en nuestro país para referir la externalización de servicios, la descentralización productiva o la subcontratación– está regulada en el Perú por la Ley¹²⁰ 29245¹²¹, el Decreto Legislativo 1038¹²² y el Decreto Supremo 6-2008-TR¹²³, que establecen: el objeto de la tercerización, los casos en los que procede, sus elementos constitutivos y característicos, los requisitos para su validez, los tipos de tercerización, los derechos y obligaciones de las empresas participantes y la responsabilidad de éstas, la garantía de cumplimiento de los derechos laborales, el registro administrativo de las empresas que prestan tales servicios, los supuestos de desnaturalización y sus consecuencias, y las sanciones pertinentes.

¹¹⁹ Sin perjuicio de los enlaces aquí indicados para la ubicación y consulta de normas específicas, la legislación peruana puede consultarse –en general– en el *Sistema Peruano de Información Jurídica (SPIJ)*: <https://spijweb.minjus.gob.pe> del Ministerio de Justicia y Derechos Humanos, de acceso libre.

¹²⁰ Citamos las *normas con rango de ley*: la *ley* (aprobada por el Congreso de la República y promulgada por el Poder Ejecutivo) y los *decretos legislativos* (dictados por Poder Ejecutivo con base en la delegación de la atribución legislativa efectuada por el Congreso de la República y sometidos, respecto a su promulgación, publicación, vigencia y efectos, a las mismas normas que rigen para la ley). También, los *decretos supremos* (en lo formal, la norma de mayor jerarquía dictada por el órgano ejecutivo, dada y aprobada por el Presidente de la República, firmada por él y al menos por un ministro de Estado).

¹²¹ http://www.trabajo.gob.pe/archivos/file/SNIL/normas/2008-06-24_29245_936.pdf

¹²² http://www.trabajo.gob.pe/archivos/file/SNIL/normas/2008-06-25_1038_14.pdf

¹²³ http://www.trabajo.gob.pe/archivos/file/SNIL/normas/2008-09-12_006-2008-TR_520.pdf

Con relación a algunos de los asuntos aquí tratados, interesa también la legislación reguladora de la “intermediación” laboral: la Ley 27626¹²⁴ y los decretos supremos vinculados.

1. ¿Es la descentralización productiva o subcontratación una forma lícita de organización de la producción?

La Constitución peruana reconoce la libertad de empresa: “*El Estado estimula la libertad de trabajo y la libertad de empresa, comercio e industria*”¹²⁵; y fija también la libertad dentro de la ley: “*Nadie está obligado a hacer lo que la ley no manda, ni impedido de hacer lo que ella no prohíbe*”¹²⁶. En este marco, la legislación regula la tercerización. De no incurrirse en fraude a la ley, es lícito recurrir a ella.

Ahora bien, el artículo 2 (primer párrafo) de la Ley 29245 define la tercerización: “*Se entiende por tercerización la contratación de empresas para que desarrollen actividades especializadas u obras siempre que aquellas asuman los servicios prestados por su cuenta y riesgo; cuenten con sus propios recursos financieros, técnicos o materiales; sean responsables por los resultados de las actividades y sus trabajadores estén bajo su exclusiva subordinación*”. Además, el artículo 3 de la misma Ley dispone que constituyen tercerización de servicios “*los procesos de tercerización externa, los contratos que tiene por objeto que un tercero se haga cargo de una parte integral del proceso productivo*”. Entonces, nos permitimos afirmar que las organizaciones pueden recurrir a la tercerización para la ejecución de cualesquiera actividades relativas al desarrollo y la gestión del proceso productivo que les concierne.

Actualmente, las empresas tienden a la tercerización de actividades complementarias al *core business* (actividad distintiva) de la organización con la finalidad de centralizar esfuerzos y maximizar recursos. Las empresas “tercerizadoras” se convierten, así, en una suerte de “aliadas estratégicas” de la empresa principal. Ello no obstante, las empresas participantes deben respetar los derechos laborales y de la seguridad social de los trabajadores involucrados.

¹²⁴ http://www.trabajo.gob.pe/archivos/file/SNIL/normas/2002-01-09_27626_742.pdf

¹²⁵ CONSTITUCIÓN, artículo 59 (primera parte).

¹²⁶ CONSTITUCIÓN, artículo 2, inciso 24, letra a.

2. ¿Existen límites y/o prohibiciones a la descentralización productiva?

En concreto, la tercerización: no admite la simple provisión de personal, no debe restringir los derechos laborales –individuales y colectivos– de los trabajadores y no debe vulnerar los derechos de seguridad social¹²⁷.

La legislación no ha previsto límites o prohibiciones respecto a proscribir la tercerización en sectores específicos, a restringir la cantidad de subcontrataciones permitidas o a imponer el porcentaje máximo de trabajadores involucrados en la tercerización (o tercerizaciones) con relación al número total de trabajadores de la empresa principal.

Desde nuestro punto de vista y como hemos adelantado en nuestra respuesta a la pregunta anterior, tampoco existen límites o prohibiciones acerca de las actividades del proceso productivo de la empresa principal que pueden ser “tercerizadas”. O lo que es lo mismo, es posible externalizar los servicios concernientes a cualesquiera de tales actividades, incluso las que constituyen el *core business* de la organización¹²⁸; siempre con respeto de las obligaciones laborales y de seguridad social pertinentes.

De todos modos, importa anotar que la Cuarta Sala Laboral de la Corte Superior de Justicia de Lima, mediante la sentencia dictada el 27 de octubre de 2015 en el expediente 22411-2013-0-1801-JR-LA-15, ha sostenido que “no es posible tercerizar la actividad nuclear de la empresa usuaria”. Las partes afectadas (codemandas) con esta sentencia interpusieron sendos recursos de casación contra ella, que, mediante la sentencia de la Segunda Sala de Derecho Constitucional y Transitoria de la Corte

¹²⁷ Artículo 2 de la Ley 29245. De acuerdo con el artículo 1 del Decreto Supremo 6-2008-TR: por “*simple provisión de personal*”, se entiende la cesión de trabajadores realizada al margen de las normas sobre intermediación laboral (Ley 27626 y los decretos supremos vinculados); mientras que no constituyen una simple provisión de personal “el desplazamiento de los trabajadores de la empresa tercerizadora que se realiza en cumplimiento de los requisitos establecidos en la Ley, la tercerización sin desplazamiento continuo, el encargo integral a terceros de actividades complementarias, ni las provisiones de obras y servicios sin tercerización”.

¹²⁸ En sentido contrario: “[...] no es posible tercerizar la actividad nuclear, esto es, el *core bussiness*, que constituye la razón de ser de la empresa” (TOLEDO TORIBIO, O., *La tercerización laboral (Outsourcing)*, Lima, Editora y Librería Jurídica Grijley, 2015, p. 48); así, “una empresa puede tercerizar o descentralizar todas sus actividades, excepto aquellas que tienen que ver con su *core bussiness*, [...] su actividad nuclear” (*ibidem*, p. 143). En los hechos, “se ha observado que las empresas han recurrido de manera más intensiva a la tercerización incluso de las actividades esenciales o nucleares de las mismas. Este recurso frecuente a recurrir a la tercerización ha originado la aparición de numerosas empresas de tercerización [...]” (*ibidem*, pp. 17 y 150).

Suprema de Justicia de la República, emitida el 31 de octubre de 2017 en el expediente “Casación Laboral 5659-2016 LIMA”, han sido declarados infundados: por cuanto concierne al punto, el órgano jurisdiccional supremo expone simplemente que “la Sala Laboral concluyó que [...] las labores desempeñadas forman parte de la actividad de la empresa [...]; en consecuencia, el contrato de tercerización se habría desnaturalizado [...]” (octavo considerando, último párrafo). En consecuencia, el temperamento expuesto ha quedado firme o definitivo; sin embargo, no constituye precedente vinculante para casos semejantes.

Similarmente, una resolución anterior a la promulgación de la Ley 29245, dictada en el expediente 3000-2006-IDNL(S), ya había declarado: “Si bien la tercerización u *outsourcing* es una modalidad contractual con miras a que una empresa beneficiaria satisfaga el requerimiento de un bien determinado o servicio especializado [...] también lo es que existen determinadas actividades, tales como la principal, nuclear o distintiva de la empresa, que no pueden ser tercerizadas. Por lo tanto, al verificarse la realización de alguna actividad prohibida mediante tercerización, en aplicación del principio de la primacía de la realidad, debe colegirse, independientemente de la buena fe plasmada en los contratos celebrados, que estos se han desnaturalizado, lo que implica el reconocimiento de una relación laboral”¹²⁹.

3. La empresa principal que externaliza una parte o la totalidad de su producción, ¿mantiene alguna responsabilidad laboral o de seguridad social respecto a los trabajadores de la empresa contratista? ¿Cuáles?

En tal caso, la empresa principal mantiene una *responsabilidad solidaria* respecto a los trabajadores de la empresa contratista y, de ser el caso, de las empresas subcontratistas¹³⁰.

Esta responsabilidad solidaria está referida expresamente en el artículo 9 de la Ley 29245: “La empresa principal que contrate la realización de obras o servicios con

¹²⁹ MESINAS MONTERO, E. Y GARCÍA MANRIQUE, A., *Problemas y soluciones laborales. Guía de casos de controversias laborales resueltos por los tribunales*, Lima, Gaceta Jurídica, 2008, p. 196.

¹³⁰ En el ámbito del Derecho del Trabajo, por *responsabilidad solidaria* se entiende “al vínculo obligacional que envuelve a un tercero como consecuencia de un reconocimiento expreso, un mandato legal o por la conexidad particular que existe entre el obligado, generalmente el empleador, y un tercero” (ÁVALOS JARA, OXAL V., “La Tercerización del trabajo en el Perú”. En: *Tercer Congreso Nacional de la Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social*, Lima, Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social, 2008, p. 85).

desplazamiento de personal de la empresa tercerizadora es solidariamente responsable por el pago de los derechos y beneficios laborales y por las obligaciones de seguridad social devengados por el tiempo en que el trabajador estuvo desplazado. Dicha responsabilidad se extiende por un año posterior a la culminación de su desplazamiento. La empresa tercerizadora mantiene su responsabilidad por el plazo establecido para la prescripción laboral”. Tal responsabilidad opera siempre que exista un desplazamiento continuo de personal de la empresa “tercerizadora” a las instalaciones de la empresa principal, no así a los supuestos de tercerización sin desplazamiento ni a los que desplazamientos eventuales o esporádicos¹³¹. Por otro lado, la responsabilidad alcanza al empresario principal, al contratista y al subcontratista, quienes son deudores solidarios frente al trabajador impago o la entidad de previsión social¹³². Finalmente, la solidaridad “se contrae únicamente a las obligaciones laborales y de seguridad social de cargo de la empresa tercerizadora establecidos por norma legal y no a las de origen convencional o unilateral”¹³³.

Así las cosas, en atención a la *responsabilidad solidaria* aquí indicada, los trabajadores de la empresa contratista podrán requerir el abono de las obligaciones de previsión social a la empresa principal; esto es, el pago de las contribuciones y aportes, establecidos por norma legal, que debe retener o pagar el empleador al Seguro Social de Salud o al sistema pensionario. Todo ello, siempre que durante la relación laboral haya existido un “desplazamiento continuo”.

En otro orden, la *responsabilidad solidaria* se aplica también respecto de cualquier ocurrencia habida en el marco de la seguridad y la salud en el trabajo.

4. ¿Cuál es el convenio colectivo aplicable a la empresa contratista durante su relación con la empresa principal?

La legislación laboral peruana no ha previsto expresamente esta situación.

Para resolver la cuestión, debe considerarse –a nuestro juicio– los artículos 28 inciso 2 (segundo párrafo) de la Constitución, 42 de la Ley de Relaciones Colectivas de Trabajo y 28 (primer párrafo) del Reglamento de esta.

De acuerdo con la norma constitucional indicada, “La convención colectiva tiene fuerza vinculante en el ámbito de lo concertado”.

¹³¹ DECRETO LEGISLATIVO 1038, artículo 2.

¹³² DECRETO SUPREMO 6-2008-TR, artículo 7.

¹³³ DECRETO LEGISLATIVO 1038, artículo 3.

Acerca de la *fuerza vinculante de la convención colectiva*, la norma legal invocada prescribe: “La convención colectiva de trabajo tiene fuerza vinculante *para las partes que la adoptaron*. Obliga a éstas, a las personas en cuyo nombre se celebró y a quienes les sea aplicable, así como a los trabajadores que se incorporen con posterioridad a las empresas comprendidas en la misma, con excepción de quienes ocupan puestos de dirección o desempeñan cargos de confianza”.

Y según la norma reglamentaria referida, “La fuerza vinculante [...] implica que en la convención colectiva las partes podrán establecer el alcance, las limitaciones o exclusiones que autónomamente acuerden con arreglo a ley”.

En este hábitat –a la luz de la fuerza vinculante del convenio colectivo y de la autonomía privada colectiva–, el convenio aplicable a la empresa contratista durante su relación con la empresa principal es el convenio colectivo de rama de actividad o de empresa aplicable a la empresa contratista. Vale decir, la empresa contratista no tiene obligación de aplicar el convenio colectivo (de empresa o de rama de actividad) aplicable a la empresa principal.

5. ¿Existe la obligación legal de la empresa contratista de reconocer a sus trabajadores condiciones laborales aplicables a los trabajadores de la empresa principal?

No existe dispositivo legal alguno que disponga la obligación de parte del empleador contratista de reconocer las mismas condiciones laborales que otorgue el empleador de la empresa principal. De todos modos, los trabajadores que realicen labores en las instalaciones de la empresa principal en una tercerización, cualquiera fuese la modalidad de contratación laboral utilizada, como todo trabajador contratado a tiempo indeterminado o bajo modalidad, tiene respecto de su empleador todos los derechos laborales colectivos e individuales establecidos en la normatividad vigente¹³⁴. Sin embargo, esto no significa que los trabajadores de la contratista tengan derecho a recibir las mismas remuneraciones o beneficios convencionales que los trabajadores de la empresa principal.

En el año 2012 el Ministerio de Trabajo y Promoción del Empleo emitió el informe 67-2012-MTPE, que dispuso: “La previsión normativa ha establecido que el personal destacado por una empresa de servicios o por una cooperativa de trabajadores tiene derecho a percibir las mismas remuneraciones y condiciones de trabajo que la empresa usuaria brinda a sus trabajadores. Ello deberá darse principalmente de los trabajadores de entidades que proporcionan mano de obra temporal, en estos casos se podrá contar

¹³⁴ LEY 29245, artículo 7 inciso 2.

con un trabajador dentro de la empresa a tomar como referencia para homologar las remuneración y condiciones de trabajo”. Este informe fue aplicable solo al asunto particular ahí tratado y sus consideraciones no son de observancia obligatoria en otros casos aun cuando similares.

6. ¿En qué supuestos existe una descentralización productiva fraudulenta o cesión ilegal de trabajadores? ¿Qué consecuencias se derivan de esta situación?

La legislación *no admite* la simple provisión de personal; *tampoco*, la recurrencia a la tercerización para restringir el ejercicio de los derechos individuales de los trabajadores o con la intención o efecto de limitar o perjudicar sus derechos colectivos. De igual modo, *no debe afectarse los derechos de seguridad social*.

A su vez, se tiene establecido que las empresas “tercerizadoras” deben tener “autonomía empresarial” y, en consecuencia, contar con sus propios recursos financieros y técnicos o materiales, asumir los servicios prestados por su cuenta y riesgo, ser responsables por los resultados de sus actividades y tener a sus trabajadores subordinados exclusivamente a ellas. Además, deben tener pluralidad clientes, contar con equipamiento e inversión de capital y percibir una retribución por los servicios que prestan. Ello no obstante, todos estos aspectos serán evaluados en cada situación concreta atendiendo los antecedentes de la tercerización, la actividad económica, la oportunidad de inicio de las actividades de la empresa “tercerizadora”, la dimensión de las empresas principal y “tercerizadora” y la clase de actividad delegada.

El incumplimiento de las exigencias anotadas determina la *desnaturalización* de la tercerización –a saber, la existencia de una “tercerización” fraudulenta y una simple provisión de personal–, con dos efectos inmediatos: el *establecimiento de una relación laboral directa* entre la empresa principal y los trabajadores desplazados de la empresa “tercerizadora” desde el momento mismo en que aquella se produjo; y la *cancelación del registro administrativo* correspondiente a esta. Ambas cuestiones, sin perjuicio de las *sanciones dinerarias* pertinentes. La legislación no prevé la existencia de responsabilidad penal en tales casos.

En tal entorno y al lado de la legislación pertinente, el Tribunal Constitucional ha rechazado “la operación (subcontratación fraudulenta) que no tiene otro fin que el aumento de las ganancias empresariales, a costa de la ilegítima disminución de los derechos de los trabajadores (y no mediante la búsqueda real de la eficiencia empresarial)” (sentencia del 26 de junio de 2014, dictada en el expediente 5035-2013-PA-TC; fundamento 20).

Empero, ha resuelto también: “No existe fraude o simulación del contrato de tercerización si: i) se advierte de las boletas de pago que la contratista era la que pagaba las remuneraciones, ii) se consignaba que el demandante era un trabajador destacado a la empresa cliente, iii) constata que se había suscrito un contrato para que la contratista destaque a trabajadores para satisfacer las necesidades de servicios temporales y iv) no se acredita que el vínculo laboral haya sido con la empresa principal” (sentencia del 3 de enero de 2011, recaída en el expediente 3793-2010-PA/TC)¹³⁵.

Por su parte, el Poder Judicial viene entendiendo que se produce también la “desnaturalización” de la tercerización: i) cuando la empresa principal realiza exámenes médicos ocupacionales a trabajadores de terceros (casación laboral 10691-2017 LIMA), y ii) cuando la empresa principal brinda capacitaciones en materia de seguridad y salud en el trabajo a los trabajadores de terceros. En tales circunstancias, presume la existencia de una relación laboral directa entre la empresa principal y los trabajadores de las empresas tercerizadoras.

7. ¿La contratación de trabajadores mediante Empresas de Trabajo Temporal está permitida en su país? ¿En qué supuestos?

La Ley 27626, Ley que regula la actividad de las empresas especiales de servicios y de las cooperativas de trabajadores, faculta la contratación de trabajadores mediante “empresas de servicios temporales” y “cooperativas de trabajo temporal” respecto a servicios de carácter ocasional¹³⁶ o de suplencia¹³⁷.

Según dicha Ley, las empresas de servicios temporales son “*aquellas personas jurídicas que contratan con terceras denominadas usuarias para colaborar temporalmente en el desarrollo de sus actividades, mediante el destaque de sus trabajadores para desarrollar las labores bajo el poder de dirección de la empresa usuaria correspondientes a los contratos de naturaleza ocasional y de suplencia [...]*”¹³⁸. Y

¹³⁵ *Manual del Régimen Laboral*, Lima, Editorial Economía y Finanzas; actualización correspondiente a marzo de 2015, p. 50.8A.

¹³⁶ Artículo 60 (primera parte) de la Ley de Productividad y Competitividad Laboral: “*El contrato accidental-ocasional es aquel celebrado entre un empleador y un trabajador para atender necesidades transitorias distintas a la actividad habitual del centro de trabajo*”.

¹³⁷ Artículo 61 (primera parte del primer párrafo) de la Ley de Productividad y Competitividad Laboral: “*El contrato accidental de suplencia es aquel celebrado entre un empleador y un trabajador con el objeto [de] que este sustituya a un trabajador estable de la empresa, cuyo vínculo laboral se encuentre suspendido por alguna causa justificada prevista en la legislación vigente, o por efecto de disposiciones convencionales aplicables en el centro de trabajo*”.

¹³⁸ LEY 27626, artículo 11 inciso 1.

cooperativas de trabajo temporal son “aquellas constituidas específicamente para destacar a sus socios trabajadores a las empresas usuarias a efectos de que éstos desarrollen labores correspondientes a los contratos de naturaleza ocasional y de suplencia [...]”¹³⁹.

A su vez, se establece que la intermediación de servicios temporales “*consiste en emplear uno o más trabajadores con el fin de destacarlos temporalmente a una tercera persona, natural o jurídica, denominada empresa usuaria, que dirige y supervisa sus tareas*”¹⁴⁰.

De todos modos, el número de trabajadores de tales empresas o cooperativas que pueden prestar servicios temporales en una empresa usuaria no debe exceder del veinte por ciento del número total de trabajadores que tienen vínculo laboral directo con ésta¹⁴¹.

8. ¿Existen supuestos o actividades económicas en los que la contratación de trabajadores mediante Empresas de Trabajo Temporal está prohibida?

La contratación de trabajadores mediante “empresas de servicios temporales” o “cooperativas de trabajo temporal” *no está permitida* para sustituir trabajadores en huelga o de trabajadores o socios trabajadores de otras empresas de servicios o cooperativas¹⁴². Esto, sin perjuicio de cualesquiera otros supuestos limitativos que pueda establecerse mediante disposiciones gubernamentales reglamentarias.

La *infracción* de tales prohibiciones comprobada debidamente en un procedimiento de Inspección del Trabajo determinará que, en aplicación del *principio de la primacía de la realidad*, se entienda que los trabajadores involucrados han tenido un *contrato de trabajo con la empresa usuaria* desde el inicio mismo de la prestación de sus servicios¹⁴³.

Así mismo, *se estima desnaturalizada* la intermediación laboral y, por tanto, configurada una *relación laboral directa* entre la empresa usuaria y el trabajador cuando se produzca un exceso del porcentaje limitativo fijado para la intermediación de

¹³⁹ LEY 27626, artículo 12 (primer párrafo).

¹⁴⁰ DECRETO Supremo 3-2002-TR, artículo 1.

¹⁴¹ LEY 27626, artículo 6 (primer párrafo); Decreto Supremo 3-2002-TR, artículo 3 (primer párrafo).

¹⁴² LEY 27626, artículo 8.

¹⁴³ LEY 27626, artículo 5.

servicios temporales¹⁴⁴ o se recurra a la intermediación de servicios temporales respecto a servicios que no sean de carácter ocasional o de suplencia.

En toda circunstancia, la intermediación laboral será *nula de pleno derecho* cuando haya tenido por objeto o efecto vulnerar o limitar el ejercicio de los derechos colectivos de los trabajadores de la empresa usuaria, de las empresas de intermediación laboral o de las cooperativas de trabajadores. De ser el caso, la acción judicial pertinente podrá ser planteada por cualquiera con legítimo interés¹⁴⁵.

Sin perjuicio de lo expuesto, no existen supuestos o actividades económicas en los que la contratación de trabajadores mediante empresas de servicios temporales o cooperativas de trabajadores esté prohibida.

9. ¿Qué responsabilidades laborales y de Seguridad Social mantiene la Empresa de Trabajo Temporal respecto de los trabajadores cedidos a empresas usuarias? ¿Y la empresa usuaria?

Los trabajadores de las empresas de servicios y los socios trabajadores de las cooperativas de trabajadores gozan de los derechos y beneficios correspondientes a los trabajadores del régimen laboral de la actividad privada¹⁴⁶; cuando destacados a una empresa usuaria y mientras dure el destaque, los trabajadores de las empresas de servicios y los socios trabajadores de las cooperativas de trabajo, en general, y, por tanto, los trabajadores de las empresas de servicios temporales y los socios trabajadores de las cooperativas de trabajo temporal, en particular, tienen derecho a percibir las remuneraciones y condiciones de trabajo que la empresa usuaria otorgue a sus trabajadores¹⁴⁷. Por otro lado, dichas empresas y cooperativas de trabajadores, cuando suscriban contratos de intermediación laboral, deben otorgar una fianza que garantice el cumplimiento de las obligaciones laborales y de seguridad social del personal destacado a la empresa usuaria¹⁴⁸. Así las cosas, cuando la fianza resulte insuficiente para el pago de los derechos laborales –de origen legal o provenientes de la negociación colectiva– adeudados al personal destacado a las empresas usuarias, estas serán solidariamente responsables del pago de tales deudas por el tiempo que el personal destacado laboró en la empresa usuaria¹⁴⁹.

¹⁴⁴ Vid. el último párrafo de nuestra respuesta a la pregunta anterior.

¹⁴⁵ LEY 27626, artículo 4.

¹⁴⁶ LEY 27626, artículo 7 (primer párrafo).

¹⁴⁷ LEY 27626, artículo 7 (segundo párrafo).

¹⁴⁸ LEY 27626, artículo 24 (primer párrafo).

¹⁴⁹ LEY 27626, artículo 25. Decreto Supremo 3-2002-TR, artículo 26.

En otro orden, las empresas de servicios temporales y las cooperativas de trabajo temporal también son responsables por todo cuanto concierne a la seguridad y salud en el trabajo de los trabajadores y socios trabajadores. En tal virtud, el personal destacado a la empresa usuaria deberá conocer los riesgos y contar con los implementos de seguridad necesarios para la prestación de los servicios a realizar en favor de aquella, y cumplir los procedimientos pertinentes establecidos por la empresa usuaria.

10. ¿Cómo se determinan las condiciones laborales aplicables a los trabajadores contratados mediante Empresas de Trabajo Temporal y cedidos a empresas usuarias?

En principio, entendemos que la determinación de las condiciones laborales aplicables a los trabajadores contratados mediante empresas de servicios temporales y cooperativas de trabajo temporal implica considerar todos los aspectos involucrados en el concepto *trabajo decente* (libertad, igualdad, seguridad y dignidad humana)¹⁵⁰ y, en consecuencia, cumplir principalmente el principio de *igualdad de oportunidades sin discriminación*¹⁵¹ (con relación a los trabajadores de la empresa usuaria) y los principios y normas concernientes a la *seguridad y salud en el trabajo* y a la *seguridad social*.

Como indicamos en la respuesta a la pregunta anterior, cuando destacados a una empresa usuaria, los trabajadores de las empresas de servicios temporales y los socios trabajadores de las cooperativas de trabajo temporal tienen derecho a percibir las remuneraciones y condiciones de trabajo que la empresa usuaria otorgue a sus trabajadores¹⁵². Precisamos ahora que tales remuneraciones y condiciones de trabajo “se extienden a los trabajadores destacados cuando son de alcance general, de acuerdo con la categoría ocupacional o función desempeñada, mientras dure el destaque. No son extensivos los que sean otorgados por la existencia de una situación especial objetiva, inherentes a calificaciones personales, desarrollo de actividades específicas, particularidades del puesto o el cumplimiento de condiciones específicas. No procede la extensión de derechos y beneficios cuando las labores desarrolladas por los trabajadores destacados no son efectuadas por ningún trabajador de la empresa usuaria”¹⁵³.

¹⁵⁰ “*Trabajo decente* es aquella ocupación productiva que es justamente remunerada y que se ejerce en condiciones de libertad, equidad, seguridad y respeto a la dignidad humana” (LEVAGGI, V., *Democracia y trabajo decente en América Latina*, Lima, Oficina Internacional del Trabajo, 2006, p. 28).

¹⁵¹ CONSTITUCIÓN, artículo 26 inciso 1.

¹⁵² LEY 27626, artículo 7 (segundo párrafo).

¹⁵³ DECRETO SUPREMO 3-2002-TR, artículo 5.

11. Derecho a información

Por último, importa destacar el *derecho a información* de los trabajadores involucrados en la tercerización¹⁵⁴.

En tal virtud, al inicio de la ejecución del contrato, la empresa tercerizadora tiene la obligación de informar *por escrito* a los trabajadores a cargo de la ejecución de la obra o servicio, a sus representantes y a las organizaciones sindicales y los trabajadores de la empresa principal: 1) la *identidad* de la empresa principal (nombre, denominación o razón social, domicilio y número de Registro Único del Contribuyente); 2) las *actividades* materia del contrato pactado con la empresa principal –cuya ejecución se realizará en el centro de trabajo o de operaciones de esta–; y 3) el *lugar* donde se llevarán a cabo tales actividades. Con relación a los trabajadores de la empresa tercerizadora encargados de la ejecución de la obra o servicio, sus representantes y sus organizaciones sindicales, la obligación de informar debe efectuarse *antes del desplazamiento*; respecto a los trabajadores de la empresa principal, tal obligación se satisface por intermedio de esta.

La empresa principal debe informar a la organización sindical –o a los delegados representantes de los trabajadores– la identidad de la empresa tercerizadora y de los trabajadores desplazados, dentro de los *cinco días* siguientes al mes calendario en el cual se concretó el desplazamiento o de las *veinticuatro horas* de la solicitud planteada por la organización sindical.

El *incumplimiento* de la obligación de informar constituye *infracción administrativa*, según las reglas sobre Inspección del Trabajo.

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¹⁵⁴ LEY 29245, artículo 6. Decreto Supremo 6-2008-TR, artículo 8.

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EXTERNALIZACIÓN Y CADENAS DE PRODUCCIÓN EN URUGUAY

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Introducción

En Uruguay, las leyes n° 18.099¹⁵⁵ (del 24 de enero de 2007) y n° 18.251¹⁵⁶ (del 6 de enero de 2008) introdujeron significativos cambios al régimen que hasta entonces regía la responsabilidad de las empresas que organizan su actividad recurriendo al auxilio de subcontratistas, intermediarios o suministradores de mano de obra.

La primera de dichas leyes (n° 18.099) implantó un sistema de responsabilidad *solidaria* de la empresa principal por las obligaciones laborales que las empresas prestadoras (subcontratista, intermediaria o suministradora de mano de obra) tienen con los trabajadores contratados, así como por las obligaciones de seguridad social que se adeuden a la entidad previsional que corresponda, de la prima de accidente de trabajo y enfermedad profesional y de las sanciones y recuperos que se adeuden al Banco de Seguros de Estado en relación a esos trabajadores.

Poco tiempo después, la mencionada ley sufrió nuevas y significativas variantes, al resultar promulgada la Ley n° 18.251, del 6 de enero de 2008, que conforma junto con la primera un sistema legal *bifronte*, que obliga al intérprete a abordar una lectura conjunta y coordinada para comprender e intentar armonizar los perfiles que presenta el nuevo régimen que entre ambas han consagrado. La segunda norma habilitó la posibilidad de que, cumpliendo con determinadas condiciones, las empresas principales puedan mutar la naturaleza de su responsabilidad, transitando de la *solidaridad* hacia la *subsidiariedad*.

Si bien no existen en Uruguay estadísticas oficiales al respecto, es apreciable a simple vista la habitualidad del recurso a diversas modalidades de *externalización* o *tercerización* (este último es el vocablo más comúnmente empleado para referirse al fenómeno), sobre todo mediante la figura de la *subcontratación*, que se utiliza con mucha frecuencia para determinadas actividades (por ejemplo, servicios de seguridad, vigilancia, limpieza, mantenimiento, etc.).

¹⁵⁵ <https://www.impo.com.uy/bases/leyes/18099-2007>

¹⁵⁶ <https://www.impo.com.uy/bases/leyes/18251-2008>

1. ¿Es la descentralización productiva o subcontratación una forma lícita de organización de la producción?

La regulación uruguaya permite la descentralización productiva como una forma lícita de organización de la actividad en cualquier área o sector de la economía. Las empresas están en condiciones de externalizar sus actividades o procesos en forma parcial o total mediante la contratación de terceras empresas.

Esta libertad de subcontratación encuentra su fundamento en los artículos 10 y 36 de la Constitución de la República.

El primero consagra el denominado “principio de libertad”, estableciendo que *“Las acciones privadas de las personas que de ningún modo atacan el orden público ni perjudican a un tercero, están exentas de la autoridad de los magistrados. Ningún habitante de la República será obligado a hacer lo que no manda la ley, ni privado de lo que ella no prohíbe”*.

Por su parte, el artículo 36 de la Constitución plasma el derecho a la libertad de comercio o empresa, en los siguientes términos: *“Toda persona puede dedicarse al trabajo, cultivo, industria, comercio, profesión o cualquier otra actividad lícita, salvo las limitaciones de interés general que establezcan las leyes”* y se encuentra regulada expresamente en las leyes más arriba mencionadas (a saber: ley n° 18.099 y ley n° 18.251).

La combinación de dichas normas, constitucionales y legales, permite concluir que el acometimiento de este tipo de procesos empresariales no resultaría ilegítimo en nuestro país, siempre que los mismos no contradigan el orden público ni perjudiquen a terceros.

2. ¿Existen límites y/o prohibiciones a la descentralización productiva?

Con la excepción que enseguida se dirá, hay que decir que la legislación uruguaya no establece límites ni prohibiciones a la descentralización productiva.

Las empresas pueden hacer uso de las modalidades de subcontratación, intermediación o suministro de mano de obra sin restricciones y, por consiguiente, la externalización puede tener lugar en cualquier sector de actividad, tanto público como privado y tanto en relación a actividades principales o propias del giro o en relación a actividades secundarias o periféricas.

Sin embargo, se prohíbe expresamente (artículo 3º de la Ley nº 18.099), emplear la subcontratación, intermediación o suministro de mano de obra para reemplazar trabajadores que se encuentren amparados al subsidio por desempleo por la causal de suspensión parcial o total de trabajo o en conflicto colectivo, sin perjuicio de las disposiciones especiales que rigen los servicios esenciales. Textualmente, la norma dice lo siguiente: “*Artículo 3º.- En ningún caso podrán emplearse las modalidades de contratación referidas en el artículo 1º de la presente ley para reemplazar trabajadores que se encuentren amparados al subsidio por desempleo por la causal de suspensión parcial o total de trabajo o en conflicto colectivo, sin perjuicio de las disposiciones especiales que rigen los servicios esenciales*”.

3. La empresa principal que externaliza una parte o la totalidad de su producción, ¿mantiene alguna responsabilidad laboral o de Seguridad Social respecto los trabajadores de la empresa contratista? ¿Cuáles?

En el régimen vigente (que, como se dijo, es el que resulta de la combinación de dos normas legales: Ley nº 18.099 y Ley nº 18.251) el patrono o empresario que utiliza subcontratistas, intermediarios o suministradores de mano de obra, responde solidariamente cuando no ejerza sobre el subcontratista, intermediario o suministrador de mano de obra su “derecho a ser informado” acerca del cumplimiento de “...las obligaciones laborales, previsionales, así como las correspondientes a la protección de la contingencia de accidentes de trabajo y enfermedades profesionales que a éstos correspondan respecto de sus trabajadores” (artículo 4º de la ley nº 18.251)¹⁵⁷.

De este modo, quedó consagrado el derecho de la empresa usuaria a recibir información del subcontratista, intermediario o suministrador de mano de obra sobre el estado de cumplimiento de las obligaciones a cargo de estos últimos y, al mismo tiempo, se implantó una consecuencia favorable para quien ejerce efectivamente aquel derecho, transformando su responsabilidad de solidaria en subsidiaria.

Por consiguiente, la responsabilidad de la empresa usuaria variará entre la subsidiariedad o la solidaridad, dependiendo de que ejerza o no su derecho a ser informada por el subcontratista, intermediario o suministrador de mano de obra. Si

¹⁵⁷ El art. 6º de la ley Nº 18.251 estableció lo siguiente: (“Responsabilidad del patrono o empresa principal). Cuando el patrono o la empresa principal hiciere efectivo el derecho a ser informado establecido en el artículo 4º de la presente ley, responderá subsidiariamente de las obligaciones referidas en el artículo 1º de la Ley Nº 18.099, de 24 de enero de 2007, con la limitación temporal allí establecida y el alcance definido en el artículo 7º de la presente ley. Cuando no ejerza dicha facultad será solidariamente responsable del cumplimiento de estas obligaciones”.

ejerce efectivamente tal derecho, su responsabilidad será *subsidiaria*. Si omite ejercerlo o si lo ejerce defectuosamente, su responsabilidad será *solidaria*.

Dado que del efectivo ejercicio de este derecho, se deriva un beneficio para el titular del mismo (que consiste en la disminución de la intensidad de su responsabilidad), puede entenderse que se trata de una *carga* de la empresa principal¹⁵⁸. Si el derecho no es ejercido, no se cumple con la *carga* y, consecuentemente, no se consigue el beneficio: la responsabilidad continuará siendo solidaria. En cambio, si el derecho a ser informado es ejercido correctamente, la responsabilidad se torna subsidiaria, pues la *carga* resulta cumplida.

Se trata, entonces, de un sistema de responsabilidad *dual* (ya que puede variar entre la solidaridad y la subsidiariedad), que cuenta con un dispositivo *intercambiador* cuya utilización queda en manos de la empresa usuaria.

Con relación a las deudas que quedan alcanzadas por la referida responsabilidad, las mismas abarcan lo siguiente:

- a. *Las obligaciones laborales que el subcontratista, intermediario o suministrador de mano de obra mantenga con sus dependientes;*
- b. *Las contribuciones a la seguridad social que el subcontratista, intermediario o suministrador de mano de obra, adeude a la entidad previsional que corresponda, con exclusión de las contribuciones especiales de seguridad social relativas a la industria de la construcción; y*
- c. *La prima de accidente de trabajo y enfermedad profesional, así como las sanciones y recuperos que el subcontratista, intermediario o suministrador de mano de obra adeuden al Banco de Seguros del Estado en relación a sus dependientes.*

Dentro del concepto de *obligaciones laborales* quedan comprendidas las de cualquier naturaleza (salarial o indemnizatoria) e inclusive, involucra no solamente las obligaciones *de dar*, sino también las obligaciones *de hacer* (como por ejemplo, la obligación de seguridad de la que es deudor el empleador frente a sus dependientes).

El artículo 7° de la ley n° 18.251 dispone que la responsabilidad alcanza a las obligaciones laborales “...*derivadas de la relación de trabajo que surgen de las normas internacionales ratificadas, leyes, decretos, laudos o decisiones de los Consejos de*

¹⁵⁸ Es decir, según la clásica definición de COUTURE: un imperativo del propio interés. COUTURE, E., Vocabulario Jurídico, 4ª reimpresión, Depalma, Bs. As., 1991.

Salarios, o de los convenios colectivos registrados, así como el deber del patrono o empresario principal de colaborar en la aplicación de las medidas previstas en el artículo 1º de la ley 5.032 de 21 de julio de 1914, sus decretos reglamentarios y convenios internacionales del trabajo vigentes”.

Resulta clara la vocación del legislador fue otorgarle a las normas un alcance extremadamente amplio. La responsabilidad no solamente está referida a materias o condiciones de trabajo consagradas en normas de origen heterónomo, sino también aquellas otras que pueden ser producto de la negociación colectiva, aunque en este caso se exige que los convenios que las consagren se encuentren registrados.

Pero además de las fuentes normativas del Derecho del Trabajo antes mencionadas, la ley también incorpora dentro de la esfera de las responsabilidades que consagra, a aquellas *obligaciones laborales* que aun no estando consagradas en alguna de dichas normas, pudiera encontrar su fuente en el contrato individual de trabajo. Esto se desprende de la referencia que reza “*o de la información que surja de la documentación a la que refiere el literal D) del artículo 4º de la presente ley*”. De modo que si existiera alguna *obligación laboral* que sin surgir estrictamente de alguna de las normas citadas en la ley (normas internacionales ratificadas, leyes, decretos, decisiones de Consejos de Salarios, convenios colectivos registrados) fuere exigible por el trabajador por haber sido consagrada en virtud de lo acordado individualmente por él con la empresa para la que se desempeña, éste beneficio también quedaría incluido dentro de la responsabilidad, pero en este caso, con una condición: que el mismo surja de la documentación a la que refiere el literal D) del artículo 4º de la ley N° 18.251. Si la *obligación laboral* no surge de dicha información, la empresa principal no responde por el mismo.

4. ¿Cuál es el convenio colectivo aplicable a la empresa contratista durante su relación con la empresa principal?

El convenio colectivo que resulta de aplicación a los trabajadores de la empresa contratista que prestan servicios en o para la empresa principal o “usuaria”, es el de sector o de empresa aplicable a la empresa contratista. Por tanto, las condiciones laborales de los trabajadores de la empresa contratista que prestan servicios en ejecución del contrato con la empresa principal se determinan en atención al convenio colectivo aplicable a la empresa contratista y no a la empresa principal.

5. ¿Existe la obligación legal de la empresa contratista de reconocer a sus trabajadores condiciones laborales aplicables a los trabajadores de la empresa principal?

Existe una única situación en que la ley prevé que la empresa contratista debe reconocer a sus trabajadores condiciones laborales aplicables a los de la empresa principal. Se trata del caso del *suministro de mano de obra temporal*. El artículo 5° de la ley n° 18.099 dispone lo siguiente: “*Los trabajadores provistos por empresas suministradoras de empleo temporal no podrán recibir beneficios laborales inferiores a los establecidos por laudos de los Consejos de Salarios, convenios colectivos o decretos del Poder Ejecutivo para la categoría que desempeñen y que corresponda al giro de actividad de la empresa donde los mismos prestan sus servicios*”. Como puede apreciarse, la norma que se viene de transcribir introduce una referencia especial, aplicable exclusivamente a aquellas empresas que brindan el servicio de *suministro temporal de mano de obra*. Dicha especialidad consiste en reconocerle al trabajador que realiza la *misión*, el derecho a recibir los beneficios laborales que se establecen como mínimos obligatorios para la categoría laboral que desempeñe, de acuerdo al giro de la empresa a la que temporalmente sea destinado

6. ¿En qué supuestos existe una descentralización productiva fraudulenta o cesión ilegal de trabajadores? ¿Qué consecuencias se derivan de esta situación?

Para que propiamente pueda hablarse de subcontratación, es necesario que la empresa que presta los servicios actúe *por su cuenta y riesgo* y con *personal dependiente propio*.

La ejecución bajo cuenta y riesgo del empleador que se encarga de realizar una obra o ejecutar un servicio para terceros, debe ser entendida en el sentido de que aquel sea realmente independiente del patrono o empresa principal. De lo contrario, ya no se estaría ante una hipótesis de subcontratación, sino en un supuesto de dependencia o subordinación encubierta, que haría nacer directamente en cabeza del patrono o empresario principal las obligaciones laborales y previsionales. Reforzando lo anterior, la ley exige, asimismo, que la subordinación de los trabajadores dedicados a la ejecución de la obra o servicio radique en la empresa contratista o subcontratista, y en ningún caso, en el patrono o empresa principal.

También podría configurarse la noción de *conjunto económico*, cuyas notas características -en ausencia en Uruguay de una norma que las explicita- han sido desarrolladas por la doctrina y la jurisprudencia. Esto acontecerá, por ejemplo, cuando exista una pluralidad de empresas con apariencia autónoma en el plano formal, pero estrechamente vinculadas entre sí en la realidad material, donde se conducen según una

única orientación económica, tras de la que resulta subyacente una unidad económica¹⁵⁹. Es importante destacar que en Uruguay no se considera al *fraude* como una condición indispensable para concluir en la existencia de un conjunto económico¹⁶⁰. Acreditada la existencia del conjunto económico, la consecuencia jurídico-laboral consistirá en el surgimiento de la solidaridad pasiva de todas las unidades (personas jurídicas y/o físicas¹⁶¹) que lo integran, circunstancia que habilitará al trabajador a dirigir su reclamación contra cualquiera de ellas o contra todo el grupo.

7. ¿La contratación de trabajadores mediante Empresas de Trabajo Temporal está permitida en su país? ¿En qué supuestos?

Sí está permitida la contratación de trabajadores mediante empresas de trabajo temporal y dicha posibilidad no se encuentra específicamente referida a determinados supuestos, sino que se considera habilitada con carácter general, sin que ni siquiera se encuentre condicionada por la exigencia de que las tareas deban ser temporales.

La Ley n° 18.251 define al suministro de mano de obra como la actividad que realiza la “*Agencia de empleo privada o empresa suministradora de mano de obra que presta servicios consistentes en emplear trabajadores con el fin de ponerlos a disposición de una tercera persona física o jurídica (empresa usuaria), que determine sus tareas y supervise su ejecución*”, siguiéndose en este caso la definición del Convenio Internacional del Trabajo N° 181 sobre Agencias de Empleo Privadas, 1997, artículo 1.1b). Tanto el artículo 1° de la ley N° 18.099 que menciona a los “*suministradores de mano de obra*”, como la definición precisa de “*empresa suministradora de mano de obra*” contenida en el literal “C” del artículo 1° de la Ley N° 18.251, refieren a todo tipo de suministro de mano de obra y no sólo al suministro de mano de obra *temporal*. Lo anterior determina que la definición comprenda todo tipo de suministro de mano de obra, tanto el suministro temporal como el suministro de mano de obra permanente, otorgándole así carta de ciudadanía a una modalidad que constituye una desviación del fenómeno original basado en las necesidades temporales de las empresas de obtener el concurso de personal.

¹⁵⁹ Ver: PLÁ RODRÍGUEZ, A., Curso de Derecho Laboral, T. I, vol. 1, Ed. Acali, Mdeo., 1979, p. 150 y 151

¹⁶⁰ PLÁ RODRÍGUEZ, A., Curso de Derecho Laboral, T. I, vol. 1, Ed. Acali, Mdeo., 1979, p. 152.

¹⁶¹ PLÁ RODRÍGUEZ, A., "Sobre el alcance de la noción de conjunto económico", rev. judicatura, noviembre 1993, núm. 36, p. 16.

8. ¿Existen supuestos o actividades económicas en los que la contratación de trabajadores mediante Empresas de Trabajo Temporal está prohibida?

Como se indicó más arriba, la ley prohíbe la contratación de trabajadores mediante empresas de trabajo temporal (del mismo modo que también en los mismos supuestos prohíbe la subcontratación y la intermediación) para reemplazar trabajadores que se encuentren amparados al subsidio por desempleo por la causal de suspensión parcial o total de trabajo o en conflicto colectivo, sin perjuicio de las disposiciones especiales que rigen los servicios esenciales.

9. ¿Qué responsabilidades laborales y de Seguridad Social mantiene la Empresa de Trabajo Temporal respecto de los trabajadores cedidos a empresas usuarias? ¿Y la empresa usuaria?

La empresa de trabajo temporal es formalmente considerada la empleadora directa de los trabajadores y, por consiguiente, sobre aquella recaen todas las obligaciones inherentes a la condición de empleador. A su vez, sobre la empresa usuaria recaen las responsabilidades que se indicaron más arriba, de carácter solidario o subsidiario, según se cumplan o no con las condiciones que ya fueron descriptas ut supra.

10. ¿Cómo se determinan las condiciones laborales aplicables a los trabajadores contratados mediante Empresas de Trabajo Temporal y cedidos a empresas usuarias?

En el caso del *suministro de mano de obra temporal*, el artículo 5° de la ley n° 18.099 dispone que “*Los trabajadores provistos por empresas suministradoras de empleo temporal no podrán recibir beneficios laborales inferiores a los establecidos por laudos de los Consejos de Salarios, convenios colectivos o decretos del Poder Ejecutivo para la categoría que desempeñen y que corresponda al giro de actividad de la empresa donde los mismos prestan sus servicios*”. Se le reconce al trabajador que realiza la *misión*, el derecho a recibir los beneficios laborales que se establecen como mínimos obligatorios para la categoría laboral que desempeñe, de acuerdo al giro de la empresa a la que temporalmente sea destinado

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EXTERNALIZACIÓN Y CADENAS DE PRODUCCIÓN EN COSTA RICA

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Introducción

Hoy tenemos que situarnos en la realidad que viven las empresas con motivo de la globalización y de los cambios que se han generado en los procesos productivos en aras de satisfacer las necesidades de los clientes y de la propia competencia. Uno de los aspectos más desafiantes que afrontan las empresas, es la opción de recurrir a la figura de la tercerización o outsourcing, mediante la cual se contrata servicios de un tercero confiándole el cumplimiento de actividades secundarias o principales, generales e incluso especializadas por medio de un contrato mercantil o civil. En sentido más amplio, se habla de externalización, descentralización o desconcentración productiva.

La posibilidad que brinda el mundo global y que ha empezado a introducirse tímidamente en las legislaciones nacionales latinoamericanas y en especial en la costarricense, permite que surja una relación comúnmente llamada “triangular”, entre la empresa principal o usuaria, que decide contratar mano de obra de terceros, el contratista y el trabajador de éste. Tres aspectos deben destacarse: a) La externalización de las actividades que hacen parte del ciclo productivo propio de la empresa, teniendo como consecuencia en algunos casos un fraccionamiento del proceso productivo; b) La contratación de empresas muy especializadas para el desarrollo y ejecución de las actividades encomendadas; y c) El control de todo el proceso por parte de la empresa principal o usuaria.

La 85ª Conferencia Internacional del Trabajo celebrada por la OIT en el año 1996, tuvo como tema central la subcontratación, la cual se definió como “toda situación en la que el trabajo es ejecutado por una persona que no es trabajador del empleador tal y como lo establece actualmente el derecho del trabajo, pero en condiciones de subordinación o dependencia muy próxima a lo que se concibe como un contrato de trabajo según la ley”. Para la OIT el trabajo en subcontratación puede presentarse de múltiples formas. La primera, es la subcontratación de bienes y servicios y la segunda la subcontratación de mano de obra. En la subcontratación de bienes y servicios, la empresa confía a otra el

suministro de bienes o servicios y ésta última se compromete a llevar el trabajo por su cuenta y riesgo y con sus propios recursos financieros, materiales y humanos. La segunda tiene por objetivo proveer de mano de obra por parte del subcontratista a la empresa usuaria o contratante, para lo cual le puede pedir que trabaje en sus locales junto con sus propios empleados o en otro lugar externo a la empresa.

Hoy el dinamismo que ha tenido la tercerización ha hecho que las formas tradicionales de los modelos de contratación laboral entren en crisis. La empresa tradicional ha tenido que acomodarse a las nuevas tendencias globales ajustando sus propios procesos productivos y empleando nuevas formas de contratación “atípicas” para afrontar los desafíos que la misma competencia impone en materia de costos e innovación en productos y servicios. Hoy la empresa ha echado mano de esta figura entre otras por las facilidades operativas que ofrece, el tener la posibilidad de determinar la continuidad o no del recurso humano que le brinda la empresa proveedora sin tener que justificar sus razones ni pagar indemnizaciones laborales y también por los bajos costos que la figura implica.

Se afirma que la empresa usuaria debe dedicarse a lo que realmente ella sabe hacer, lo que le permite aprovechar de una forma más eficaz sus propios recursos técnicos y humanos para lograr una mayor productividad; esto es un primer intento de obtener mayores ventajas en la concentración de las actividades propias de la empresa y la transferencia hacia terceros de las otras actividades que propiamente no se encuentran dentro del giro ordinario del negocio.

Estas nuevas formas de organización de la producción y del ciclo productivo, permite a las empresas evaluar cuáles de sus actividades serán asumidas por sus propios trabajadores en el ámbito del derecho laboral y cuáles de esas u otras actividades se las confían a un tercero, ya sea persona física o jurídica ajena a la empresa, en el ámbito del derecho comercial o mercantil y civil. La descentralización productiva implica un desprendimiento de las actividades por parte de la empresa principal o usuaria del servicio, respetando su propio proceso productivo, las cuales pueden en algunas circunstancias coincidir o no con el núcleo de las funciones principales y ordinarias de la empresa.

Adicionalmente, la empresa que opta por externalizar los servicios debe tener en cuenta la importancia de esta decisión y crear un estricto control en la escogencia de la empresa proveedora. Entre otros, debe evaluar temas como: calidad, experiencia, solidez financiera y económica, respeto al medio ambiente, respeto de los derechos humanos y laborales, etc. puesto que cualquier inconveniente que se le presente a la empresa

proveedora puede afectar la imagen y reputación de la empresa usuaria, con consecuencias casi siempre negativas.

Desde el punto de vista del empleo, la tercerización conlleva en sí una competencia interna entre los trabajadores de la empresa usuaria y la empresa proveedora, ya que en la mayoría de los casos, los derechos de estos son muy inferiores a los trabajadores que están en la planilla de la empresa usuaria, trayendo en algunos casos insatisfacciones laborales que afectan la productividad de forma directa. La empresa proveedora en la mayoría de los casos generalmente tiene una capacidad económica menor a la empresa usuaria y no pueden ofrecer las mismas condiciones de trabajo y únicamente otorgan las consagradas en la ley.

En Costa Rica, el artículo 3 del Código de Trabajo establece la figura del Intermediario, como “toda persona que contrata los servicios de otra u otras para que ejecuten algún trabajo en beneficio de un patrono”. De modo que “este quedará obligado solidariamente por la gestión de aquél” y “serán considerados como patronos de quienes trabajen -y no como intermediarios- los que se encarguen, por contrato, de trabajos que ejecuten con capitales propios”.

En consecuencia, si la empresa proveedora o prestadora del servicio tiene su propio capital y por así decirlo, actúa con una estabilidad económica y financiera, la ley no la toma como intermediaria; pero si por el contrario, no se actúa de esa forma, entonces se está ante la figura del intermediario asumiendo las consecuencias jurídicas que ello implica (Sentencia del Tribunal de Trabajo de San José, N°562-2005 de las 18:25 hrs. del 07/12/2005).

1. ¿Es la descentralización productiva o subcontratación una forma lícita de organización de la producción?

En Costa Rica la libertad de empresa está consagrada en el artículo 46 de la Constitución política reformado por la Ley N°7607 del 29 de mayo de 1996, el cual establece que está prohibido “cualquier acto, aunque fuere originado en una ley, que amenace o restrinja la libertad de comercio, agricultura e industria”.

Sobre el contenido de esta libertad de empresa, la Sala Constitucional de la Corte Suprema de Justicia, ha expresado que la misma “radica en el derecho de cada ciudadano de escoger libremente la actividad económica que desea desarrollar. Sin embargo, éste no es un derecho ilimitado, pues el Estado puede limitar dicha actividad por razones de orden público, la moral y la tutela de los derechos de terceros. Una vez que una persona escoge la actividad económica que desea desarrollar, debe ajustarse a

los requisitos y lineamientos que el ordenamiento jurídico exige para llevar a cabo la actividad, siempre que estos requisitos superen el juicio de razonabilidad y proporcionalidad y que no hagan nugatorio el ejercicio del derecho fundamental...” (Voto N°2010-8600 de las 15:08 hrs. del 12/05/2010).

En este mismo sentido y del mismo Tribunal, en fecha más reciente, se incluía a modo de “razones adicionales del voto de mayoría”, la afirmación de que “no se puede desconocer que la libertad de empresa, además de ser un derecho fundamental, es un elemento esencial del modelo de economía de mercado por el que optó el Constituyente” (Voto N°11545–2016 de las 11:31 hrs. del 12/08/2016).

A partir de este marco constitucional se concluye que no existe en el derecho costarricense, una norma que prohíba la descentralización productiva. Es una forma válida y lícita que tiene el empresario de organizar de la mejor manera posible su proceso productivo. Las empresas pueden externalizar todo o parte su producción y contratarlo con otra(s) empresa(s), sean estas nacionales o extranjeras.

2. ¿Existen límites y/o prohibiciones a la descentralización productiva?

Como ya se advertía, no existe ningún límite o prohibición a la posibilidad del empresario de descentralizar todo o parte de su producción.

Adicionalmente, Sala Constitucional de la Corte Suprema de Justicia ha interpretado “que las normas constitucionales deben interpretarse de manera armónica, de tal forma que se compatibilicen bajo el mismo techo ideológico que las informa. Así, el artículo 28 párrafo segundo de la Constitución, dispone que “Las acciones privadas que no dañen la moral o el orden públicos, o que no perjudiquen a terceros, están fuera de la acción de la ley”. En consecuencia, la libertad de comercio es susceptible de regulación por parte del Estado, siempre y cuando no llegue a traspasar los límites de razonabilidad y proporcionalidad constitucionales. En ese sentido, se crea así “una verdadera <reserva constitucional> en favor del individuo a quien garantiza su libertad frente a sus congéneres, pero, sobre todo, frente al poder público”. (Voto N°2010-8600 de las 15:08 hrs. del 12/05/2010).

3. La empresa principal que externaliza una parte o la totalidad de su producción, ¿mantiene alguna responsabilidad laboral o de Seguridad Social respecto los trabajadores de la empresa contratista? ¿Cuáles?

El Código de Trabajo, en su artículo 3, consagra la figura del intermediario, definiéndolo como toda persona que contrata los servicios de otra u otras para que

ejecuten algún trabajo en beneficio de un patrono, sin tener capital propio. En estos casos, tanto el patrono como el intermediario quedarán obligados solidariamente por la gestión de éste “para los efectos legales que se deriven del presente Código, de sus Reglamentos y de las disposiciones de previsión social”.

Por “capital propio” entiende la Sala Segunda de la Corte Suprema de Justicia, “la existencia de una organización empresarial suficiente y autónoma”. La sola configuración jurídica del contratista libera al beneficiario del suministro de mano de obra de la responsabilidad solidaria (Voto N°2010-954 de las 14:12 hrs. del 30/06/2010).

En igual sentido y en aplicación de esa normativa, recuerda la Sala que “la jurisprudencia ha establecido que un contratista posee el elemento del “capital propio”, el cual es acuñado por el Código de Trabajo; y podríamos entenderlo como la existencia de una organización empresarial suficiente y autónoma; ese factor permite distinguirlo del intermediario -empresario solidariamente responsable con el beneficiario de la prestación de servicios-, pues el contratista es un empresario autónomo único obligado frente a sus trabajadores y frente a las instituciones de previsión social...” (Voto N°00362–2012 de las 9:30 hrs. del 20/04/2012).

Adicionalmente, existe una “tendencia” en la práctica, de considerar que el riesgo de solidaridad también se puede derivar de la existencia de un poder de “direccionamiento” de los trabajadores de la empresa proveedora por representantes de la empresa que se beneficia o usuaria de esos servicios, lo que constituye una injerencia indebida e injustificada de un tercero, pero propia y consustancial del empleador, que pueda terminar por declarar la existencia de un vínculo de “subordinación jurídica” entre el beneficiario y aquellos trabajadores y derivado de ello, surgir una responsabilidad solidaria y/o compartida entre ellas. Debido a este temor, en la práctica las empresas beneficiarias tratan de “no contaminar” la relación de tercerización, llevando al extremo el trato que reciben los trabajadores de las empresas prestadoras de servicios. Esto suele ocasionar fuertes distorsiones en el clima laboral, que terminan por afectar a los trabajadores externos. Mantener estas barreras incólumes no resulta fácil para ninguna de las empresas involucradas, ni para los supervisores inmediatos del personal de ambas organizaciones que debe interactuar cada día en el cumplimiento de las labores del personal contratado, sobre todo, cuando el personal de ambas organizaciones comparten el mismo centro de trabajo.

El reforzamiento de formalidades destinadas únicamente a servir en un futuro proceso judicial de indicios de la no existencia de subordinación o control, para evitar la

responsabilidad solidaria, es fuente de imaginación perenne entre los equipos de recursos humanos y asesores legales.

Sin embargo, en una resolución poco conocida, la Sala Segunda de la Corte reconoció que el poder subordinación puede “delegarse” por parte de la empresa tercerizada a favor de la empresa beneficiaria, quien así puede dirigir y controlar el cumplimiento de labores del personal externo, sin que ello signifique que la empresa beneficiaria se transforme en patrono de esas personas: “El personal contratado por este organismo internacional, debido a su naturaleza, debe prestar servicios en lugares e instalaciones ajenas a las de quien les contrata, y así quedó dispuesto en los contratos firmados... Por este motivo,.. la supervisión de su personal está delegada... La figura de la delegación de la potestad de dirección no es extraña en nuestra legislación toda vez que el artículo 18 del Código de Trabajo dispone: “Contrato individual de trabajo, sea cual fuere su denominación, es todo aquél en que una persona se obliga a prestar a otra sus servicios o a ejecutarle una obra, bajo la dependencia permanente y dirección inmediata o delegada en ésta, y por una remuneración de cualquier clase o forma” (la negrita no es del original). Es decir, en ocasiones el trabajo puede prestarse a un tercero quien puede ejercer el derecho de dirección, mientras que la obligación de pagar el resto de obligaciones fundadas en el contrato de trabajo quedan a cargo del empleador (en sentido similar puede verse el voto 140 de las 9:30 horas del 15 de junio de 1994)...” (Voto N°2015-000182 de las 9:35 hrs. del 13/02/2015).

Específicamente, el empleador –empresa usuaria o beneficiaria- responde solidaria y directamente ante el trabajador, conjuntamente con la empresa contratista, si esta última es considerada como intermediaria, por las prestaciones especiales que la normativa sobre riesgos de trabajo prevé, conforme al artículo 193 del Código de Trabajo.

En este sentido, el artículo 31 de la Norma Técnica del Seguro de Riesgo del Trabajo (2014), disponen que el usuario o beneficiario de la empresa proveedora de mano de obra que contrata o sub-contrata un intermediario para realizar una actividad de cualquier índole, tiene el deber de velar por que éste también mantenga vigente su póliza de Riesgos del Trabajo y pague las primas que correspondan para amparar a sus trabajadores. Las primas que no hayan sido pagadas por el intermediario serán cargadas a la empresa usuaria o beneficiaria, salvo que esta última demuestre que la empresa intermediaria presta el servicio con capital propio, para lo cual deberá cumplir con dos requisitos: a) adjuntar a la “Declaración de sub-contrato” una copia certificada del contrato y Declaración Jurada en escritura pública donde el usuario o beneficiario y/o el intermediario manifiestan “que este último construirá con capital propio, sin recibir ningún tipo de financiamiento ni adelantos del primero, aceptando que la obra contratada le será pagada en su totalidad una vez concluida la misma· y b) aportar copia

del comprobante de pago realizado al intermediario.

Conforme al artículo 68 de la misma Norma, cuando el reclamo del trabajador sea procesado como caso no asegurado, el Instituto Nacional de Seguros, que es la institución pública que administra el régimen de riesgos profesionales, tendrá el derecho de cobrar al intermediario y a la empresa usuaria o beneficiaria de los servicios recibidos, todas las prestaciones otorgadas al lesionado y sus causahabientes, más los intereses, para lo cual tendrán un plazo máximo de 10 días hábiles para depositar las sumas adeudadas, contados a partir de la fecha de la respectiva notificación.

Finalmente, también debe resaltarse que la responsabilidad solidaria también surge en materia de condiciones de trabajo y de seguridad social, cuando se determina que la empresa usuaria y beneficiaria y la empresa contratista constituyen un “grupo de interés económico”, consecuencia de lo cual, “si una de las empresas del conglomerado incumple los derechos laborales de un trabajador, las restantes responden solidariamente” (Voto N°2016-000848 de las 11 hrs. del 10/08/2016). En cuyo caso, “ya no tendrá tanta importancia cuál persona jurídica aparezca formalmente como patrono, o a cuál establecimiento se presenta el trabajador diariamente a realizar sus labores, o quién pague el salario” (Voto N°2016-001338 de las 10:10 hrs. del 2/09/2016).

Forman parte de los elementos que determinan la existencia del grupo económico, entre otros la convergencia en la titularidad de las acciones y en la administración de las sociedades, (Voto N°2017-001402 de las 9:30 hrs. del 8/09/2017).

4. ¿Cuál es el convenio colectivo aplicable a la empresa contratista durante su relación con la empresa principal?

Las condiciones que se aplicarían a los trabajadores de la empresa contratista, son las previstas en el convenio colectivo de esta última y no las de la empresa principal. No obstante, en algunos casos la Sala Segunda de la Corte Suprema de Justicia, ha estimado que en situaciones en las que la empresa contratista y la principal forman parte de un mismo grupo económico, en el cual la principal es la única que tiene convenio colectivo y los trabajadores han sido trasladados de la principal a la contratista, el derecho de los trabajadores “no puede verse perjudicado por el solo hecho de haber sido trasladado a trabajar con otra de las empresas del conglomerado económico, pues de esa manera podría dejarse sin efecto, con facilidad, el contenido de una convención colectiva, en perjuicio de los trabajadores”, por lo que les terminan aplicando la convención colectiva de la empresa principal (Voto N°2010-000839 de las 16:20 hrs. del 10/06/2010).

5. ¿Existe la obligación legal de la empresa contratista de reconocer a sus trabajadores condiciones laborales aplicables a los trabajadores de la empresa principal?

No existe ninguna obligación por parte de la empresa contratista de reconocer a sus trabajadores las condiciones laborales reconocidas a los trabajadores de la empresa principal, salvo en los supuestos ya indicados en la respuesta anterior.

6. ¿En qué supuestos existe una descentralización productiva fraudulenta o cesión ilegal de trabajadores? ¿Qué consecuencias se derivan de esta situación?

Como ya se ha expuesto, únicamente se regula la figura del intermediario y la del grupo económico, en cuyo caso, la consecuencia es la declaratoria de responsabilidad solidaria entre el beneficiario o usuario de los servicios y las empresas proveedoras, respecto de las obligaciones en beneficio de los trabajadores de estas últimas. Sin embargo, no existen una norma que tipifique los supuestos de una descentralización productiva fraudulenta o de cesión ilegal de trabajadores. Los tribunales, en su caso, han examinado casos de descentralización fraudulenta cuando, la descentralización se realiza dentro del mismo grupo económico, manteniéndose la relación de trabajo en iguales condiciones, aun y cuando haya mediado en el cambio una extinción del contrato anterior y la firma del nuevo, con el pago respectivo de las indemnizaciones normales por despido. Al respecto advierte la Sala Segunda de la Corte, que si bien “no desconoce los procesos de descentralización productiva que actualmente rigen en el mercado”, en el caso concreto que examina, “está claro que entre todas las codemandadas media un vínculo que las une... y no puede decirse que sean independientes y ajenas entre sí”, por lo que “a todas debe considerárselas como empleadoras del accionante y, consecuentemente, corresponsables de los derechos por este reclamados” (Voto N°2010-000839 de las 16:20 hrs. del 10/06/2010).

7. ¿La contratación de trabajadores mediante Empresas de Trabajo Temporal está permitida en su país? ¿En qué supuestos?

No existe ninguna norma que regule las Empresas de Trabajo Temporal; tampoco que las prohíba. Por ello, en la práctica, si existen este tipo de empresas y la empresa usuaria puede contratar con una Empresa de Trabajo Temporal para que le ceda trabajadores para realizar tareas que se encuentren o no dentro de su giro ordinario de negocios, también para atender todo tipo de necesidades, bien sean permanentes o transitorias.

8. ¿Existen supuestos o actividades económicas en los que la contratación de trabajadores mediante Empresas de Trabajo Temporal está prohibida?

Como se explicaba en la respuesta anterior, no existen supuestos o actividades en los que la contratación de trabajadores mediante Empresas de Trabajo Temporal esté prohibida. Han existido casos en los que el Gobierno contrata esquirols durante la huelga en los servicios públicos. Aunque se ha intentado legalizar esta práctica, no existe norma que lo regule. En todo caso, se trata de una práctica contraria al Convenio núm.87 de la OIT.

9. ¿Qué responsabilidades laborales y de Seguridad Social mantiene la Empresa de Trabajo Temporal respecto de los trabajadores cedidos a empresas usuarias? ¿Y la empresa usuaria?

La Empresa de Trabajo Temporal si actúa como un contratista mantienen su responsabilidad laboral y de Seguridad Social respecto del trabajador cedido. Si la Empresa de Trabajo Temporal actúa como un simple intermediario, la empresa usuaria responderá de forma solidaria con la Empresa de Trabajo Temporal, frente a las obligaciones de laborales y de Seguridad Social de los trabajadores cedidos.

10. ¿Cómo se determinan las condiciones laborales aplicables a los trabajadores contratados mediante Empresas de Trabajo Temporal y cedidos a empresas usuarias?

No existe norma que obligue a las Empresas de Trabajo Temporal a otorgar determinadas condiciones de trabajo a sus trabajadores; de modo que estas empresas las fijan independientemente de las condiciones que tengan trabajadores en iguales categorías y puestos en la empresa usuaria. Hasta la fecha no han existido reclamaciones de los trabajadores de las Empresa de Trabajo Temporal, solicitando el pago de diferencias especialmente salariales, por violación del principio de no discriminación o de igualdad en el salario.

11. Otras cuestiones relevantes y valoración de la regulación en materia de externalización y cadenas de producción en su país.

Existe en la actualidad un proyecto en la Comisión Permanente de Asuntos Sociales de la Asamblea Legislativa denominado “Ley de Solidaridad Laboral en casos en Sub contratación o Tercerización de Servicios” (Expediente N°19,772), que fue publicado el 5 de julio de 2016.

La iniciativa tiene por motivación que: “El trabajador que presta servicios a una empresa en la cual esta no es su patrono sino que depende de un vínculo laboral con la empresa subcontratada, se encuentra en una situación de eventual desprotección si esta

última incumple sus obligaciones laborales”. En razón de lo anterior, se propone establecer un vínculo de solidaridad legal entre la empresa contratante y la empresa contratista hacia el trabajador, a fin de que ambos respondan de manera solidaria, ante eventuales incumplimientos de obligaciones de carácter laboral.

Asimismo, dado el vacío normativo en el Código de Trabajo en tal sentido, se propone incorporar la figura del subcontratista como parte de los sujetos de la relación laboral, definiéndola como “aquella persona física o jurídica que en virtud de un vínculo contractual, se dedica a poner a la orden de un tercero, persona física o jurídica, trabajadores bajo su cuenta y riesgo, manteniendo su relación laboral con estos, con el fin de que los mismos presten servicios principales o accesorios en la organización de la empresa contratante”.

El 21 de noviembre del 2018, el proyecto recibió un dictamen negativo de mayoría en la Comisión Permanente Ordinaria de Asuntos Sociales en la que estaba siendo tramitada, solicitándose en consecuencia al Plenario de la Asamblea Legislativa, el archivo definitivo del proyecto.

Entre los motivos por los cuales se tomó tal decisión, se encontraban los siguientes: 1. El proyecto es innecesario en razón de que la regla del artículo 3 del Código de Trabajo, ampliamente desarrollada en la jurisprudencia, ya establece la responsabilidad solidaria en casos de intermediación; 2. no especifica las “medidas de seguimiento”, que emprendidas por parte de la empresa usuaria, demostrarían un nivel de diligencia que le permitiría relevarse de una responsabilidad solidaria en caso de incumplimiento laboral; 3. resulta confuso el plazo de prescripción para que el trabajador de la empresa contratante pueda interponer un reclamo judicial por incumplimiento de la legislación laboral; y 4. “La eventual aprobación del presente proyecto de ley crearía un grave estado de inseguridad jurídica, que afectaría desde las relaciones comerciales privadas hasta las relaciones derivadas de contratos públicos, debido a las eventuales contingencias financieras que los contratistas se verían obligados a asumir, producto del incumplimiento de contratos laborales en los que no tuvieron participación”.

Porque las deficiencias técnicas del proyecto (sobre “medidas de seguimiento” o el plazo de prescripción) podían ser fácilmente solucionadas; el verdadero motivo de la suerte del proyecto, que se oculta tras el argumento de la inseguridad jurídica, se refiere a la incapacidad de definir quien asume la responsabilidad del incumplimiento de la ley y de los derechos de los trabajadores, a pesar de beneficiarse de sus servicios.

En todo caso, el proyecto presentado tenía un ámbito de regulación muy estrecho, relacionado con la protección patrimonial de los reclamos interpuestos por los

trabajadores de las empresas contratistas. En consecuencia, no trataba de normar una actividad que todavía hoy exige una mayor reglamentación, no solo en ese aspecto puntual, sino en otros muchos más, muestra de lo cual es el presente estudio.

EXTERNALIZACIÓN Y CADENAS DE PRODUCCIÓN EN PANAMA

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Introducción

Panamá posee una legislación laboral que se describe como altamente protectora, aún después de la reforma de los años 90 en clave desreguladora sin embargo, los cambios ocurridos en la legislación laboral facilitaron la externalización y la presencia, antes prohibida, de las agencias de colocación de empleo temporal, con o sin fines de lucro y aunque la reglamentación de estas normas intenta ejercer un balance entre la posibilidad legal de externalización y la colocación temporal de empleo por una parte y los derechos de los trabajadores reconocidos en la ley por la otra, en la práctica han proliferado la agencias privadas de colocación de empleo que son utilizadas para promover la externalización de los servicios brindados por las llamadas empresas beneficiarias de esta externalización.

Con un conjunto de medidas como la Ley de Sede de Empresas Multinacionales (Ley 45 de 10 de agosto de 2012)¹⁶²; la Ley 44 de 1995 que reformó el Código de Trabajo y permitió la existencia de agencias privadas de colocación de empleo temporal, con o sin fines de lucro y su reglamentación entre otras, se promovió la llegada de empresas multinacionales al país para aumentar la inversión extranjera directa. Como consecuencia las empresas multinacionales y las nacionales, utilizaron algunas de las figuras como la subcontratación y desconcentración para evitar responsabilidades laborales, principalmente los derechos adquiridos de los trabajadores contratados a tiempo indefinido.

Desde que se promovió la flexibilización de las normas reguladoras del contrato de trabajo (1995) aumentó el número de contrataciones por tiempo definido y por obra determinada¹⁶³, que implican de suyo, ausencia de estabilidad laboral. A esto debe sumarse la existencia de 141 empresas multinacionales con oficinas en Panamá, desde 2007 hasta 2018, que utilizan el mecanismo de contratación temporal para una gran parte de su personal.

¹⁶² http://sem.gob.pa/doc/Ley_45_de_2012.pdf

¹⁶³ Según datos estadísticos del Ministerio de Trabajo, sólo el 27% de todos los contratos registrados en 2018, fueron por tiempo indefinido. Ver <https://www.mitradel.gob.pa/wp-content/uploads/2019/02/contrato-1.pdf>

Siendo Panamá un país cuya economía se basa en los servicios y el comercio, la mayor parte de la empleomanía se desarrolla en este sector y es allí donde se concentra por supuesto, la mayor parte de las contrataciones temporales. El sector construcción encabeza el uso de la externalización del servicio de contrataciones, seguida del sector comercio, que para el año 2015 sumaron aproximadamente unos 30,000 trabajadores.

El presente estudio sin embargo, no aborda el trabajo informal que según datos de OIT representa el 39% de los nuevos puestos de trabajo en nuestro país pero que no son contratados por medio de las agencias privadas de colocación de empleo.

1. ¿Es la descentralización productiva o subcontratación una forma lícita de organización de la producción?

Las empresas establecidas en Panamá pueden subcontratar o descentralizar su producción total o parcialmente según lo indica el Código de Trabajo pero rigen algunas reglas que aseguran los derechos de los trabajadores. En primer lugar, la descentralización, cuando revista la figura de la sustitución patronal es decir, cuando todas las actividades del empleador son sustituidas por un nuevo empleador, debe ser notificada a los trabajadores y ambas empresas son solidariamente responsables por las prestaciones de los trabajadores por el término de un año, contado a partir de la notificación que se haga al trabajador, de esa sustitución. En caso que no se produzca la notificación a los trabajadores, la responsabilidad subsidiaria existirá hasta que se realice dicha notificación, según el artículo 14 del Código de Trabajo.

El fraccionamiento de la empresa no podrá afectar los derechos adquiridos de los trabajadores, derechos que no podrán ser disminuidos ni redistribuidos entre las empresas en que se fraccione el empleador original.

En caso de comprobar que el fraccionamiento de la empresa es un acto arbitrario para evadir la responsabilidad de las prestaciones y derechos laborales, los accionistas o beneficiarios de ese fraccionamiento responderán con el patrimonio adquirido, por los derechos de los trabajadores.

2. ¿Existen límites y/o prohibiciones a la descentralización productiva?

No existen límites legales para la subcontratación o descentralización productiva. De hecho, es plenamente legal que una empresa pueda participar de actos públicos de licitación para contratar con el Estado, aún sin poseer las condiciones de infraestructura, laborales y administrativas para realizar el trabajo, siempre que tenga la capacidad económica para subcontratar empresas especializadas que se requiera y cuya

adjudicación se haya ganado en base a ofrecer el mejor precio. Lo mismo ocurre en el ámbito privado pues siendo una economía basada en servicios, es legal y culturalmente permitida la subcontratación o descentralización.

Las empresas subcontratistas en la construcción por ejemplo pueden a su vez subcontratar a otras empresas especializadas pero todas las empresas subcontratistas son solidariamente responsables por las prestaciones de sus trabajadores.¹⁶⁴

En el sector público sin embargo, la subcontratación no puede abarcar los servicios que esencialmente brindan algunas instituciones porque estaríamos en presencia de una privatización del mismo. Por ejemplo, no se puede subcontratar por parte del Instituto de Acueductos y Alcantarillados Nacionales, la dotación de agua potable a la población (salvo casos de extrema urgencia, temporalmente autorizados por el Gobierno nacional). Se pueden subcontratar algunas funciones como por ejemplo el cobro de los servicios de agua a la población, etc. pero nunca los servicios principales de la institución.

3. La empresa principal que externaliza una parte o la totalidad de su producción, ¿mantiene alguna responsabilidad laboral o de Seguridad Social respecto los trabajadores de la empresa contratista? ¿Cuáles?

La empresa principal que externaliza sus servicios lo hace de manera definitiva, por lo que no posee responsabilidad alguna de allí en adelante con sus trabajadores pero debe pagarle las prestaciones finales como vacaciones proporcionales, décimo tercer mes proporcional y prima de antigüedad, previstos en el Código de Trabajo.

Una vez canceladas las prestaciones de los trabajadores que realizaban las labores externalizadas, cesa la relación jurídico laboral entre la empresa original y estos trabajadores.

La responsabilidad de cumplir con las obligaciones laborales y de la seguridad social de los trabajadores de la empresa contratada para brindar un servicio a una empresa, es exclusivamente de la empresa que brinda el servicio sin embargo, de acuerdo al artículo 90 del Código de Trabajo, tratándose de empresas que laboren exclusiva o principalmente para el beneficio de otra, se considerará como empleador para todos los efectos legales, a la empresa realizadora del servicio pero ambas son solidariamente responsables por todas las prestaciones e indemnizaciones a que tengan derechos los trabajadores.

¹⁶⁴ Ver Ley 72 de 1975, sobre contrato de construcción, en <https://panama.justia.com/federales/leyes/72-de-1975-dec-29-1975/gdoc/e>

Por último, el artículo 92 del Código de Trabajo detalla que en el caso de que por actos fraudulentos se creen personas jurídicas para eludir el cumplimiento de las obligaciones de los empleadores que sean personas naturales, el trabajador podrá reclamar sus derechos laborales a los accionistas, socios o miembros de la persona jurídica así creada.

4. ¿Cuál es el convenio colectivo aplicable a la empresa contratista durante su relación con la empresa principal?

Los convenios colectivos panameños en un 98% se acuerdan por empresas, aunque la ley permite que se hagan por rama o actividad industrial. El convenio colectivo no alcanza a los trabajadores de otras empresas más allá de aquella que lo firmó. En el caso de la subcontratación o externalización, la ley no autoriza extender la aplicación ni los efectos del convenio colectivo a los trabajadores de la empresa subcontratada.

En la construcción, el convenio colectivo CAPAC-SUNTRACS (sectorial), faculta a aplicar el mismo a las empresas subcontratistas que formen parte de la Cámara Panameña de la Construcción (CAPAC). Las subcontratistas que no forman parte de ese convenio, son alentadas por el sindicato (SUNTRACS) a que se adhieran al mismo para que le sean aplicadas las normas del convenio a sus trabajadores pues la Ley no obliga a la extensión automática del convenio.

En caso que los trabajadores de una empresa subcontratada formen parte de un sindicato de industria, sería posible que dicho sindicato le solicite por vía de negociación colectiva, la firma de un convenio, cuyo contenido puede ser igual o distinto al que exista en las otras empresas en donde dicho sindicato esté presente.

Como quiera que la obligatoriedad de las empresas de negociar el convenio colectivo que le presente un sindicato está descrita en el artículo 401 del Código de Trabajo, resulta posible esta figura, sin necesidad de crear un nuevo sindicato de empresa, si los trabajadores de la misma están afiliados a un sindicato de industria (aunque sea sólo una persona).

5. ¿Existe la obligación legal de la empresa contratista de reconocer a sus trabajadores condiciones laborales aplicables a los trabajadores de la empresa principal?

No existe obligación legal de reconocer a los trabajadores de la empresa subcontratista condiciones semejantes a las existentes en las empresas que les contratan. El Código de Trabajo expresa en su contenido una amplia lista de obligaciones y prohibiciones que los empleadores de todas las empresas deben cumplir, entre las que se destacan un

salario mínimo legal, jornada máxima de 8 horas y recargos y limitaciones al trabajo en jornada extraordinaria, descansos obligatorios como un mes de vacaciones por cada once meses de trabajo; causas específicas de terminación de la relación de trabajo y de despido justificado; pago de prestaciones al terminar la relación de trabajo, entre otras, y derecho a la libertad sindical y la negociación colectiva, además de normas especiales para determinados tipos de contratos como la construcción, trabajadores domésticos, del campo, vendedores, docentes, autotransporte, artistas y otros; protección de los menores, de las mujeres y de los nacionales.¹⁶⁵

En razón de la existencia de estas normas, que deben ser observadas por todas las empresas, no existe la obligación de mantener condiciones iguales a las de la empresa que contrata los servicios externalizados por parte de la empresa subcontratada.

6. ¿En qué supuestos existe una descentralización productiva fraudulenta o cesión ilegal de trabajadores? ¿Qué consecuencias se derivan de esta situación?

De acuerdo al Código de Trabajo, la subcontratación o descentralización productiva es fraudulenta si con ello se afectan los derechos adquiridos de los trabajadores; si la subcontratación busca en efecto esquivar las responsabilidades laborales de la empresa original para con los trabajadores; cuando se produzcan alteraciones en la estructura económica de la empresa que no sea notificada a los trabajadores o cuando se produzcan transferencia del patrimonio de una empresa que posteriormente sea declarada ilegal o, como se ha expresado antes, cuando un empleador siendo persona natural, trata de esquivar sus responsabilidades laborales, creando personas jurídicas que lo sustituyen como empleador, a espaldas de los trabajadores.

También se considera fraudulenta en perjuicio de los trabajadores, la existencia de contratos de arrendamientos que tengan como objeto esquivar las responsabilidades laborales del empleador.

En todos estos casos, el empleador original, o en ocasiones el empleador original junto con el nuevo supuesto empleador, son responsables de los derechos laborales de los trabajadores. Tal es el efecto jurídico laboral que se le atribuye a la sustitución o subcontratación fraudulenta del empleador.

¹⁶⁵ Ver Código de Trabajo de la República de Panamá en <http://cetippat.gob.pa/wp-content/uploads/2017/05/código-detrabajo.pdf>

7. ¿La contratación de trabajadores mediante Empresas de Trabajo Temporal está permitida en su país? ¿En qué supuestos?

Como regla general, se prohíben los arreglos, contratos y combinaciones por los cuales una persona o empresa proporcione a otra total o parcialmente, los trabajadores que necesite para su funcionamiento, manteniendo la primera su condición de empleador, según se describe en el artículo 94 del Código de Trabajo.

Se establece como excepción de esta regla, el funcionamiento de empresas que se dediquen a proporcionar a sus propios trabajadores para que presten servicios temporalmente (no más de dos meses) a otras empresas, bajo su dirección y bajo las siguientes reglas:

- El salario mínimo de esos trabajadores será el más alto fijado en el distrito o región respectivo.
- Ambas empresas son solidariamente responsables por las prestaciones de los trabajadores por el tiempo que sean prestados a la empresa beneficiaria.
- Los actos perjudiciales de la empresa beneficiaria contra los trabajadores, serán reputados actos propios del empleador que los preste o los coloque en la empresa beneficiaria.
- El Ministerio de Trabajo debe autorizar previamente el funcionamiento de este tipo de empresas (agencias privadas de empleo temporal).

Posteriormente se reglamentó la existencia de las agencias privadas de colocación de empleo con fines lucrativos mediante el Decreto Ejecutivo No. 105 de 26 de diciembre de 1995, en el cual se prohíbe la colocación de trabajadores en el extranjero y cobrar emolumento alguno a los trabajadores que sean colocados por ellas.

De acuerdo a las disposiciones descritas, cualquier actividad o empleo puede ser proveído por estas agencias privadas de colocación de empleo, salvo por supuesto el caso de los servidores públicos, que poseen otro sistema de reclutamiento y selección descrito en la Constitución y la Ley.

Existen en la práctica agencias que se dedican al reclutamiento y selección especializado como lo es el caso de los trabajadores domésticos y los trabajadores del mar.

Las agencias de colocación de empleos de las instituciones públicas como universidades y el Ministerio de Trabajo, no tiene límites de regulación, salvo que no reciben beneficios económicos ni de los empleadores ni de los trabajadores.

8. ¿Existen supuestos o actividades económicas en los que la contratación de trabajadores mediante Empresas de Trabajo Temporal está prohibida?

Nuestra legislación no expresa ninguna prohibición para la colocación de empleos temporales salvo lo que ya se ha descrito es decir, trabajadores que deban laborar en el extranjero.

También se desprende del artículo 493 del Código de Trabajo, que durante la huelga no se puede contratar los servicios temporales para sustituir a los huelguistas pues ello es una prohibición para todos los empleadores, incluidas las agencias de colocación de empleo.

9. ¿Qué responsabilidades laborales y de Seguridad Social mantiene la Empresa de Trabajo Temporal respecto de los trabajadores cedidos a empresas usuarias? ¿Y la empresa usuaria?

La empresa que cede sus trabajadores a otras empresas, comparte de manera solidaria los créditos laborales con las empresas beneficiarias. En materia de seguridad social, la responsabilidad no es compartida pues cada empleador se considera un patrono separado del otro y es la empresa cedente quien asume la condición de patrono de manera exclusiva.

La solidaridad de los créditos laborales se refiere al pago de las prestaciones establecidas en el Código de Trabajo como vacaciones, décimo tercer mes, prima de antigüedad, salarios no cancelados e indemnizaciones pero no cubre los beneficios que la empresa beneficiaria le otorgue a los trabajadores que forman parte de su planilla permanente es decir, los bonos y beneficios adicionales no son responsabilidades compartidas por ambas empresas.

En la práctica sin embargo, la empresa cedente de los trabajadores, le cobra un honorario a la empresa beneficiaria equiparable a los beneficios laborales de los trabajadores cedidos y una ganancia fija mensual, establecida mediante contrato civil habido entre ambas empresas es decir, la empresa cedente no paga, al final de cuentas, las prestaciones de los trabajadores sino la empresa beneficiaria, en función del acuerdo privado habido entre ellas.

10. ¿Cómo se determinan las condiciones laborales aplicables a los trabajadores contratados mediante Empresas de Trabajo Temporal y cedidos a empresas usuarias?

No existe en Panamá regulación respecto de la igualdad de trato acerca de las condiciones laborales aplicables a los trabajadores contratados mediante Empresas de Trabajo Temporal y cedidos a empresas usuarias, lo que en algunos casos deviene en desmejoramiento de las condiciones de trabajo con respecto al resto de los trabajadores de la empresa beneficiaria aunque respetando los mínimos exigidos por la Ley.

Como se ha señalado antes, las obligaciones mínimas de todo empleador se encuentran descritas principalmente en el Código de Trabajo pero ocurre en ocasiones que al ser cesados los trabajadores de la empresa que externaliza algunos servicios y luego ser recontratados por las agencias privadas de contratación de empleo, se desmejoran sus condiciones laborales dejándolas en el mínimo requerido por la legislación, por ejemplo en materia de salario, etc.

Algunos sindicatos han intentado legislar mediante los convenios colectivos, asegurando la igualdad y aún la continuidad de las condiciones laborales preexistentes para los trabajadores cesados y recontratados por medio de agencias privadas de colocación de empleo, pero hasta ahora no se ha podido concretar esa aspiración, pues se arguye en su contra que se trata de una nueva y distinta relación de trabajo, con otro empleador, que no puede legalmente ser alcanzada por el convenio colectivo vigente en la empresa beneficiaria.

11. Otras cuestiones relevantes y valoración de la regulación en materia de externalización y cadenas de producción en su país

Panamá ha ratificado el Convenio 181 de OIT sobre Agencias de Empleo Privadas desde 1999, en el marco de una promoción de la externalización del empleo que inició con la reforma del Código de Trabajo en 1995 sin embargo, la aplicación de este Convenio y de las normas vigentes no han logrado evitar que se utilice este mecanismo para evadir responsabilidades laborales, para promover la inestabilidad laboral y para afectar el derecho a la libertad sindical y la negociación colectiva por lo que resulta necesario hacer ajustes, más que en la normatividad, en los mecanismos institucionales que aseguren su cumplimiento, tanto desde las entidades públicas como desde los sindicatos.

La inestabilidad laboral contrasta en el caso panameño con el crecimiento económico sostenido por más de 12 años pues es evidente, con las cifras aportadas por el Ministerio

de Trabajo, en donde sólo el 27% de los nuevos contratos son por tiempo indefinido, que tanto las empresas multinacionales como la gestión de las agencias privadas de colocación de empleo sustentan dicha inestabilidad.

El trabajo decente promovido por OIT, así como el cumplimiento de los derechos fundamentales del trabajo chocan con esta inestabilidad laboral institucionalizada, que no permite un crecimiento con desarrollo social, que sostiene la pobreza multidimensional y que milita contra los objetivos de desarrollo sostenible, especialmente contra el trabajo decente y la sostenibilidad de las empresas.

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OUTSOURCING AND CHAIN SUPPLY IN CANADA¹⁶⁶

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Introduction

While data on the extent of outsourcing by Canadian businesses is scant, there is general agreement that over the last several decades the phenomenon has increased and taken a variety of forms including the use of global supply-chains (offshoring) and domestic subcontracting (outsourcing).¹⁶⁷ The most important reason firms give for engaging in outsourcing is to reduce labour costs. Nearly half of firms reported in 2010/2012 that reducing the cost of labour was highly important to their decision, compared to around 40 percent in 2007/2009.¹⁶⁸ As well, over the same period, there was a dramatic decrease in firms reporting that they faced significant obstacles to relocating or outsourcing business activities (from about 20 percent to about 5 percent).¹⁶⁹ Not only do firms reduce labour and other costs, but they are also able to shed responsibility for the employees who actually perform the work. David Weil has aptly characterized this phenomenon as “fissuring”, which can take a variety of forms including sub-

¹⁶⁶ This is an updated version of our contribution to the *IUSLabour* dossier on the same topic in 3/2016. Professor Eric Tucker is solely responsible for this revision.

¹⁶⁷ A study that examined outsourcing and offshoring between 1961 and 2003 found a large increase in the outsourcing of service inputs but a much more limited change in the outsourcing of material inputs. However, it also found a significant increase in the percentage of outsourced goods and services that were secured through offshoring. See John R. Baldwin and Wulong Gu (2008) “Outsourcing and Offshoring in Canada” (Statistics Canada, Economic Analysis Research Paper Series, 11F0027M, No. 055). A more recent study focused on off-shoring found a small decline from 2002 to 2006. Lydia Couture, Jianmin Tang and Beiling Yan, “Offshoring and Business Organization: Evidence from Canadian Manufacturing Firms” (2015) 7:2 *Transnational Corporations Review* 148.

¹⁶⁸ Statistics Canada, Table 27-10-0047-01, Innovation and Business Strategy, Importance and Reasons for Relocating or Outsourcing Business Activities (Accessed 1 March 2019).

¹⁶⁹ Statistics Canada, Table 27-10-0048-01, Innovation and Business Strategy, Obstacles that Slowed Down or Prevented Relocating or Outsourcing Activities to Another Country (Accessed 1 March 2019)

contracting, franchising, and other arrangements.¹⁷⁰ A related phenomenon that will be addressed here is the use of temporary employment agencies through which companies continue to produce goods and services internally but try to avoid responsibility for having their own employees by securing workers on ostensibly temporary bases through an agency's action as intermediaries. Indeed, in both scenarios, there are intermediaries between leading businesses and the workers who perform the productive labour, which may result in poorer terms and conditions of employment because of the more highly competitive environment in which the work is performed and concomitantly in greater challenges for workers in gaining the benefit of protective labour and employment laws. Despite these well-known problems, Canadian labour and employment law has largely responded to these challenges in a piecemeal fashion.

A prefatory note before proceeding: Canada is a federal state in which the provinces are given constitutional authority to legislate with regard to business and employment relations. Consequently, each province has its own laws governing these matters, although, the general situation of business freedom and limited worker protection is common across jurisdictions. Our focus here, therefore, is on Ontario, the Canadian province with the largest population and economy.

1. Is outsourcing a legal form of production organization?

Businesses are free to organize themselves as they see fit. This includes the freedom to outsource production, in whole or in part. Moreover, the law permits multiple forms of outsourcing. A company can sub-contract with another to provide any good or service it requires, which might include the production of a component or the provision of cleaning or foodservices. As well, it may choose to operate through franchise agreements rather than to own and operate outlets itself. The source of this freedom derives from freedom of contract and does not need positive legislative enactment. Indeed, quite the opposite. Restrictions on the freedom to outsource require positive state action and there has been very little appetite in Canada for imposing such restrictions.

2. Are there limits and/or prohibitions to outsourcing?

As previously noted, Canadian law does not prohibit or limit outsourcing. Moreover, as indicated below, when outsourcing occurs, companies can generally avoid legal responsibility for the employees of the companies with whom they sub-contract. However, Canadian law does patrol the boundary between 'genuine' outsourcing and other transactions that produce a different legal effect.

¹⁷⁰ WEIL D (2014) *The Fissured Workplace* (Cambridge: Harvard University Press).

There are two key distinctions that arise in this context. The first is between sub-contracting and the sale of business. This distinction arises in a situation where a company formerly produced a good or service for itself but wishes to cease doing so. One option is to sell that part of its business as a going concern (sale of a business); another is to terminate the activity and to sub-contract for it. In either scenario, the employees from the selling or sub-contracting company may be hired by the purchasing company or the company to whom the work has been sub-contracted. The legal consequences that flow from the sale of a business were explored in greater detail in a previous IUS Comparative Labour Law Dossier, [IUSLabor 1/2015](#).

The second key distinction goes to the question of whether there has been a genuine arms-length sub-contracting or outsourcing or whether the company continues to exercise control so that it continues to be responsible for the duties of the employer. Apart from the question of whether a transaction is bona fide or a sham, adjudicators will consider the question of the degree of control, if any, the user retains over the company with whom it has contracted. The most common scenario in which related-employer status will be found is where there is some common ownership and control between the two firms.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

On the assumption that the company has genuinely outsourced all or part of its production, with one narrow exception, it has no responsibilities whatsoever to the subcontractor's employees. The narrow exception is in the area of occupational health and safety regulation, where the employees of the sub-contractor perform work on the sub-contracting company's premises. In Canada, employers are responsible to provide a reasonably healthy and safe working environment to all *workers* on its premises, regardless of their employment status. As a result, the main enterprise remains responsible for the health and safety of the sub-contractors' employees working on its premises. However, where an owner of lands on which a construction project is taking place hires a constructor, the constructor and not the owner is the party responsible for health and safety on the project.¹⁷¹

¹⁷¹ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

Canadian collective bargaining occurs at the enterprise level. As a result, collective agreements generally only cover the employees of individual enterprises. Therefore, when a company sub-contracts part of its business to a separate enterprise through an arms-length transaction, the employees of the sub-contractor are not covered by a collective agreement covering the employees of the main company. There are two exceptions, mentioned in the answer to question 2. First, if the transaction is classified as a sale of a business rather than a contracting out, then the purchasing company is bound by the any collective agreement covering the employees of the sold business.¹⁷² Second, if the sub-contracting company is not arms-length from the main company, then it may be held to be a related employer, in which case the collective agreement will continue to apply.¹⁷³

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

Sub-contractors are not under any legal obligation to offer their workers the same conditions of employment enjoyed by workers at the user company. A sub-contractor is free to negotiate entirely new conditions of employment with its employees even if this results in significantly less compensation for the performance of the same work.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

As mentioned previously, Canadian law patrols the boundary between ‘genuine’ outsourcing and illegitimate attempts by employers to skirt their statutory employment obligations. While an employer is free to contract out a function of their business they no longer wish to operate they cannot escape their employment responsibilities through ‘creative’ corporate restructuring.

If a user company retains a sufficient degree of control over a sub-contractor then the employees of the sub-contractor can apply to have the user company deemed a “related employer” under the *Employment Standards Act, 2000*.¹⁷⁴ (The “ESA”) If the claim is successful, then the sub-contractor and the user company will be treated as one

¹⁷² *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 69.

¹⁷³ *Ibid.*, s. 1(4).

¹⁷⁴ *ESA, 2000*, S.O. 2000, c 41, s 4.

employer for the purposes of imposing statutory employment obligations. The court looks to a number of factors to determine whether a sub-contractor is engaged in “related or associated activities:”

- Common management.
- Common financial control.
- Common ownership.
- Common trade name or logo.
- The movement of employees between two or more business entities, the use of the same premises or other assets by the entities or the transfer of assets between them.
- Common market or customers served by each business.¹⁷⁵

Canadian courts have been reluctant to use related employer provisions to regulate industries that rely heavily on sub-contracting practices such as the creation of supply chains. Despite the fact that the conditions of employment imposed by sub-contractors are often, in large part, determined by the contractual terms imposed by the user company, courts have refused to deem these kinds of business relationships as “related or associated.” As long as the user company maintains an arms-length relationship, in respect to management and ownership, towards its sub-contractors it is unlikely that the court will pierce the corporate veil and treat two legally distinct entities as one for the purposes of imposing the obligations of the employer.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

In all provinces in Canada, it is legal to hire an employee through a temporary employment agency. In Ontario, the *ESA*, which sets minimum terms and conditions in areas such as wages, working time and termination and severance of employment, establishes an employment relationship between the temporary agency worker, known in the Act as the “assignment employee” and the temporary employment agency, known as a “temporary help agency.”¹⁷⁶ Through the establishment of this relationship, the *ESA* legitimizes the existence of temporary employment agencies as entities that provide employment services for a price or mark-up that is derived from paying assignment employees an amount that is lesser than the rate charged to client firms. User firms of assignment employees are clients of the agency. In Ontario, as elsewhere in Canada, there are no limitations on the duration of assignments or, for that matter, the length of time assignment employees may be engaged by an agency.

¹⁷⁵ *Lian v Crew Group et al.*, (2001), 54 O.R. (3d) 239, at para 47.

¹⁷⁶ *ESA*, 2000, s.74.3.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

Under the *ESA*, regulations governing temporary help agencies aim mainly to limit certain well-documented abusive practices on the part of agencies.¹⁷⁷ For example, there are specific prohibitions on charging fees to assignment employees. An agency cannot charge a fee to an employee upon registering with an agency, for assigning the employee to a client firm or providing services to the employee such as resume and interview preparation.¹⁷⁸ Agencies are also prohibited from barring assignment employees from becoming direct employees of client firms.¹⁷⁹ However, there is an exception to this general rule: if a client firm enters into direct employment with an assignment employee, the temporary help agency may levy “buyout” fees on the client firm during a period lasting six months from the day the assignment employee began work for the client firm as an agency employee.¹⁸⁰ This provision therefore sanctions formal restraints on the mobility of assignment employees in the labour market, and encourages temporary help agencies to cycle employees from one short assignment to another in order to retain the mark-up on their wages.¹⁸¹ Other prohibitions include that a temporary help agency cannot prevent its client firms from providing a reference for an assignment employee, and a client firm cannot penalize an employee for inquiring about, or exercising, their rights under the *ESA*¹⁸²; in other words, the Act contains anti-reprisal provisions acknowledging the vulnerability of workers engaged as assignment employees.

Certain kinds of written information must also be provided to the assignment employee; for instance, the temporary help agency’s name and contact information,¹⁸³ and a copy of an information sheet outlining the minimum employment standards applicable to assignment employees, in the employees’ first language if available.¹⁸⁴ Upon being offered a work assignment, an employee must receive certain written information about the client firm including the legal name of the entity, contact information, the rate of pay and benefits for the assignment, information on hours of work, a job description, the duration of the assignment if known, and the pay day/period.¹⁸⁵

¹⁷⁷ Leah F. Vosko (2010) “A New Approach to Regulating Temporary Agency Work in Ontario or Back to the Future?” *Relations Industrielles / Industrial Relations* 65(4): 632-653.

¹⁷⁸ *ESA*, 2000 s. 74.8(1).

¹⁷⁹ *Ibid.*

¹⁸⁰ *ESA*, 2000 s. 74.8(2).

¹⁸¹ Vosko, “A New Approach to Regulating Temporary Agency Work.”

¹⁸² *ESA*, 2000 s.74.12 (1).

¹⁸³ *ESA*, 2000 s.74.5 (1).

¹⁸⁴ *ESA*, 2000 s.74.7 (1).

¹⁸⁵ *ESA*, 2000 s.74.6 (1).

9. What labor and social security liabilities does the temporary employment Othe user firm?

The temporary employment agency is the employer of record of their assignment employees with regard to general labour and social security liabilities. Therefore, it is primarily responsible for fulfilling employer obligations to assignment employees workers imposed by the *ESA*, as well as for social insurance contributions mandatory in Canada (e.g., Employment Insurance premiums, Canada Pension Plan premiums etc.) and in Ontario (e.g., Workers' Safety and Insurance Board premiums etc.). However, in recognition of the complexity of the triangular employment relationship characterizing temporary agency work, and responding to the overrepresentation of *ESA* wage violations among groups encompassing assignment employees,¹⁸⁶ client firms are jointly and severally liable for unpaid wages, overtime pay, and public holiday pay, in the event that temporary help agencies fail to pay monies owed to the employee.¹⁸⁷

Under the *Occupational Health and Safety Act*, both the temporary help agency and the client are jointly responsible for the duties of the employer, including the provision of training, instruction and information and of a safe work environment.¹⁸⁸

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

Beyond the law making it illegal for agencies to prohibit transfers, there are no other rules determining the labour conditions of temporary agency workers if they transfer to user companies. Therefore, freedom of contract reigns, subject to the general minimum standards that apply to all workers, including the *ESA*'s general provisions related to minimum wages, hours of work, daily rest periods, time off between shifts, weekly/bi-weekly rest periods, eating periods, and overtime.

Apart from the question of transfers, it should be noted that some special rules apply to assignment employees in the areas of public holiday pay,¹⁸⁹ termination of employment, and severance pay¹⁹⁰; these rules pertain to the calculation of entitlements in light of the often intermittent nature of temporary agency work.

¹⁸⁶ Leah F. Vosko, Andrea M. Noack, and Eric Tucker (2016) "Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution under the Employment Standards Act, 2000." Online: http://digitalcommons.osgoode.yorku.ca/all_papers/265/.

Also, see also Ministry of Labour (2015) Temporary Help Agencies: Blitz Results. Online:

¹⁸⁷ *ESA*, 2000 74.18 (1).

¹⁸⁸ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, ss. 1, 25.

¹⁸⁹ *ESA* 2000 s.74.10(1).

¹⁹⁰ *ESA* 2000 ss. 74.10.1 and 74.11.

11. Other relevant aspects and personal assessment of the regulation regarding outsourcing and supply chains

As a liberal market economy, Canada prioritizes freedom of contract over worker protection, including the freedom of businesses to organize themselves as they see fit. As a result, businesses have a relatively free hand to outsource and offshore as well as to secure employees through temporary help agencies. This freedom has serious consequences for workers, resulting in job loss, deteriorating terms and conditions of employment and difficulty enforcing the employment rights they continue to enjoy. The government response, considered here at a provincial level in Ontario, to these adverse effects is generally limited. For example, displaced workers may collect Employment Insurance but only if they qualify, sham transactions are voided if detected, and the temporary help industry is weakly regulated.

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See footnotes.

OUTSOURCING AND CHAIN SUPPLY IN CHINA

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Introduction

Outsourcing and labor dispatch both are flexible employment model in China.¹⁹¹ Labor dispatch is formally legalized in China by the Labor Contract Law of 2008. However, the number of dispatched workers had increased rapidly after the implementation of Labor Contract Law. According to the investigation report by ACFTU (All China Federation of Trade Unions) in 2010-2011, the dispatched workers had increased to more than 37 million, which accounted for 13.1% of total employment in the enterprises.¹⁹² For curbing the abnormal development of labor dispatch, the revised Labor Contract Law enhanced the limitations on the labor dispatch. Thus, the percentage of labor-dispatched workers decreased rapidly in some sectors. The China Bank reduced its percentage of labor-dispatched worker from 20% in 2013 to 2% in 2014.¹⁹³ In this circumstance, the outsourcing has been the new choice for the employers. Nonetheless, the phenomenon of false outsourcing also brings a new challenge to labor law in China, as the lack of relevant rules.¹⁹⁴ The article introduces the basic law issues for outsourcing and labor dispatch in China following the questions from the Journal.

1. Is outsourcing a legal form of production organization?

Outsourcing is a legal form of production organization in China. In the Contract Law of 1999, the outsourcing regulation has appeared in the construction project contracts. The Contract Law allows that enterprises enter into the prospecting, design and construction contractors with subcontractor.¹⁹⁵ In practice, the outsourcing not only exists in the construction sector, but also in other industries for special business aims. According to the guidelines prescribed by the Ministry of Finance etc., the business outsourcing

¹⁹¹ The temporary agency work is always called as labor-dispatched work in China.

¹⁹² The Research Group of ACFTU on the Problems of Labor Dispatch, The Investigation Report on the Current Situation of Labor Dispatch, China Labor, 2012(5), p.23.

¹⁹³ HAN BINZHI, The Employment Strategy Are in Transition, Economic Daily News, 2014-09-21.

¹⁹⁴ LI JIANA, Prevent the Labor Dispatch to Be False Outsourcing, China Workers, 2013(9), p.18.

¹⁹⁵ Article 272, Contract Law of the People's Republic of China, 1999.

means that “*the enterprise takes advantages of specialized division of labor to entrust part of its routine businesses to external professional service agencies or other economic organizations*”.¹⁹⁶

In the Labor Contract Law, the employer also could outsource his business to individual contractors.¹⁹⁷ With the enhanced limitation on employing the labor-dispatched worker by the Labor Contract Law in 2012, outsourcing has been used by more and more enterprises to replace labor dispatch. As no limitation on the business scope of outsourcing in current law, enterprises can outsource partly or entirely their business to other enterprises for various demands.

2. Are there limits and/or prohibitions to outsourcing?

Although no limitations on the scope of outsourcing in the current law, there are some limitations on the illegal outsourcing in some sectors, which normally have special requirements on the qualifications of enterprises, such as construction sector.

The Contract-Letting Party normally can outsource the project the Contract-Undertaking Party according to the agreement and law. However, the following circumstances would be identified as illegal outsourcing in the construction sector: a) The Contract-Letting Party outsources the project to the individual; b) The Contract-Letting Party outsources the project to the Contract-Undertaking Parties without the appropriate qualifications; c) The specific outsourcing fails to obey the bidding procedure pursuant to the law; d) The Contract-Letting Party sets unreasonable conditions for tendering and bidding to limit or exclude the potential bidders or bidders; e) The Contract-Letting Party splits *a unit project*¹⁹⁸ into several parts and outsources to General Undertaking Parties or Specialized Contractor-Undertaking Parties.¹⁹⁹

When the Contract-Undertaking Parties subcontract the projects, they also subject to some limitations. The following circumstances would be identified as illegal subcontract: a) The Contract-Undertaking Party subcontracts the project to the

¹⁹⁶ Article 2. Guidelines for the Application of Internal Control in Enterprises No. 13 -Business Outsourcing, ([2010] No. 11, Ministry of Finance etc.)

¹⁹⁷ Article 94, Labor Contract Law of the People's Republic of China, 2012.

¹⁹⁸ A unit project means that buildings or structures with independent construction conditions and capable of forming independent functions. See Classifying Criterion of Construction Project (GB/T50841—2013)

¹⁹⁹ Article 8, Administrative Measures for the Determination and Punishment of the Illegal Outsourcing and Subcontracting in the field of Construction Industry (No. [2019]1, the Ministry of Housing and Urban-Rural Development).

individual; b) The Contract-Undertaking Party subcontracts the project to Parties without the appropriate qualifications. c) The General Contract-Undertaking Party subcontracts the main structure of construction project to other parties, except for works of steel structures; d) The Specialized Contract-Undertaking Party subcontracts the non-labor operation of the undertaking project. e) The Labor Service of Contract-Undertaking Party subcontracts the labor services to other parties; f) In addition to the fees for labor service, the Labor Service of Contract-Undertaking Party also calculates and charges fees for major construction materials, revolving materials, and large and medium-sized construction machinery and equipment.²⁰⁰

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

If an enterprise legally outsources his part of business to another enterprise (subcontractor), the contract between the enterprise and subcontractor would be subject to civil law, and the enterprise has no responsibility for the workers of subcontractor in labor law or social security law,²⁰¹ unless otherwise stipulated in the contract.

However, if the outsourcing has such the following circumstances, the enterprise who outsources the business has to bear the joint and several liability with the subcontractor.

- a. If an enterprise outsources the business to an individual contractor who recruits employees in violation of the provisions of Labor Contract Law and causes damage to the employees, the enterprise has to bear the joint and several liability with the individual contractor.²⁰²
- b. If an enterprise outsources the business to a subcontractor who has no legal employer qualification, it has to take employer responsibility of the employees recruited by the subcontractor.²⁰³ However, whether the employees can claim that the labor relationship has been established with the enterprise is in dispute.²⁰⁴

²⁰⁰ Ibid, Article 12.

²⁰¹ WANG QUANXING AND HUANG KUN, The Circumvention Tendency of Outsourcing Labour and the Countermeasure of Labour Legislation, Academic Journal of Zhongzhou, Vol.2, 2008, p. 87.

²⁰² Article 94, supra note 6.

²⁰³ Article 4, Notice of Certain issues on Identification of Employment Relationship (Notice [2005] No.12 of the Ministry of Labor and Social Security).

²⁰⁴ Liu Wenhua and Zhao Lei, Research on the Labor Law Issues in the Business Outsource, China Labor, Vol.11, 2017, p.5.

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

There are no specific rules about the collective agreement applicable to a subcontractor during its relationship with main company in China. The working conditions in the individual labor contract, between the employees and the subcontractor, subject to the collective agreement that applicable to the subcontractor.

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

Actually, the answer is also negative in China. In the current Labor Law, the principle of equal pay for equal work only applies to the employees in the same enterprise.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

If an employer adopts fraudulent outsourcing, but actually uses employees in the form of labor dispatch, the legal relationship between the employer and the employees of the subcontractor will be subject to the regulations of labor dispatch.²⁰⁵

However, the law has no further explanation on how to identify the fraudulent outsourcing. Normally the arbitrators and judges would consider the employment subordination. In Jiangsu Province, if an enterprise outsources business to a subcontractor, however, the employees of the subcontractor work in the workplace and use the equipment, and subject to the work arrangement of the enterprises etc., the outsourcing would be identified as labor dispatch.²⁰⁶ However, in Shanghai City, the guidelines suggest that the arbitrators and judges should not deny the appropriate management right to the employees of subcontractor by the enterprises, for example, fire control, working safety, quality of goods or services, the workplace order etc.²⁰⁷ Some points that the criterion of the management of core interests should be mostly considered. If the working conditions, benefits, rewards and punishments, and the renewal of labor contracts etc. related to the employees of subcontractor are subject to the management of the enterprises, the outsourcing should be classified as fraudulent

²⁰⁵ Article 27, Temporary Regulations on Labor Dispatch (Order No. 22 of 2014, the Ministry of Human Resources and Social Security).

²⁰⁶ Article 36, Labor Contract Regulation of Jiangsu Province, 2013.

²⁰⁷ Article 11, Meeting Summary about the Relevant Issues on the Law Application of Labor Dispatch by the Bureau of Human Resources and Social Security, and High People's Court of Shanghai City, 2015.

form.²⁰⁸ In addition, the calculating method of outsourcing fee also would be considered. If the fees of outsourcing are calculated not according to the achievement of service, but based on the number of employees, the judge would consider it as fraudulent outsourcing.²⁰⁹

The consequences are: a) the subcontractor still is the employer of the employee, and the enterprise who outsources the business would be taken as the user undertaking of the labor dispatch. They both should take the joint and several liability for the caused damage to the employees; b) if the subcontractor has no legal certification of labor-dispatching agency, labor administrative department shall order it to stop the illegal activities and confiscate its illegal gains, and concurrently fine it according to the standard of law.²¹⁰

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

Labor dispatch is a legal employment form introduced in the Labor Contract Law in 2008. The revised Labor Contract Law in 2012 strictly enhances the limitations on labor dispatch.

- a. The revised article 66 emphasizes that labor dispatch only is a supplementary employment for the enterprises in China, and it *only* can be used in the three types of job, namely, *temporary position*, or *auxiliary position*, or *substitutive position*. This article changes the advocated expression “normally” in the version of 2008 into the mandatory expression “only” and exclude other circumstances to use dispatched workers.
- b. The revised provisions also further clarify the definition of three types of job. *Temporary position* means that the duration of employment does not last over 6 months. *Auxiliary position* means that it does not belong to the main business position of user undertaking. *Substitute position* means that a vacant position is left by an employee of user undertaking, who cannot work for some time as attending full-time study or taking holidays or other reasons.²¹¹

²⁰⁸ LU JINGBO and SHI QING, The identifying Criterion between Labor Dispatch and Labor Outsource, China Labor, 2016(4), p.15.

²⁰⁹ ZHAO SHANGHAI, ZHAO DI VS. WUHAN DINGYI FOOD Inc., Wuhan Intermediate People's Court, (2018) Civil Case No. 01359(01).

²¹⁰ Article 92, supra note 6.

²¹¹ Article 3, supra note 14.

- c. Another important limitation is that the user undertaking should control the percentage of labor-dispatched workers, which cannot exceed the 10% of its total employment.²¹²

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

Although the scholars argues that the law should prescribe the prohibited sector or occupations for using dispatched worker in China,²¹³ there is still no limitation on economic activities in which workers are hired through labor-dispatched agencies in current law. The main prohibitions are the two illegal situations, namely the *Re-dispatch* and *Self-dispatch*.

- a. Prohibit Re-dispatch. This means that the user undertaking should not re-dispatch the dispatched workers to another user undertaking.²¹⁴
- b. Prohibit Self-dispatch. The user undertaking should not establish labor-dispatching agencies to dispatch workers to itself or to its subordinate undertaking.²¹⁵

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

In the Chinese law system, the labor-dispatching agency was taken as the legal employer of dispatched worker and has to take the employer responsibility. As dispatched worker actually work in the workplace of user undertaking, which also should take some employer responsibilities.²¹⁶ The respective obligation for the dispatched worker can be concluded by agreement between the labor-dispatching agency and the user undertaking, but cannot obey the rules of Labor Contract Law.

According to the article 58 of Labor Contract Law and the article 8 of Temporary Regulation on Labor Dispatch, the *labor-dispatching agency* should obey the following obligations:

²¹² Ibid, article 28.

²¹³ CHANGZHENG ZHOU, The Abnormal Increase of Labor Dispatch and Legal Improvement, China Labor, Vol.5, 2012, p.28.

²¹⁴ Article 62, supra note 6.

²¹⁵ Ibid, article 67.

²¹⁶ XIE ZENGYI, Labour Law in China: Progress and Challenges, Springer, 2015, p.89.

- a. If it concludes a fixed-term labor contract with an employee, the period of contract should not be less than two years.
- b. It shall truthfully inform the dispatched worker of the relevant facts of the labor contract and dispatched agreement, and establish the training system including safety and education training pursuant to the law;
- c. It shall pay labor remunerations and relevant benefits to the dispatched worker, and contribute social insurance premiums for the dispatched worker in accordance with the law and the agreement. During the intervals when there is no work to do, the labor-dispatching agency shall pay labor remuneration on a monthly basis at the minimum wage standard.
- d. It shall urge the user undertaking to provide labor protection, working safety and health conditions for the dispatched worker in accordance with the law;
- e. It shall issue the proof for rescission or termination of the relevant labor contract in accordance with the law;
- f. It shall assist in handling the disputes between the dispatched worker and user undertaking.

According to the article 62 of Labor Contract Law, the *user undertaking* shall perform the following obligations:

- a. It shall provide the necessary working conditions and occupational protection according to the labor standards of the State;
- b. It shall inform the dispatched workers of the job requirements and labor remuneration;
- c. It shall offer overtime pay and performance bonuses, and provide welfare benefits related to specific position to the dispatched workers;
- d. It shall provide the dispatched workers with necessary training of the working position;
- e. It shall apply a regular wage adjustment mechanism in case of continued employment.

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

The Labor Contract Law extends the equal rights to the labor-dispatched worker. The user undertaking shall, pursuant to the principle of “equal pay for equal work”, apply the same labor remunerations distribution measures to dispatched workers and its permanent workers holding in the similar positions. If the user undertaking has not hired any permanent worker for a similar position currently hold by the dispatched worker, the labor remunerations payable to the dispatched worker shall be determined with

reference to the labor remunerations payable to workers holding the same or a similar position in the place where the user undertaking is located.²¹⁷ The user undertaking also should provide the dispatched employees with benefits relevant to the position and should not discriminate the dispatched workers.²¹⁸

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OUTSOURCING AND CHAIN SUPPLY IN INDIA

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Introduction

India started the globalization process in 1990. By this time (2019) the economy adheres to all most all international standards required to be a LPG economy. India is the founder member of WTO and has passed new Laws and policies to convert the legal system to suit the globalized economy. In the year 2000, in response to the UNCITRAL model of Information Technology law the Information Technology Act, 2000 was passed especially to promote e-commerce. The ICT technology was fully introduced and there was also boom in IT technicians and experts. India produces high number of software Engineers and experts, who have a conspicuous presence in most of the countries especially US, EU and Australia. These conditions enabled India to be significant stakeholder in outsourcing and supply change sector/industry.

With a significant change in the functioning of businesses in today's world, the process of outsourcing, the non-core activities of a company, both domestically and internationally, to skilled vendors has increased tremendously. The outsourcing sector, especially facility management and general business service outsourcing have a long history in India. Realizing the potential in IT-BPO outsourcing, the government introduced the National Telecom Policy in 1999, which provides for the establishment of IT-BPO outsourcing companies and regulation of the same. Reportedly in 2012, the aggregate revenues in the IT-BPO industry crossed the US\$100 billion mark, providing direct employment to about 2.8 million people and indirectly employing 8.9 million people. As a proportion of national GDP, the IT-BPO sector revenues have grown from 1.2 per cent in the financial year 1998 to an estimated 7.5 per cent in the financial year 2012 and the IT-BPO sector's share of total Indian exports (merchandise plus services) increased from less than 4 per cent in the financial year 1998 to about 25 per cent in the financial year 2012. Outsourcing in facility management and general business services is still unorganized and as a general practice is governed under the contract labour laws. The nature of this sector is unique and there is complete deviation from traditional system of labour management relation.

1. Is outsourcing a legal form of production organization?

Yes. Outsourcing is a sector that is recognized and aided by the wide range of legal regime in India. These laws aim at protection of the company outsourcing the work as well as to the company to whom the work is outsourced. Realizing the prospective development of IT-BPO outsourcing in the country, the government incorporated the Department of Telecommunications, Ministry of Communications and IT (DoT) with the task of supervising and standardizing the sector. Pursuant to this, the DoT introduced special provisions in the National Telecom Policy of 1999 by inculcating the category of ‘other service provider (OSP).’ This policy was formulated for the registration for IT-BPO outsourcing considering the disparities in domestic and international outsourcing. It requires that a company willing to outsource must obtain a registration from the DoT. Apart from this mandatory registration, the Information Technology Act, 2000 which provides legal recognition to e-commerce and facilitates e-transactions, regulates an ‘intermediary’ and the recent amendment also places a liability on the corporation in case of breach of privacy. The Act provides for compensation in cases of failure to protect data,²¹⁹ and punishment for disclosure of information leading to breach of lawful contract.²²⁰ The other set of laws which govern the outsourcing sector are the Contract Act 1872, the Companies Act 2013, the Copyright Act 1957, the Patents Act 1970, the Foreign Exchange Management Act 2000, various labour legislations, etc.

2. Are there limits and/or prohibitions to outsourcing?

There are no direct limitations or prohibition imposed on outsourcing by way of legislations; onshore or offshore the jurisdiction on both, government and private operations. However, the core services of certain sector and industries cannot be outsourced. They include:

Insurance services- The insurance sector in India is regulated by the Insurance Regulatory and Development Authority and the outsourcing of such services are regulated by the Guidelines on Outsourcing of Activities by Insurance Companies. The abovementioned guidelines lay down the core and non-core insurance activities and also classify activities that can be outsourced.

Financial and Banking services- The Indian banks and financial institutions regulated and licensed by the Reserve Bank of India (RBI) are required to comply with and adhere to the Guidelines on Managing Risks and Code of Conduct in Outsourcing of

²¹⁹ Information Technology Act, 2000, section 43A.

²²⁰ Information Technology Act, 2000, section 72A.

Financial Services for banks outsourcing financial services. The said guidelines are put in place so that the banks do not shy away from their obligations to customers. However, the banks and financial institutions regulated by the RBI are not allowed to outsource core management and banking functions.

General business process outsourcing- Any company engaged in business process outsourcing (data and voice) is required to obtain registration from the Department of Telecommunications under the other service provider category. The services may include telebanking, telemedicine or teletrading, customer support, call centres, data processing, etc.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

Till 2008, foreign nationals exercising employment in India were not covered under the Provident Fund (PF) regulations, since PF contributions were not mandatory where the employees' pay exceeded the wage ceiling. On the contrary, Indian nationals working abroad were required to contribute to the social security scheme of the respective country. However, these contributions were generally lost due to limited tenure overseas or in failing to fulfill the minimum qualifying period of contribution or residence. In India, The Employees' Provident Funds (EPF) and Miscellaneous Provisions (MP) Act, 1952 controls the provident fund contributions in scheduled factories and notified establishments. The EPF Scheme, 1952, framed under the EPF Act mandates the provident fund contributions made in respect of international workers. It defines an international worker and also states that international workers working in an establishment coming under the purview of the EPF Act must be the members of the Employees' Provident Fund Organization. The Ministry of Labour, Government of India has issued a special notification with regards to strict compliance of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952. To ensure that the social security guaranteed to the employees continues, India has entered into Social Service Agreements (SSAs) with a number of countries in the world. These agreements are reciprocal in nature and seek to avoid double contributions and taxes paid by the employers. The Indian government has working SSAs with 18 countries which enable Indian migrant workers to seek exemption from mandatory social security contribution in foreign countries. These countries are Belgium, Germany, Switzerland, Denmark, Luxembourg, France, South Korea, Netherlands, Hungary, Norway, the Czech Republic, Finland, Canada, Japan, Sweden, Austria, Portugal and Australia. However, the 19th SSA with Brazil was signed on March 16, 2017 and is not yet operational. Six

proposals with respect to the execution of an SSA are in motion with Spain, Thailand, Sri Lanka, Russia, Cyprus and the United States.

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

The industrial relations in the Indian legal system is tripartite in nature. The system of collective bargaining wherein terms and conditions are exclusively determined on the basis of collective agreement is not very prominent and significant in India. Therefore, the state, through various legislations tries to regulate the industrial relations in the organized sector which is between 8-9% only. The remaining workforce is prevailing in the unorganized sector wherein, the workforce has no bargaining power and generally is paid low wages.

The collective bargaining agreement between principle employer (main company) and the contractor may be held as a general practice of business negotiation, however, the benefit or advantage is rarely passed on to the workforce.

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

The outsourcing industry in India is regulated by the Contract Labour (Regulation & Abolition) Act, 1970. The provisions of this Act, place a mandate on the contractor to ensure regular payment of wages within the prescribed period to the workers working in the establishment. The provisions of this Act, moreover, place an obligation upon the contractor to provide basic amenities like first aid, restrooms, canteens, etc. to the workers. If the contractor fails to provide such facilities to the workers, the principal employer can provide such facilities to the workers and recover the amount from the contract employer.

The proposed amendment to the Contract Labour Act seeks to ensure that where a contract labour and a labour employed directly through the principal employer are performing the same or similar kind of work, they shall be entitled to the same wage rated, hours of work, holidays and social security provisions (at present this is a serious lacunae, there is vast difference in pay structure as they are paid low wages for same work). Also that, wherever a worker is employed through a contractor, the agreement between the contractor and the principal employer shall clearly stipulate the wages, social security contributions and other benefits, which the contractor shall be bound to pay to the worker hired by them.

In case of contraventions of provisions of the Act, the contractor can be prosecuted as per the provisions of the Act which includes imprisonment and fine.

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

Generally, there are no restrictions on the engagement of foreign employees providing services in India. However, there are certain services which are closely regulated by local legislations such as professions as law, medicine and chartered accountancy. These professional sectors are subject to the regulations and accreditations prescribed by the specific sectorial regulators. In addition, core services of certain industries, such as finance and insurance, cannot be outsourced. To work in India an employment visa designated as an "E visa" is a mandatory requirement for non-resident employees and foreign employees.

Indian labour laws do not have any specific provisions for the transfer of employees by operation of law, except in cases of the transfer of ownership or the management of a business undertaking (whether by agreement or by operation of law). The Factories Act, 1948 and The Industrial Disputes Act, 1947 are the primary labour legislation in India, which govern, among other things, working conditions for employees and disputes between employers and workmen. Therefore, in the event a business undertaking is transferred in an outsourcing transaction, under the IDA, workmen who have been in continuous service for over one year are entitled to receive notice and compensation, unless the terms of the transfer ensure that the employees are transferred under the same terms and conditions of service, without any interruption. The employees who are likely to be affected by the transfer of ownership or management of a business concern, either positively or negatively, should be given an adequate amount of notice and complete information about the transfer. In addition, the employment agreement executed between the employer and employee should also be considered. A civil action could arise where the contractual obligations are not carried out, and in the case of a willful breach of contractual obligations, criminal liability may also arise. The parties must also be aware that contracting out of statutory provisions will not mitigate any criminal or civil liability.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

Hiring workers through temporary employment agencies, also known as temporary staffing is a widespread practice in India and a leading HR trend. Companies and captivities especially those requiring frequent adjustment of staff, depend largely upon

such staffing agencies to lease them with required manpower. The temporary recruitment market which consists of both professional and general staffing was estimated to be INR 172 billion in 2012 and has reportedly grown 5 fold by 2018.

Professional staffing agencies provide skilled workers, who are technically proficient to large companies that generally deal with the IT and engineering sectors. On the other hand, the General staffing agencies provide workers with basic skill set or generic training, to companies operating in the retail, Information Technology enabled Services sector and telecom sectors.

The services of these Temporary Employment Agencies are mostly availed by corporations that transcend locations, size and skill component, whose common feature is uncertain duration of work. The following industries in India practice active flexi staffing:

1. Agriculture & Agrochemicals,
2. Automobile & Allied Industries,
3. Consumer Durables, Power & Energy,
4. Fast Moving Consumer Goods,
5. Manufacturing & Allied Industries,
6. Banking, Financial Services and Insurance domain,
7. Telecommunication,
8. Hospitality,
9. Healthcare & Allied Industries,
10. Information Technology,
11. Information Technology enabled Services and
12. Retail.

The industry is estimated to grow in the coming decade and reach arenas which are untapped by it so far.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

In India, the Contract Labour (Prohibition & Abolition) Act, 1970 prohibits the use of temporary workers, if the work performed is core to the industry or the process is of perennial nature.²²¹ Prior to the enactment of the said Act, the Supreme Court of India in the case of *Standard Vacuum Refinery Company v. Their Workmen*²²² had observed that contract labour should not be employed where:

²²¹ Contract Labour (Regulation and Abolition) Act, 1970, section 10(2).

²²² 1961 SCR (3) 536.

- (i) The work is perennial and must go on from day to day;
- (ii) The work is incidental to and necessary for the work of the factory;
- (iii) The work is sufficient to employ considerable number of whole time workmen; and
- (iv) The work is being done in most concerns through regular workmen.

After the enactment of the Act in 1970, in 1997, the Supreme Court in *Air India Statutory Corporation*²²³ case held that abolition inherently contemplates absorption of workers as the very object of the Act is to reduce the harsh and terrible conditions of contract labour. But the court soon overruled its previous stand in the *Steel Authority of India*²²⁴ case held that abolition cannot result in absorption as no specific provision for absorption and no relation of master and servant and that absorption is a choice of employer and also depends upon timely procedures of recruitment.

Further, in *State of Karnataka v. Umadevi*²²⁵ the Court held that Casual labourers cannot seek regularization ever as recruited through backdoor entry and No punishment to recruiter/employer punishment is to be meted out. But finally, in the case of *Bhilwara Dugdh Utpadak Sahakari v. Vinod Kumar*²²⁶ the Court expressed anguish and held that “labour statutes were meant to protect the employees/workmen because it was realized that the employers and the employees are not on an equal bargaining position. Hence, protection of employees was required so that they may not be exploited.”

But, it is pertinent to highlight the fact that core or perennial nature of work remains undefined; and it is changing with changing times as is evident from the trend of the Apex judiciary of this country. As a result there is a tremendous increase in the number of contract labour in almost all sectors.

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

The hiring of temporary staff through recruitment agencies is governed under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970. As per the Contract Labour (Regulation and Abolition) Act 1970, temporary staff would be considered as employees of the recruitment agencies. The organization which utilizes

²²³ *Air India Statutory Corporation V. United Labour Union*, AIR 1997 SC 645.

²²⁴ *Steel Authority of India Ltd. V. National Union Water Front Workers & Ors.*, 2001 II LLJ 1087.

²²⁵ *State of Karnataka v. Umadevi*, AIR 2006 Sc P.1806

²²⁶ SC 2011.

the services of the temporary staff would be regarded as a principal employer under the provisions of the Contract Labour (Regulation and Abolition) Act 1970. In the event the recruitment agency fails to pay salary or applicable employee benefits to the temporary staff, the principal employer would be required to pay salary or applicable employee benefits to the temporary staff (the principal employer would have a statutory right to recover the amount from the recruitment agency).

Moreover, the Indian Staffing Federation (ISF) in India is striving towards organizing and establishing quality standards for the staffing industry as a whole. The said organization has also formulated Code of Conduct for its members and is in talks with the governments at the centre and state levels to ensure that the consumers are provided with quality services and also enable the industry to grow.

10. How are the labour conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

Agency workers are not treated as employees of the establishment, and hence they are not eligible for any statutory benefit typically received by the principal employer's employees. They will be eligible to receive all such statutory benefits from the agency since they are direct employees of the agency. Nevertheless, these employees fall under the ambit and protection of the Contract Labour (regulation and Abolition) Act, 1970 and can therefore avail the benefits available to workers under the said Act (see question 5). Additionally, the Employees' Provident Funds and Miscellaneous Provisions (EPF&MP) Act, 1952,²²⁷ and the Unorganized Workers Social Security Act, 2008, guarantee security to workers. The Employees' Compensation Act 1923, places liability on the principle employer and the contractor to pay compensation to the worker²²⁸ and the Employees' State Insurance Act, places responsibility on the principle employer to pay contributions in the first instance.²²⁹ Similarly in Factories Act, definition of 'worker' include contract labour and ensure health, safety, welfare, working hours, leave, holidays and the working conditions to the contract labour at par with the directly employed workers. (There is vast difference between law in books and law in action, due to large number of unemployed poor many laws remain in books and suffer from poor implementation).

²²⁷ Section 2(f)(i), Employees' Provident Funds and Miscellaneous Provisions (EPF&MP) Act

²²⁸ Section 12(1), Employees' Compensation Act 1923.

²²⁹ Section 40, Employees' State Insurance Act.

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