

Precarious work in the Asia Pacific Region

**A 10 country study by
The International Trade
Union Confederation (ITUC)
and ITUC Asia-Pacific**

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Foreword

Precarious work holds down wages by stripping workers of their basic rights. It also means few if any benefits and more dangerous workplaces. Millions of workers are trapped in precarious forms of work, leaving them and their families insecure. Corporate power, which governments have failed to tame, imposes precarious employment conditions to frustrate workers' efforts to form or join unions and to bargain collectively. Across the Asia-Pacific region, precarious work is on the rise.

We know that working people need quality jobs, a social protection floor and a minimum living wage. The ITUC World Congress 2014 committed to building workers power, and organising in our workplaces and communities to build the power of workers to effect change. Organising all workers, including those in precarious work, is a central challenge for the ITUC as it fights for full employment and decent work along with universal social protection floors.

Precarious work in Asia Pacific has been identified by trade unions across the region as a central concern for working people.

The international trade union movement working with national centres and industry federations has committed to working together to tackle the scourge of precarious work.

The first step in this co-ordinated approach develops a legal mapping of precarious work form ten countries in the region, which outlines the laws, regulations and jurisprudence related to precarious work. Using this mapping, good laws and regulations can be identified which can be shared across countries, and bad laws can be identified to prevent their spread.

This report provides a comprehensive legal analysis to support national, regional and international strategies to tackle precarious work.

At an international level, the fight against precarious work is also being fought at the ILO. For the first time, this report surveys the ways in which international labour standards have been used by unions in the Asia-Pacific to challenge precarious work. Next year, discussions on precarious work will begin at the ILO which could lead to standard setting on key aspects of this problem.

Precarious employment robs workers of security and the possibility to plan for their and their children's futures. It harms economies by reducing the purchasing power of ordinary people. Our campaign action for justice at work and fair decent jobs will support and benefit working families, and help build economies which work for all.

A handwritten signature in black ink, appearing to read 'A. Burrow', with a stylized flourish at the end.

Sharan Burrow
General Secretary, ITUC

Introduction

1. What Do We Mean By “Precarious Work?”

The term “precarious work” is often used loosely to refer to all kinds of undesirable work, including low-paid work, work with limited or no benefits (health care, pension, bonuses, etc.), involuntary part-time work, work in unsafe or unhealthy workplaces and work in the informal economy, among others. These are all serious issues that require urgent attention by trade unions and policymakers. However, we use the term “precarious work” in this report to refer to a more limited phenomenon concerning the deterioration of the once-standard direct, indefinite employment relationship in the formal economy. This report is not about the informal economy, which is a distinct issue with a different set of policy responses, though certainly there is some overlap. Specifically, we refer to:

- 1) the use of short, fixed-term (“temporary”) employment contracts for work that is permanent (or at least ongoing) in nature;
- 2) the intentional misclassification of a worker as a self-account, independent contractor hired under a commercial contract when he/she should be classified as a worker hired under an employment contract (we could include here other “commercial” contract arrangements such as sham cooperatives); and
- 3) indirect (or “triangular”) employment relationships, meaning the use of various kinds of intermediaries (subcontractors, employment agencies and labour dispatch companies) to perform work that is not ancillary to the work of the company. This is done in order to sever the direct employment relationship and thereby reduce or eliminate the ultimate beneficiary employer’s legal responsibilities to the worker. Further, the exclusion of entire categories of workers from the coverage of labour laws, such as domestic workers, could be considered a fourth category as it creates a situation where few if any legal protections are available. These categories are not discrete and are often combined so that, for example, a dispatched worker is employed on a series of temporary contracts.

The ITUC and ITUC-AP believe that this more specific approach helps to focus on the particular legal relationships that are creating the greatest challenge to the “standard” employment relationship and to trade unionism. These precarious or “non-standard”¹ forms are the result of specific policies and practices meant to reshape the employment relationship to the disadvantage of workers; they are not merely bad jobs, which can include jobs based on a direct, indefinite employment relationship. By understanding precarious work in this more specific sense one can develop more targeted and more effective policy responses.

2. Why Focus on Precarious Work?

The existence of a legally-recognized employment relationship between an employer and worker is essential, for without it workers have no access to the rights and to protections available under law. The very reason why employers use precarious forms of work is to weaken or eliminate this legal relationship and consequently to limit or eliminate access to those rights and protections. In particular, employers seek to undermine trade union rights, namely the right to freedom of association (including the right to strike) and the right to collective bargaining. Indeed, workers in precarious work relationships do face great -if not insurmountable- difficulties to organize, to form or join a union and to bargain collectively, as this report explains. The increase in the use of precarious work around the world is indicative of a deliberate effort by employers to shed their legal responsibility to the workforce, to weaken existing unions and to prevent the formation of new ones, thus maximizing short-term profitability at the expense of workers, their families and communities.

While precarious work has always been a serious problem in the developing world, it has become a serious and growing problem in highly-industrialised countries in recent decades, where well-paying, full-time work is being replaced by precarious work. It is an increasing problem on every continent, undermining wages and working conditions. In some cases, governments facilitate these practices by failing to properly enforce laws or amending laws to facilitate the expansion of precarious work.

In 2006, representatives of workers, employers and governments negotiated and adopted the ILO Employment Relationship Recommendation, No. 198. This useful recommendation addresses some of the most common forms of precarious work. Most importantly, it provides clear guidance on the elements of the employment relationship, which can be applied, for example, to unmask the intentional misclassification of employment and to help ascertain the true employer where he/she may attempt to hide behind one or many intermediaries. However, it is a non-binding instrument and, in practice, does not yet appear to have influenced significantly government policy or employer behaviour.

For years, Global Union Federations (GUFs) have been active in raising this issue and developing new tools to organize and bargain in this difficult terrain. However, continued efforts by trade unions are needed, as growing numbers of workers worldwide are trapped in precarious work that provides little hope for a better future. The ITUC has also devoted resources to addressing this issue,

and intends to invest further resources in the future. This volume focuses on the Asia-Pacific region, as the demand for the research originated in that region

3. What did we find?

Our report shows that precarious work is pervasive throughout the Asia-Pacific region and affects millions of workers in the countries surveyed – even according to official figures. We believe that the actual figures are likely much higher. There appears to be an increase in the use of precarious forms of work in the region, though in some countries certain forms of precarious work may be declining slightly (e.g., dispatch work in Japan and Korea). Throughout the region (and indeed consistent with the rest of the world), women and youth tend to be hired under precarious forms of work at rates far higher than adult men. Further, precarious forms of work are more common in the service sector than in the manufacturing sector, though this is not to discount the prevalence of precarious work in manufacturing – from garments to electronics to auto assembly.

Labour laws in the Asia-Pacific region tend to grant employers a great deal of flexibility. There have been important amendments to the law in some countries in recent years (e.g., Indonesia, Japan, Korea and the Philippines) though the extent to which these laws have contributed to reducing precarious work has yet to be measured. As noted below, the reach of these amendments and existing protections is frequently limited by very poor labour inspection and very costly and inefficient judicial mechanisms. In some countries, the judiciary has stepped in to limit the use of certain forms of precarious work; however, compliance with these judgements is uneven, as is the application of the holdings to other similarly situated workers.

There is considerable variation in the regulation of the employment relationship in the region. In some countries, the use of “*temporary*” or “*fixed-term*” contracts is essentially unregulated (e.g., Australia, Singapore, Sri Lanka), whereas most other countries have imposed some caps on the total number of years under which a worker can be hired under a temporary contract. In some countries, a related employment form, casual workers, has been recognized. These workers are essentially highly precarious day labourers that do not enjoy even the limited protections usually afforded to temporary contract workers (e.g., Australia, New Zealand, Philippines).

TEMPORARY FIXED-TERM CONTRACTS			
COUNTRY	LENGTH	RENEWALS	REASONS
Australia	No limit	No limit	Any reason
Cambodia	2 years	renewals up to a cumulative maximum of 2 years	any reason, though usually for a fixed-term (e.g. a time period of 6 months) or for a specified task (e.g. a specific project)
Indonesia	2 years, possible extension of 1 year	renewals up to a cumulative maximum of 2 years, with additional 1 year	Cannot be used if work is permanent in nature
Japan	3years, up to 5 in some circumstances	Guidelines on renewal, failure to renew a contract can be treated as unlawful dismissal	Should not be renewed repeatedly
Korea	2 years	renewals up to a cumulative maximum of 2 years	Any reason
Nepal	Should become permanent after 1 year	No limit	Cannot be used for work which is permanent in nature
New Zealand	No limit	No limit, but the law requires a genuine reason for each contract to end	The law requires a genuine reason for the contract to end
Philippines	No limit	No limit	Cannot be used for work which is permanent in nature
Singapore	No limit	No limit	No limit
Sri Lanka	No limit	No limit	No limit

In some countries, “indirect” or “triangular” employment arrangements (subcontracting, dispatch, agency work) can be used for almost any reason (Australia, Cambodia, New Zealand, Singapore, Sri Lanka), where in others (Indonesia, Japan, Korea, Philippines) the reasons for which they can be employed is limited to certain jobs and/or for certain periods of time. A few countries apply joint and several liability if the intermediary fails to respect the law (Cambodia, Indonesia, Japan, Korea, Philippines), though in others liability does not extend to the primary employer.

TRIANGULAR EMPLOYMENT			
COUNTRY	LIMITATIONS	LIABILITY	WORK CONDITIONS
Australia	No limitations on use of subcontracting/ agency	No joint and several liability though joint duty of care may potentially occur in occupational health and safety (OHS) situations.	Some industry specific rules, such as in textile and footwear, to ensure workers have same status, protections and entitlements as workers covered by the Fair Work Act.
Cambodia	No limitations on use of subcontracting	Primary employer liable if subcontractor cannot pay claims.	
Indonesia	Cannot be used to perform core business functions, limited to specific job classifications	In case of violations, contracted worker becomes a hired employee of the primary employer	Same legal protections and working conditions.
Japan	Dispatch: 1 year maximum, up to 3 years subject to consultation with union; no limits if in 1 of 26 specified job classifications; shall endeavour to hire worker directly after 1 year (unless in one of 26 specified classifications); very short term contracts prohibited.	As of Oct 15, 2015, when a client uses the services of a dispatched worker in violation of the Act, the client is considered to have offered a labour contract to the dispatched worker on the same terms and conditions	The dispatching company is now required to try to ensure equal treatment between dispatched workers and the directly employed workers engaged in the same type of work.
Korea	Dispatch: 2 year maximum, can only be used in 26 specified job classifications Subcontracting: In construction, it is prohibited to subcontract out all of the work.	Dispatch: Joint liability Subcontracting: Joint liability	A dispatch worker is to enjoy equal treatment in comparison with workers performing the same work in the business of the using employer

TRIANGULAR EMPLOYMENT			
COUNTRY	LIMITATIONS	LIABILITY	WORK CONDITIONS
Nepal	No limit	No joint liability	
New Zealand	No limit	No joint liability	No requirement of equal treatment
Philippines	Prohibits labour-only contracting, as well as a number of arrangements considered to be contrary to law or public policy.	Joint liability	Workers have a right to all the rights and privileges as provided in Labour Code.
Singapore	No legal framework, though typically used for non-core services	No legal framework	No legal framework
Sri Lanka	No limitations	No joint liability	No requirements

As for *statutory exclusions*, domestic workers are most consistently excluded from the coverage of the labour law and which are not otherwise covered by another body of law (such as civil servants, who are often covered by a civil service code).

Even in countries in which the legal framework has improved, e.g., to limit the renewals of fixed-term contracts, to limit the jobs for which subcontracting or dispatch work may be used and/or to strengthen remedies of illegal contracting, labour inspection has failed to adequately combat precarious work even when illegal under domestic law. In many countries, litigation to enforce workplace rights is too costly and/or lengthy to provide effective redress for affected workers. In some cases, employers have simply ignored the law and court judgments with impunity. In Cambodia, for example, garment manufacturers have simply decided as a matter of policy not to respect repeated decisions of the Arbitration Counsel finding a 2-year cumulative limit on fixed-duration contracts, which employers view as a flawed interpretation of the Labour Code. In Korea, a final court judgement which found that Hyundai Motors had hired a worker under an illegal dispatch scheme and which ordered his reinstatement and direct employment has yet to be respected (or enforced). Generally, the penalties on employers who break the law are far too low to be dissuasive.

The Country profiles

**AUSTRALIA
CAMBODIA
INDONESIA
JAPAN
KOREA, REPUBLIC OF
NEPAL
NEW ZEALAND
PHILIPPINES
SINGAPORE
SRI LANKA**

AUSTRALIA



The ACTU has identified precarious work (which they refer to as “insecure work”) as one of the most pressing issues facing workers in Australia. Today, millions of Australian workers are engaged in work that provides them with little economic security and little control over their working lives. Though every worker may experience precarious work, it is often associated with certain forms of employment, such as casual and fixed-term employment, seasonal work, contracting and labour hire. It is also increasingly a problem faced by workers employed part-time and workers in non-traditional workplaces, including home-based outworkers.

Today, one in four Australian workers is engaged on a casual basis, meaning they have no right to paid leave entitlements and little or no job security. Casual employment has become entrenched in the Australian economy as a tool to minimise labour costs rather than to deal with temporary or intermittent variations in the patterns of work. Over half of all casual workers are “permanent casuals” who have been employed in their current job for over a year. Over 15% of casual workers have been in their job for more than five years. Fixed-term

employment is being used by employers to avoid the costs associated with standard employment conditions like leave, notice of termination and redundancy – particularly in the public sector. The growth of the “workforce management industry” and the use of labour hire have created new avenues for cutting costs and transforming permanent jobs into casual positions. Independent contracting is also being misused to mask employment relationships.

In October 2011, the ACTU commissioned the *Independent Inquiry into Insecure Work*,² a six month national inquiry chaired by former Deputy Prime Minister Brian Howe. The Inquiry was tasked with investigating the extent of insecure work in Australia, as well as its impact and possible policy responses. The Inquiry held hearings all around the country and took hundreds of submissions from workers, employers, unions, and researchers. The Inquiry heard stories from many workers about how insecure work affected them and their families. Because of the nature of their employment, many workers were unable to plan for the future or get a car loan or a home loan. Many are too afraid to speak out at work about issues like health and safety.

The existing legal framework has proven incapable of preventing and addressing the rise in insecure work. In particular, it fails to prevent employers from using various types of employment as a means of shifting the risks and costs associated with work from the employer to the worker. At the same time, the laws do not provide pathways for those trapped in insecure work to access more secure, better quality jobs. Many union priorities are already directed at securing better jobs for all workers. These include improving access to flexible working arrangements, strengthening rights and minimum standards for contractors, seeking to ensure that casual employees are properly defined and utilised and securing improvements to Australia's collective bargaining system.

The ACTU and its affiliates are committed to continue working to address insecure work, including by: bargaining for better wages and conditions of work, and more secure jobs; securing better minimum standards through awards and legislation, so as to deliver stronger universal rights, entitlements and protections for all workers; preventing the abuse of types of non-standard employment and enabling those in insecure work to transition to ongoing employment; better enforcement of existing rights; investigating the development of a national portable entitlements scheme, aimed at reducing job and income insecurity; and calling on governments to take a leading role through promoting secure jobs. The ACTU and its affiliates are also keen to learn from unions in other countries how workers are being mobilised to fight against precarious work and how law and policy reforms are being pursued to address this issue.

LEGAL FRAMEWORK OF PRECARIOUS WORK

1. Exclusions

The main federal labour law statute in Australia, the *Fair Work Act 2009 (FWA)*, applies to 'employers' and 'employees'. Some provisions also apply to 'outworkers' (which are defined to include individuals who are contractors and that perform work in the textile, clothing or footwear industry and at residential premises or at other premises that would not conventionally be regarded as business premises).³ Some general protections provided under the FWA extend to independent contractors and their principals: e.g. the right to be a member of an industrial association and/or to engage in certain industrial activities.⁴ The anti-bullying provisions contained in Part 6-4B of the FWA also apply to contractors. In general, however, independent contractors are excluded from the protections afforded by the Act.

2. Temporary "Fixed-Term" Contracts

The FWA does not limit the use of fixed-term contracts (defined as employees employed for a specified period of time, for a specified task, or for the duration of a specified season). In Australia, industry or occupation-specific minimum standards are also determined by modern awards.⁵ Some of these awards limit the use of fixed-term contracts. For example, the *Manufacturing and Associated Industries and Occupations Modern Award 2010* and the *Mining Industry Award 2010* do not identify fixed-term employment as a permissible type of employment. A few modern awards (e.g. *Higher Education Industry – Academic Staff Modern Award 2010*) enumerate the circumstances under which a fixed-term contract can be used.⁶ However, the absence of a mention of these types of employment in an award does not mean they cannot be used. Fixed-term and specific task employment are considered 'subsets' of either full-time or part-time employment.

There are no general limitations on the length of fixed-term contracts. There are also no general limitations on the number of renewals of these contracts. Workers on fixed-term contracts are considered employees for the purposes of the FWA and they are therefore entitled to the minimum rights and standards afforded by the legislation. However, workers on fixed-term contracts are specifically excluded from those sections of the FWA that require an employer to provide an employee with notice of termination and redundancy pay.⁷ They are also excluded from unfair dismissal.⁸

A very common type of employment in Australia is casual employment. This is somewhat akin to "daily hire" employment. Casual workers are covered by the FWA but are specifically excluded from receiving a number of the minimum entitlements, such as paid sick, holiday or carer's leave, redundancy or termination entitlements. Their work is not guaranteed to be ongoing. Casual workers are paid a loading (generally 25%) on their wages which purports to compensate them for not receiving all of the entitlements of permanent employees. In reality, many casual workers in Australia are "permanent casuals" in that they are engaged on a long term and regular basis with one employer.

Nearly all 122 modern awards allow for casual employment as a permissible category of employment. Some modern awards provide for the conversion of a casual contract to a permanent one if the casual worker is employed on a regular basis beyond a specified threshold (e.g. 6 weeks or 3 months).⁹ In the case of the *Manufacturing and Associated Industries Award*, the worker may after six months of employment elect to convert to full or part-time employment. An employer is obligated to give

the worker notice of having achieved six months of employment and the worker thereafter has four weeks to elect to convert or not. If the worker had worked full time as a casual employee, he or she may elect to convert to full time employment. The worker cannot become a casual employee again unless by his or her agreement.

3. Misclassification

The *FWA* prohibits “sham contracting” (the misrepresentation of an employment contract as a contracting one).¹⁰ It makes it illegal for an employer to:

- say something false to persuade an employee to become an independent contractor;
- dismiss or threaten to dismiss an employee and then hire them as an independent contractor to do the same work; or
- claim that an employee is an independent contractor.

The *FWA* does not contain a test for determining the existence of an employment relationship. In applying the provisions above, the courts apply the common law test of whether a contract is one for services or of service, which looks at a number of factors (e.g. the degree of control exerted by the employer over the worker and whether the worker is able to work for other businesses).¹¹

The *FWA* provides for penalties to be imposed on an employer for breaching these provisions. Generally, legal proceedings to prosecute an employer for sham contracting will also involve claims for the recovery of underpayments for the worker (that is, payments they should have received had they been properly classified as an employee: e.g. wages; paid leave entitlements).¹² Where an employer seeks (or threatens) to dismiss an employee for the purposes of engaging them as an independent contractor, it is also possible for the worker, an industrial association or an inspector to apply to the courts to grant an injunction or an interim injunction. The purpose of the injunction would be to prevent the dismissal from occurring, or otherwise remedy the effects. Courts can also make other orders to have the employee reinstated or compensated.

The sham contracting provisions of the *FWA* are civil penalty provisions, with a maximum penalty that can be imposed for each offence of 60 penalty units for an individual (60 penalty units = \$10,200) and 300 for a body corporate (300 penalty units = \$51,000). One penalty unit is A\$170. As noted above, legal proceedings to prosecute an employer for sham contract-

ing will also involve claims for the recovery of underpayments for the worker.

4. Triangular Employment

There are generally no limits to the sectors or situations in which work may be subcontracted or supplied by an agency. There are also no limits to the amount of the workforce that may be subcontracted or supplied by an agency. There are some industry specific rules, however, which regulate subcontracting arrangements. In the textile, clothing and footwear industry, for example, there are laws that regulate work throughout the supply chain, including subcontracting arrangements.¹³

The *FWA* does not provide guidance to determine who is the employer (to avoid the use of subcontractors to disguise an actual employment relationship with the primary employer) but courts apply the common law to determine whether a relationship is an employment or contracting one.

The law generally does not hold the primary employer jointly responsible for the wages, working conditions and other benefits of the worker in the case the subcontractor fails to follow the law or collective agreement. However where the work is outsourced the transfer of business rules apply to ensure continuation of conditions by default to those who remain employed. There are specific rules applicable to the textile, clothing and footwear industry which seek to ensure contract outworkers (who often work at the bottom of long and complex supply chains) have the same status, protections and entitlements as employees under the *FWA*. The *FWA* also contains provisions which allow outworkers to recover unpaid wages and entitlements up the supply chain when their employer refuses to pay them. Some state jurisdictions have laws specific to the building and construction industry which hold contractors liable for remuneration payable to employees of subcontractors.¹⁴

Subcontracted workers or agency workers are not covered by the collective agreements that apply to directly employed workers. Under the *FWA*, collective agreements may only apply to an employer (or employers) and its direct employees. However, some limited terms relating to labour hire/subcontracted workers can be included in enterprise agreements – e.g. a clause stating that they will receive the same terms and conditions and employees doing the same work under the agreement.

The Fair Work Ombudsman (the national labour inspectorate in Australia) has taken an increasingly active role in monitoring and prosecuting instances of sham contracting. The Om-

budsman does not focus on or seek to combat other types of precarious work (casual, fixed-term or labour hire work).

(1.2% of all workers); however, it is likely that the percentage of labour hire workers is particularly concentrated in some sectors and occupations.¹⁵

STATISTICAL DATA OF PRECARIOUS WORK

1. Casual employment

One in five Australian workers (19% of all workers or 2.2 million workers) are engaged in casual employment. These workers do not receive any kind of paid leave entitlements and generally do not have job security. In some industries, more than half of all employees are casual. In the accommodation and food services industry, 64% of all workers are engaged as casual employees. In the agriculture, forestry and fishing industry, it is 43%. Female workers are over-represented in casual employment: 20% of male employees are in casual employment, compared to 26% of female workers. Of the 2.8 million workers in Australia who work part-time hours, most (53%) are in casual employment rather than permanent, ongoing part-time work.

2. Fixed-term employment

Fixed-term employment remains relatively uncommon in Australia, with around 3.9% of workers working on a fixed-term contract. Fixed-term employment, however, is concentrated in particular industries: in the education and training industry, for example, 14% of workers are engaged on fixed-term contracts.

3. Misclassification

Just under one in ten Australian workers (9% of all workers or 980,000 workers) are engaged as 'independent contractors'. Nearly three quarters (73%) of independent contractors are male. Nearly a third (29%) of all workers in the construction industry is independent contractors. One in five (21%) of workers in the administrative and support services industry are independent contractors. Only 61% of independent contractors report having control over their own work, and 80% had no employees.

4. Triangular Employment

Labour hire workers are paid by a labour hire agency while working in another business. They can be employed by the agency as permanent or fixed-term employees; however they are typically employed by the agency as casual employees. It is very difficult to obtain reliable statistics on the extent of labour hire work in Australia. The Australian Bureau of Statistics estimates that there are only 141,700 labour hire workers

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Insecure jobs invariably mean lower pay and less rights and entitlements. The fear, vulnerability and powerlessness experienced by workers engaged in insecure work mean they are also less likely to raise health and safety concerns, accept poor conditions and exploitation, and face greater risks of injuries and illness. Training and career development opportunities are much less likely to be available.

The lack of income security can have severe impacts on workers' living standards and financial independence. Workers are unable to secure a home loan or a car loan because of their lack of job security. When they were able to secure a loan, it was often from a second-tier lender meaning they faced higher rates of interest.

Workers also suffered serious health impacts after extended periods in insecure work. The OECD and World Health Organisation have found that insecure work in all its forms has negative impacts on the safety of workers in the short term, and the uncertainty and anxiety associated with experiencing insecure work damages the health of workers in the longer term. The continued growth of insecure work will, over time, contribute to a widening of health inequalities.

The lack of flexible working arrangements and social support for working parents forces many women into insecure work, especially those with caring responsibilities. Most part-time jobs in Australia are casual jobs, and 55% of casuals are women – as a result 25.5% of all women workers find themselves in casual employment. Industries that predominantly employ casual and insecure workers such as health care and social assistance and the retail trade are heavily female dominated. As a result, over a quarter of women employees do not have access to paid leave entitlements, compared to around one fifth of men.

As women are predominately employed in insecure arrangements, it only serves to increase the gender gap in pay equity, superannuation equity and in workplace equity. As casual and insecure jobs are generally not managerial positions, which are more likely to be held by men, insecure work has the potential to create a labour market that is not only segregated between

secure and insecure workers, but also entrenches segregation between men and women.

Workers from culturally and linguistically diverse (CALD) backgrounds are also particularly vulnerable to finding themselves trapped in insecure work. This can result from social isolation, low English literacy, discrimination in the workplace and a lack of education and information about rights and entitlements at work in languages other than English. Critically however, there is limited accurate statistical information about the extent of insecure work amongst CALD communities, leading many to label this an “invisible” issue.

For young people, opportunities to find full-time work have declined dramatically over the past 25 years. The nature of the working environment young people experience has changed significantly as increasing numbers find themselves in casualised industries, and long-term unemployment remains higher than among the rest of the population. As a result, 40% of all casual workers are now aged between 15 and 24, and young people in casual work are more likely to be sexually harassed, discriminated against and underpaid.

A further group who are more likely to be affected by insecure work are workers from Aboriginal and Torres Strait Islander backgrounds. Australia’s indigenous population is growing rapidly, now making up 2.5% of the population. The Indigenous population more than doubled in the period from 1991 to 2006 and is relatively young, meaning that education and employment programs are more important than ever. However, participants in many programs targeted at Indigenous people such as CDEP are not employees and, while expected to work in job settings, do not enjoy formal rights to annual or personal leave, the right to collectively negotiate with employers, or access to dispute resolution.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

There are in general no legal restrictions or obstacles on the right to join a union for workers employed in any form of precarious work mentioned. However there are some restrictions on the capacity of unions to represent independent contractors for the purposes of engaging in collective bargaining (imposed through the *Australian Competition and Consumer Act 2010*). In general, independent contractors cannot bargain collectively as this is regarded as anti-competitive conduct, in breach of the *Australian Competition and Consumer Act 2010*. There are two avenues through which contractors may apply to the Australian Competition and Consumer Commission (ACCC) to obtain

immunity from legal action under the competition provisions of the Act for collective bargaining arrangements that are in the public interest. These processes are used by some trade unions (e.g. owner-drivers in the road transport industry). However, there are a number of requirements that contractors must meet before the ACCC will grant such an exemption. The Media, Entertainment and Arts Alliance obtained such an exemption for freelance journalists in 2010 and workers in the construction and transport industries have also obtained such exemptions.

Casual employees are significantly less likely than permanent employees to be union members. Australian Bureau of Statistics data (2013) indicates that 23.4% of permanent employees are trade union members, compared to just 6.3% of casual employees.

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

Trade union action to combat precarious work includes promoting secure work through collective bargaining and advocating for law and policy reform. Australian unions are committed to addressing the rise in insecure work and promoting the rights of all workers to:

- Fair and predictable pay and hours of work
- A say about how, where, and when they work, and to be consulted about change
- Access to important conditions, like annual leave, paid sick leave, overtime, penalty rates and long service leave
- Quality skills and training, and career opportunities
- A healthy and safe work environment

A further priority is the promotion of measures to provide better protections to workers employed indirectly through labour hire and agency arrangements (including through advocating for the recognition of a doctrine of joint employment in the *FWA*), and better protections against disguised employment arrangements like sham contracting.

CAMBODIA



The growth of precarious work in Cambodia is a serious problem - in particular the phenomenon of fixed-term contracts (commonly referred to as fixed-duration contracts (FDCs) in Cambodia). While views on these contracts are mixed, trade unions have vociferously opposed them. As Soun Sokunthea of the National Independent Federation Textile Union of Cambodia once explained, these contracts give workers no job security and few benefits and added that workers dare not stand for union election. ILO Better Factories Cambodia (BFC), which monitors labour law compliance in the garment sector, reported in April 2013,

The interpretation of Cambodian labour law on the issue of Fixed Duration Contracts (FDCs) continues to be one of the most contentious in the sector. Data analysed by BFC confirms that 90% of newly registered factories assessed classify all workers as FDC workers. The use of FDCs can result in workers receiving fewer of their legal benefits. This report finds that 37% of factories used rotating fixed-term contracts or otherwise did not include the entire period of continuous employment when determining a worker's

entitlements to maternity leave, seniority bonus and/or annual leave.

Indeed, these contracts can be more expensive for businesses, but they are used to keep workers fearful of organizing.

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

Article 1 of the Labour Law specifically excludes 5 classes of workers from its coverage. Those are: 1) Judges of the Judiciary; 2) persons appointed to a permanent post in the public service; 3) personnel of the police, the army, the military police, who are governed by a separate statute; 4) personnel serving the air and maritime transportation, who are governed by a special legislation (who are entitled to apply the provisions on freedom of association under the law); and 5) domestics or household servants, unless otherwise expressly specified

under this law. At the 102nd International Labour Conference, the Committee on the Application of Standards urged the government to approve a new Trade Union law and noted in particular the need to eliminate the exclusions under Article 1 of the Labour Law.¹⁶ In 2014, the government tabled a new draft Trade Union law though it does not appear to address this problem.

Article 3 of the Labour Law excludes workers in the informal economy in defining “workers” as - “every person of all sex and nationality, who has signed an employment contract in return for remuneration, under the direction and management of another person, whether that person is a natural person or legal entity, public or private. To clearly determine the characteristics of a worker, one shall not take into account of neither the jurisdictional status of the employer nor that of the workers, as well as the amount of remuneration.” Obviously, most workers in the informal economy have no contract and thus are not deemed workers. The inability of those workers to organize is a major problem, as in many industries workers are hired (wrongly) as independent contractors, such as in the beer promotion sector. The (alleged) lack of a recognized employment relationship has made organizing in this sector very difficult. For workers in agricultural sector, only workers working in plantations, including seasonal workers, are able to form or join unions.

Temporary “Fixed-Term” Contracts

Fixed-duration contracts (FDCs) pose a serious problem for workers, resulting in worse wages and conditions of work and at the same time restricting the exercise of the right to freedom of association. Several reports have documented the steep rise in the use of FDCs, particularly in the garment industry.¹⁷ The decision by the industry to shift from undetermined-duration contracts (UDCs) to FDCs has created substantial employment insecurity for many workers and has consequently damaged industrial relations. The industry’s move to FDCs has had the (intended) effect to avoid the formation of new trade unions in the garment industry or to undermine the power of existing trade unions.

A 2011 report from Yale University entitled, *Tearing Apart at the Seams*, explained that the shift from UDCs to FDCs had nothing to do with a drop in the number of full-time, regular workers but instead reflects a decision by the garment industry as a whole to simply reclassify workers. Many garment factories have now built an entire workforce of workers hired on repeatedly-renewed short-term FDCs. This trend is only increasing. This practice violates the Labor Law but it is widely permitted in practice.

Article 67 of the Labour Law provides that “The labor contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years.” The Arbitration Council, which has competence to interpret and apply the Labor Law, has ruled that Article 67 imposes a two-year cap on FDC renewals for the duration of the employment relationship, not for each contract renewal. The garment manufacturers dispute this interpretation of the law and have in practice ignored these rulings.

The legal implications of employment under a FDC are numerous. First, workers under a FDC are simply afforded fewer rights and benefits than workers under UDCs – including with regard to paid annual leave, seniority rights and maternity leave. Further, it is much easier to dismiss workers under a FDC than a UDC. A worker with a FDC is due a shorter notice period than a worker with a UDC – 10-15 days of notice (Article 73) rather than 1-3 months (each depending on years of service) (Article 75). Further, an employer does not need to justify its decision not to renew a worker’s FDC, whereas he has an affirmative obligation to demonstrate serious misconduct in order to dismiss a worker with a UDC (Article 74). Although the law does prohibit non-renewal of a FDC based on anti-union discrimination, workers can have their contract not renewed for any reason – and certainly for conduct which falls short of “serious misconduct.” Finally, the compensation due upon termination, such as damages and/or indemnities, is far less than what would be due a worker with a UDC. The premature termination of a FDC requires payment of the remainder of the contract term if for reasons not supported by law (act of god or serious misconduct) plus a 5% severance (Article 73). Termination of a workers with a UDC are eligible, in addition to the notice mentioned above, an indemnity under Article 89,¹⁸ damages under Articles 91 and 94¹⁹; annual leave under Articles 166 and 167;²⁰ and last salary under Article 169.²¹

Workers are also only eligible for maternity leave pay under Article 183 after 1 year of uninterrupted service. The use of FDCs frustrates the ability of this largely female workforce to access this benefit.

In practice, the move to FDCs is undermining freedom of association and collective bargaining. The use of FDCs (which are of ever shorter duration), creates great instability for workers, who reasonably fear that their contracts will not be renewed if they fail to obey the employer – including joining a trade union. In addition to the greater levels of fear, short-term contracts also have other practical implications. Organizing a union takes time – in many cases several months if not longer. If a worker is on a three month contract, he or she may not be

around by the time the paperwork is filed. The churn created by short term employment also means that it is difficult to identify and develop trade union leaders. It is very likely, especially in factories where a majority of contracts are FDCs, that a leaders will not be able to complete a 2-year term. This has a serious impact on the efficacy of leadership and the ability of the union to effect change in the workplace. Further, the labour law currently requires leaders to have 1-year work experience in the factory, experience which may be hard to accrue under FDCs. As explained above, FDCs make anti-union retaliation harder to prove.

Many garment factories have converted most if not all of their UDCs to FDCs – through a variety of tactics such as a fake factory shutdown only to reopen immediately thereafter under a different name. The workforce is then “rehired” under FDCs. Such procedures are used despite the fact that it is more expensive to operate this way – just to intimidate workers and chill efforts at the formation of independent unions.

A Memorandum of Understanding (MOU) in the garment industry was reached in 2012 year between GMAC and several trade unions, which included a commitment to reach a separate agreement on this issue. However, there has been no movement to initiate negotiations on this matter.

Misclassification

Workers in many industries are treated as informal/self-employed in order to prevent unionization even though it is clear that there is an employment relationship where the employer assigns and manages work and pays for the labour provided. The beer promotion industry is an example where misclassification has resulted in driving down wages and creating obstacles to unionization. In Cambodia, young, female workers are hired to sell beer at establishments under the direction and control of the establishment’s management and/or the beer brand. Roughly half of these workers are provided no contract and are paid on commission. In fact, this used to be the only arrangement in the industry. Today, workers with a fixed-term contract and a fixed salary have increased. The commission-based beer promoters are treated as self-employed/informal workers while those on a contract are treated as formal workers. They both perform the same work. Those without a contract are unable to form or join unions, as they are considered informal. Unions such as the Cambodian Food and Service-Workers Federation (CFSWF) have tried with some success to organize both commission and contract workers in the beer promotion sector.

Triangular Employment

Subcontracting is regulated under the Labour Code. Under Article 45, the labour contractor is one who contracts with an entrepreneur, who recruits the necessary work force for the execution of certain work or the provision of certain services, and for an all-inclusive price. The contract between the labour contractor and the entrepreneur must be in writing. The contractor is required by law to respect the labour code just as an ordinary employer (Art 47). Importantly, in the case of default or insolvency by the contractor, workers can make claims against the entrepreneur as if the employer (Art 48). The contractor is required to post in the place where work is performed the name and address of the entrepreneur, and the entrepreneur is required to maintain a list of all contractors and to provide that to the Labour Inspector’s Office.

Subcontracting is rampant, particularly in the construction industry, creating hazardous workplaces. Van Thol, vice president of the Building and Wood Workers Trade Union Federation of Cambodia (BWTUC), explained to the Phnom Penh Post that many companies use poor quality building materials and do not comply with standards, problems that are much worse with subcontractors. “Licensed construction companies are hired by a factory to do its construction, but those licensed firms rent out other, smaller, unlicensed construction firms to build it, and they don’t really follow the standards,” he said.²²

STATISTICAL DATA OF PRECARIOUS WORK

The Cambodia Labour Force and Child Labour Survey 2012, a joint project of the ILO and the Cambodian National Institute of Statistics,²³ noted the following:

The estimated proportion of own-account workers and contributing family workers in total employment was 53.6 per cent. Nearly five out of every ten employed male workers (48 per cent) and six of every ten employed female workers (59.8 per cent) were in vulnerable employment.

Nearly half of all employees were hired with an oral agreement (48.5 per cent), while less than a third (28.8 per cent) had a written contract. Nearly a quarter (22.7 per cent) didn’t know if they had a contract or some other arrangement. Among those with a written contract, 49.7 per cent had a contract for a fixed-duration, 45.1 per cent of unlimited duration, 3 per cent didn’t know if there was such a specification and 2.2 per cent said their contract was for an unspecified duration.

The Survey defined precarious employment as either: (a) workers whose contract of employment leads to the classification of the incumbent as belonging to the groups of “casual workers”, “short-term workers” or “seasonal workers”; or (b) workers whose contract of employment will allow the employing enterprise or person to terminate the contract at short notice and/or at will, with the specific circumstances to be determined by national legislation and custom.

ness and education campaigns among trade union members and potential members; and, 6) developing campaign tools and conducting campaigns to lobby workers in general.

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Employers prefer to employ workers on short term contracts to avoid payment of statutory benefits and severance payments upon dismissal. In practice, women on FDCs usually have their contracts terminated when they become pregnant. In some cases, workers want FDCs so that they can get the 5% compensation available on expiry of the contract and move to other factories that may pay better. While this is a short term benefit to the individual worker, it keeps turnover high and undermines efforts at building unions that can bargain for longer-term changes with regard to wages and conditions of work.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

As mentioned above, the shift in the garment industry to FDCs has been motivated in part by the desire to avoid independent unions. Workers who begin to organize can be easily fired, and the instability of short term contracts can make it difficult for workers to build up unions and move into leadership positions. Subcontracting, as in the construction industry, is similarly used to insulate primary employers from responsibility and to make union organizing more difficult.

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

Trade unions in Cambodia have identified organizing short term contract workers into trade union structures as a top priority. The following actions have been taken by various national centres and trade unions and their federations: 1) bargaining with management at the enterprise level and with GMAC at national level; 2) filing complaints to the Ministry of Labour; 3) taking complaints to the Arbitration Council; 4) lobbying at the regional level against short term contracts; 5) waging aware-

INDONESIA



The continued use of precarious forms of employment is a serious problem in Indonesia. Effective labour inspection with regard to precarious employment is rare and sanctions, when applied, are not dissuasive. Indeed, the ILO Better Work programme reported in December 2013 that just over half of the forty participating factories reviewed failed to comply with the established limits on work agreements. It found,

The use of non-permanent workers (PKWT) contributes significantly to the non-compliance[.] This is partially due to the vagueness or possible abuse in interpreting the law on recruiting non-permanent workers. The Ministry of Manpower and Transmigration (MOMT) has informed Better Work Indonesia that a garment manufacturer may use non-permanent workers for a maximum of two years in the first agreement, and this may be extended once for a maximum period of one year. However, it has been observed that workers have been contracted under non-permanent contracts more than two times and/or three years.

Trade unions have made several important gains in recent years to extend rights to all workers, including those in precarious work. Because of their efforts, the Parliament passed the BPJS bill on universal social security coverage on 28 October 2011. The President promulgated the *BPJS Law No. 24/2011* on 25 November 2011. It provides that as of 2014, all citizens will be covered by a state health and life insurance. In 2015, all workers will be covered by work accident insurance, death insurance, old age insurance and a pension.

On 3 October 2012, the KSBSI, KSPI and KSPSI organised a demonstration that attracted nearly 3 million people in 21 districts and municipalities and 80 industrial zones throughout the greater Jakarta area. The protest was called to demand the government to prohibit outsourcing beyond five allowable areas: cleaning services, catering services for employees, security services, support services in the mining and oil sector and transportation services for employees. As a result, the new Manpower Regulation No. 19 of 2012 on Conditions for Outsourcing implementation of work to other companies was

released by Ministry of Manpower on 14 November 2012 and limited outsourcing to only the areas named above.

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

The government interprets Law No. 13 of 2003 Concerning Manpower not to cover domestic workers. The problem is not with the broad definition of worker - defined as “any person who works for a wage or other form of remuneration” – but the definition of employer. The law recognizes two kinds of employers – an employer (“pemberi kerja”) and an entrepreneur (“pengusaha”). The latter is required to comply with all of the obligations of employers under Law 13. However, the former has, under Article 5, only a general obligation to provide “protection for [their workers’] welfare, safety and health, both mental and physical”. An employer of a domestic worker is considered a “pemberi kerja”. Since they are not deemed employed by a “pengusaha”, they are not covered by the complete protections available to other workers. Further, they have no access to employment dispute resolution mechanisms, such as the Industrial Court.

Temporary “Fixed-Term” Contracts

Fixed-term contracts in Indonesia are regulated by Law No. 13/2003. Under Article 59, a fixed-term contract of employment (known as PKWT) may be entered into for a fixed period of time up to a maximum period of two years and may only be extended once for a period of no longer than one year. Such a contract is only valid if the job, because of its type and nature, will finish in a specified period of time. The law identifies those situations to be: a) work to be performed and complete at one go or work which is temporary by nature; b) work whose completion is estimated at a period of time which is not too long and no longer than 3 (three) years; c) seasonal work; or d) work that is related to a new product, a new (type of) activity or an additional product that is still in the experimental stage or try-out phase. Article 59(2) makes clear that a fixed-term agreement may not be concluded for “jobs that are permanent by nature”. If a party ends the working relationship before the end specified in the employment agreement, the party which ended the working relationship is required to pay an indemnification to the other party(s) in the amount of the worker’s remaining salary until the stated end of the employment agreement (Article 61).

However, in practice, there are frequent violations of the laws and regulations on contractual employment. These include employment contracts that have been extended more than two times; in some cases, contracts of employment have been extended a dozen times. In addition, to avoid “the change of employment status” from fixed-term contract to indefinite employment, many of the employers terminate the contract before its expiry without proper compensation and any notice. These practices are obviously in breach of Article 59(4), which stipulates that a worker on a fixed-term contract shall be deemed a permanent employee after the expiry of his/her initial fixed-term contract.

Triangular Employment

Article 64-66 of the Act regulate outsourcing in Indonesia. Under Article 64, an enterprise may contract out part of its work to another enterprise under a written agreement for the “contract of work” or for the “labour supply”. *Under Article 65(2)*, such work must meet the following requirements:

- a) the work can be separate from the main business activity of the enterprise that contracts the work to the other enterprise;
- b) the work is to be undertaken under either a direct order or an indirect order from the party commissioning the work;
- c) the work is an entirely auxiliary activity of the enterprise that contracts the work to the other enterprise; and
- d) the work does not directly inhibit the production process of the enterprise that subcontracts the work to the other enterprise.

The contractor must also be a legal entity (Article 65(3)).

Under Article 65(4), the protection and working conditions provided to outsourced workers shall be at least the same as those provided by the enterprise that contracts the work to the contractor. The law does not limit the amount of workforce that may be subcontracted or supplied by an agency or contractor. If outsourcing occurs in violation of Article 65 (2) or (3), then the status of the employment relationship between the worker and the enterprise that contracted out the work to the contractor shall convert into an employment relationship.

Article 66 stipulates that workers from licensed labour providers (those who send workers to work at a third party) must not be used to carry out the receiving company’s core functions. Labour providers must ensure that there is an employment relationship with the worker, the employment must be a fixed-

term agreement in conformity with Article 59 (mentioned in the section above), that the labour provider shall be responsible for wages and welfare protections and that the agreement between the provider and using company shall be in writing and conform to the law. In the case of a breach of Article 66, the worker will have an employment relationship with the receiving employer.

In practice, however, unions report that labour outsourcing is used in almost all sectors, both in foreign as well as domestic companies, where workers are being outsourced to carry out the enterprises' core functions.

A new regulation, Manpower Regulation No. 19 of 2012 on Conditions for Outsourcing, was issued by Ministry of Manpower on 14 November 2012 to give further effect to Law No. 13/2003. It came into force in November 2013. The new regulation limits both work outsourcing and labour supply. As to outsourcing, the regulation makes clear that the work that can be contracted out to a third party must be ancillary work. Specifically,

- (a) the management and the implementation of the outsourced work must be conducted separately from the main activities of the company providing the work (i.e. the user company);
- (b) the work must be performed by direct order or indirect order from the user company for the purpose of providing clarity on how to perform the work so that it is consistent with the standards of the user company;
- (c) the work must be supporting activities, i.e. the work is necessary to support and smoothen the implementation of the main activities according to the flow chart of the work implementation process stipulated by the relevant sectoral business association; and
- (d) the work must not directly hinder the production process, i.e. the work must be an additional activity and if not performed the production process will still continue as normal.

The user company must prepare a description of the type of supporting work that will be delegated. This must be registered with the local Ministry of Manpower office. In addition to the description, the user company must submit a flowchart which is prepared by the relevant industry association. This flowchart describes which activities are "core" and "non-core" in the specified sector. No work can be subcontracted until the documents are successfully registered with an acknowledgement from the Ministry of Manpower office. If the user company subcontracts any part of work to a subcontractor before receiving

approval from the Ministry, then the subcontractor's employee becomes an employee of the user company.

The regulation also requires a written outsourcing agreement between the user company and the third party which must include: (a) the rights and obligations of the parties; (b) a guarantee of the protection of work and the fulfilment of all work conditions for the workers according to prevailing laws and regulations; and (c) the availability of competent workers in the relevant field.

As to labour supply, Regulation 19 confirms the rule that only "supporting" activities can be outsourced to a labour supplier. However, that outsourcing of labour will be limited to the following activities:

1. cleaning services
2. catering services for employees
3. security services
4. support services in the mining and oil sectors and
5. transportation services for employees

Regulation 19 also prohibits a labour supplier from subcontracting all or a part of the outsourced work. Labour suppliers must provide written employment contracts to their employees, which must be registered with the local Ministry of Manpower office. If the user company ends the labour supply contract and transfers substantially the same work to a new labour supplier, the new labour supplier must take on the fixed-term contract workers of the former supplier. If the conditions in Article 66 are not fulfilled, the user company which utilizes the services of the labour supplier will be held legally responsible as the employer of the workers supplied by the labour supplier.

In both cases, the entity performing subcontracted work or supplying labour must be registered.

Importantly, the Indonesian Constitutional Court on 17 January, 2012 ruled that some forms of outsourcing work are unconstitutional. The decision was made in the case of an electricity meter reader who filed a claim that his permanent job was lost and taken over by outsourced workers in contravention of the Constitution. The Court decided that the phrase "fixed-term employment agreement" in *Article 65 (7) and Article 66 (2) (b) of the Manpower Law No 13/2003* are unconstitutional to the extent that the fixed-term employment agreement does not include a clause protecting the rights of the worker if the com-

pany that engages the labour supplier or outsourcing company changes service providers.

The law places no restriction on outsourced workers joining a union or bargain collectively. Article 104 of Law No.13/2003 states that every worker has the right to form union and become member of trade union, with 10 members required to form a union. However, workers may bargain only with the contractor, not the primary employer.

Labour Law Enforcement

KSPI and KSBSI report that violations of the laws above occur because of the very weak of law enforcement capacity on the part of local Manpower officials, due in part to poor qualifications and insufficient numbers. For instance, labour inspectors in local Manpower offices have been recruited from among civilian public servants such as market supervisors (who collect fees for the use of space in traditional markets), animal husbandry officials, City Park and greenery officials, financial inspectors, etc. They have no experience in industrial relations or employment law.

This weakness has been recognized by central and local Manpower officials. In response, the Minister of Manpower issued a decree (Regulation of the Minister of Manpower and Transmigration of the Republic of Indonesia concerning the Labour Inspection Committee (20 April 2012)). The labour inspection committees on national and local levels have yet to be established however. The committee has some tasks such as to provide suggestions for ensuring the independence and professionalism of labour inspectors and to notify the labour inspection unit of violations of labour laws and regulations.

Since the regulation concerning the Labour Inspection Committee provides only general guidelines, there is a need to create a Minister Decree for the operation of Tripartite Committee on Labour Inspection. Issues to be included would be how to determine the membership of tripartite labour inspection committee (representatives) and their specific roles and functions. Most importantly, the committee needs to have the authority to deal with particular inspection problems, enforcing compliance and applying sanctions.

STATISTICAL DATA OF PRECARIOUS WORK

The data on the extent of precarious work is not comprehensive. However, we can look at a variety of studies which demonstrate the extent of the problem.

Official statistics for 2012 show that of the 112.8 million workers, 42.1 million workers (32.79 percent) are in formal employment, while the remaining 70.7 million (62.71) work in informal activities. KSBSI estimates that 70% of those in formal employment are working under fixed-term contract and outsourcing arrangements.

In a study conducted by the Federation of Indonesia Metalworkers Union (SPMI), they found that more than 40% of metal workers are outsourced. In the telecommunication and post sectors, ASPEK Indonesia found around 50% of all workers are under contract or outsourced. KSPI estimated that more than 60% of textile workers working under outsourcing arrangements. An ILO Working Paper from December 2012 also cites KSBSI (quoting from studies by the World Bank and the ILO) stating that of the 33 million workers in formal employment, 65 per cent were temporary workers (contract workers and outsourced workers) in February 2010 compared to 30 per cent in 2005.

The same ILO Working Paper cited the World Bank, which found that only approximately 8.7 per cent of workers in formal employment hold permanent contracts, and 10.2 per cent of formal workers have fixed-term contracts (direct hiring and outsourced). Nationwide, around 81 per cent of formal workers have no formal/written contracts.

A study conducted by Tjandraningsih, Herawati and Suhadmedi in 2010 on labour contracts and labour outsourcing in several metal industry companies found that precarious work arrangements were made regardless of the occupation and skills of a worker. Companies regularly outsourced work through labour agencies or hired employees on fixed contract in non-core activities. The report found that management level workers were most likely to be hired directly by the client company as a contract worker. Technical and support staff were more likely to be outsourced through labour agencies. The report also found that companies intentionally terminated contracts of permanent employees and then re-hired them as contract workers or outsourced them through labour agency.

In the Batam EPZ, outsourced workers were hired through a labour agency with which they signed a contract. The agency made them legally responsible if they could not do their work. If they were ill, pregnant or hurt on the job, the user company

would immediately retrench them. These outsourced workers were likely to be fined by the labour agency for breach of work agreement for the provision of labour.

There are no precise figures of the percentage of men and women working under precarious work. However, according to KSPI and KSBSI, more unmarried women are employed under precarious work. The companies are preferred to recruit young workers between the ages of 18 to 25 years old.

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

KSPI and KSBSI state that “precarious workers” receive low wages, no job security, less social protection and limited benefits. Contract and outsourced workers who perform the same work for the same hours as their full-time co-workers receive lower wages. The wages of contract workers are 17% lower than the wages of permanent labourers and the wages of outsourced workers are 26% lower than the wages of permanent labourers²⁴. All of these employment forms are short term and provide no guarantee of renewal. Based on the study conducted by the SPMI-KSPI in seven cities in 2012, 79.6% of the outsourced labourers are under contracts of less than one year.

Contract and outsourced labourers are typically not covered by social protection schemes. Under the 1992 social security law and Ministerial Decree No.24/2006, companies having at least ten workers or paying at least Rp. 1.000.000 (One Million Indonesia Rupiah) or about USD 100 in monthly salaries to their workers are required to register their workers with Jamsostek²⁵. Most employers fail to do so. In case their contracts are terminated, contract and outsourced workers do not receive any benefits.

The ILO Working Paper found that in metal industry enterprises in Jakarta contract workers earn only the basic wage. They do not receive any normal benefits such as meal, transport or family allowances. The paper also refers to earlier surveys that found that although both precarious workers and regular, permanent workers do the same jobs and the same working hours, there are discrepancies with regard to basic wages, allowances, and social security. The average differential is 17.45 per cent between outsourced and permanent workers and 14 per cent between contract and permanent workers.

An ILO publication on Indonesia’s Global Jobs Country Scan stated that the majority of informal workers did not participate in the workers’ national social security programme (Jaminan Sosial Tenaga Kerja or Jamsostek). To improve informal workers’ access to this program, the Government provided subsidies to reduce informal workers’ contributions in ten regions in 2010-11. The impact was, however, small as only 595,861 informal workers came under the Jamsostek programme as of April 2011.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

Article 104 of Law No. 13/2003 states that every worker has the right to form union and become member of trade/labour union. At least 10 members are required to form a union. However, in practice, the rights to freedom of association and to bargain collectively are effectively denied. Workers are afraid to join a union for fear they may lose their jobs or their contract will not be extended. Under these circumstances it is very difficult to organise new members and therefore weakening the strength and bargaining position of trade unions.

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

KSPI (Konfederasi Serikat Pekerja Indonesia)

KSPI has identified organising as a priority, and considers the inclusion of precarious workers in trade union structures as critical to improve their situation and strengthen the movement as a whole. The union has also adopted the HOSTUM (Stop Outsourcing and Low Wages System) campaign to improve wages for all workers, including precarious workers. As most precarious workers are not covered by the social security system, the union is also campaigning to extend social security to all.

As a part of the actions against outsourcing, the KSPI has issued an instruction letter to all of its affiliates to fight against outsourcing. The instruction letter contained an appeal to whole range of KSPI unions to negotiate with employers to remove or at least reduce the use of outsourcing system in the company. Furthermore, KSPI also published leaflet, flyers and bulletin as well as doing press conference on the issue of contract workers and outsourcing.

In 2012, the union convened mass rallies under “HOSTUM” slogan. In the May Day 2012, more than 100.000 workers

joined the May Day rally organised by KSPI in Jakarta. Mass rallies were also organised on social security for all. In 2014, health insurance will be given to all Indonesian citizens.

FSPMI, an affiliate of KSPI, also organised more than 100.000 contracted and outsourced workers. As a result more than 70% of these contract and outsourced workers are now converted into permanent workers, mainly in Batam, Bekasi and Karawang West Java.

The KSPI also provides labour lawyers and advocates to their members to file lawsuits to Industrial Relations Court to denounce the companies that violate regulations on fixed-term contracts and outsourcing under the Manpower Act.

KSBSI (Konfederasi Serikat Buruh Sejahtera Indonesia)

KSBSI has identified legislative reform as necessary to limit and/or prevent certain forms of precarious work. Further, there is some confusion on the interpretation of existing laws on contractual employment and labour outsourcing which the union wants clarified or amended. KSBSI is also campaigning for social security for all workers.

The fact that precarious work amounts to more than 40% in many sectors such as textile and garment, metal industries, construction, banking, hotel etc. cannot be ignored. KSBSI has tried to respond to this situation in two ways. First, it has started to build new structure which provides practical help and assistance for precarious workers on an individual basis. Secondly, it has developed special organizing and recruitment campaigns for certain group of precarious workers.

KSBSI provides regular trainings for their members, including precarious workers. The trainings given to precarious workers focus on workers' rights, basic trade unionism and collective bargaining. As there are significant numbers of precarious workers not covered by collective agreements, KSBSI have focused on reaching agreement for these workers, in particular on wages.

JAPAN



As John Evans and Euen Gibb explained in 2009,

Japan started to see 'nonstandard' employment build in the 70s then rise rapidly in the 90s. The rise of precarious work in Japan has particularly severe gender, inequality and broader social implications.[.] This has caused several authors, including OECD researchers, to describe the situation in Japan as one of growing 'dualism' where some workers remain in 'standard' employment while a growing group find access to this status increasingly unlikely.²⁶

Again, as Evans and Gibb explained,

The combination of a prolonged recession driving corporate restructuring towards a more western model; a clearly articulated and implemented deregulation on the part of government, an active push from the employers' side to popularize and implement differential statuses for workers; a pre-existing insider/outsider division at the level of the workplace and an employer-based system of social protec-

tion have offered a recipe for severe negative consequences resulting from the rise in precarious work in Japan.²⁷

The situation has changed little in the 5 years since that report was authored. According to a recent report of the Japanese Institute for Labour Policy and Training, non-regular employees accounted for 35.2% of all employees in 2012. Women were over twice as likely to be employed in precarious forms of work – 54.5% compared to 19.7% for men. Among precarious form of employment, 5% are temp agency workers, 19.5% are contract/entrusted workers, 7% other, with the vast bulk of being part-time work – 68.5%.²⁸

Wages in Japan have stagnated or fallen, from an average wage of 4,673,000 yen in 1997 to 4,080,000 in 2012. At the same time, working hours are increasing, with 13% of workers working 60 hours a week and 2.7% working 75 hrs. Indeed, death from overwork is a growing problem in Japan.

However, unions are fighting back. As described below, trade unions pushed for substantial reforms of the contract and dispatch work laws in 2012. A campaign to organize and regularize precarious workers is also underway. The Japanese Trade Union Confederation (RENGO) made better conditions for irregular workers one of the objectives in the 2014 annual wage talks, including introduction of a minimum ¥1,000 hourly wage. Just recently, over 5,000 of 11,500 non-regular workers at the Bank of Tokyo-Mitsubishi joined a labour union.

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

Article 116 of the Labour Standards Act does not apply to national public officers.²⁹ Additionally, the Labour Contract Act excludes national and local public officers. The Local Public Service Act prohibits police officers and firefighters from forming or joining a union.³⁰ The Labour Union Act also does not cover public officers.³¹ Thus, workers employed on precarious contracts, such as officers engaged in regular services employed on a temporary or fixed-term contract basis do not have the right to bargain collectively on these issues.³²

Temporary Fixed-Term Contracts

The use of short, fixed-term contracts is a rapidly growing trend in Japan. Fixed-term contract workers, referred to variously as *jun-shain*, *rinjikou*, *kikankou*, are typically hired as specialists or generalists. The former are usually hired to provide skilled labour on a short term basis while the later performs more routine work. Those who have reached mandatory retirement age, *shokutaku*, are often reintroduced to the labour market via short term contracts. Students and young workers are often hired on short-term, part-time contracts, known as *arbeit*. However, young workers often remain stuck in this employment relationship, forming a class often referred to as *freeters*.

Under the 2007 *Labour Contract Act*, the issue of fixed-term contracts is squarely addressed and provides a modicum of protection. Article 17 provides that an employer may not dismiss a worker until the expiration of a contract unless there are unavoidable circumstances. Further, an employer “shall give consideration to not renewing such labour contract repeatedly as a result of prescribing a term that is shorter than necessary in light of the purpose of employing the worker.”

Article 14 of the *Labour Contract Act* sets the upper limit for a term contract of three years. However, that is extended to five

years for with workers of an advanced level who have expert knowledge, skills or experience or with workers aged 60 years or older. The upper limit of the labour contract, which prescribes the period necessary for the completion of a specific project, should be the same as the period required for the completion of all the composite parts of the project. Based on Article 14, paragraph 2 of the *Labour Standards Act*, which authorizes the Ministry of Health, Labour and Welfare to prescribe standards regarding the expiry of contract terms, the Ministry issued “Guidelines on the Conclusion, Renewal and Refusal of Renewal of Fixed-term Labour Contracts (Notification No. 357 of the Ministry of Health, Labour, and Welfare [MHLW] in 2003). These guidelines provide that employers must clearly state whether workers’ contracts were being renewed or not and explain the criteria used. The Act also provides for 30-day’s notice of dismissal (or pay in lieu of notice). Notice is not required, however, for day labourers, persons on a fixed-term contract of less than 2 months (unless on a consecutive renewal), seasonal workers of less than 4 months (same) and probationary workers.

In 2012, the *Labour Contract Act* was substantially amended. Article 18 now allows workers to request to their employers a conversion from fixed-term to indefinite term contracts after five total years of employment under any number of fixed-term contracts. However, there are limitations. The period does not include any fixed-term contract which commenced before April 1, 2013, the date the law went into effect. Further, if there is any employment gap of over 6 months, any fixed-term contracts before that period are not counted for calculating the total period. The worker must also request the conversion before the expiration of the current contract. If he or she does, then an indefinite contract period starts immediately after the expiration of the fixed-term contract.

Article 19 was amended to provide that in some cases the non-renewal (or termination of the contract) can be annulled. If a fixed-term contract which has been renewed in the past is not renewed, it can be treated as equivalent to a dismissal under an indefinite contract. Similarly, if the worker has a rational reason to believe that the fixed-term contract will be extended at the end of the term (based on the totality of the circumstances) if the non-renewal is deemed not socially acceptable. Article 19 is a codification of two Supreme Court cases (*Toshiba Yanagicho Plant and Hitachi Medico*).

A new Article 20 prohibits “unreasonably different” wages and working conditions between fixed-term and indefinite term workers. In the case in which the difference is regarded as unreasonable, the provision of working conditions shall become invalid and compensation awarded. The invalid working conditions are basically to be changed to the same conditions that are prescribed

for indefinite-term contract workers (Official Notice No. 0810-2 issued by director of Labour Standards Bureau, MHLW in August 10, 2012 [partial amendment on October 26, 2012]).

In regards to public servants, there are officers engaged in regular services who are on temporary and fixed-term contracts, and their contracts can be fixed-term or part-time or short-time working arrangements.³³ However, public service in Japan is regarded not as an employment relation but an “appointment” relating to administrative actions, and thus labour laws, such as the Labour Standards Act, Labour Union Act and Labour Contract Act, are not applied in principle to these public workers. The Labour Standards Act is only partially applied.

Misclassification

The judgment concerning whether a person is a worker in an employment relationship or an independent self-employed individual depends not on the terms used in the contract between the parties but is judged comprehensively based on the realities of the relationship. Notably, there is a movement in Japan now to switch contracts over from employment to individual work contracts in order to evade labour laws and the application of labour and social insurance.

In this context, the Ministry of Health, Labour and Welfare (MHLW), regarding the “employeeeness” (the degree to which the person can be considered to be in an employment relationship) of bicycle messengers, who have outsourcing agreements rather than labour contracts, issued a notification in September 2007 titled “The Employeeeness of Bicycle Messengers and Bike Riders,” which held the view that these workers fall into the category of employees if certain conditions are met. In April 2011, the Supreme Court also handed down a decision that the “employeeeness” is judged based on the true form of the employment relationship. In subsequent cases, including the New National Theatre Foundation Case (on the “employeeeness” of opera singers) and the INAX Maintenance Case (on the “employeeeness” of customer engineers) resulted in decisions affirming their status as employees under the Labour Union Act.

The MHLW issued a report on the “Industrial Relations Act Research Meeting” in July 2011, where the above Supreme Court decisions and other matters were analysed and the factors for judging a worker as an employee under the Labour Union Act were summarized. This was in line with ILO Recommendation 198 (Employment Relationship Recommendation). It is hoped that the assessment of this report will lead to the securing of the right to organize, the right of collective bargaining and the right of collective action for those people who are working under what are formally outsourcing agreements or contract work.

Nonetheless, there still remain issues such as the relations of economic dependence and employer subordination when judging “employeeeness,” and a review of the judgment criteria for “employeeeness” under the Labour Standards Act.

Triangular Employment

Dispatch Workers

Worker dispatch, *roudousha haken*, is when a worker is employed by one person (dispatch agency) to be engaged in work for another person (client) under instruction of the latter, but while maintaining their employment relationship with the former. This is distinguished from a contract labour situation, where the contractor continues to provide supervision and direction – not the client. Authorised worker dispatch agencies are registered and licensed to operate by the Ministry of Health Labour and Welfare and are categorized as general or specified. The Worker Dispatch Act (renamed the *Act for Securing the Proper Operation of Dispatching Undertakings and the Protection of Dispatched Workers* in order to emphasize worker protection) and its implementing regulations govern the employment of dispatched workers. The law underwent a significant revision in 2012.

There are two major kinds of dispatch – registered type and regularly-employed type. In the first, the dispatch company registers workers and after concluding a contract with the client then signs a labour contract with the worker and sends him or her to work at the client’s workplace. The contract ends upon the conclusion of the dispatch work. In the latter situation, the dispatch company employs the worker and sends them to work for a client. When the work for the client is completed, the worker still retains an employment relationship with the dispatch company.

While originally dispatch workers could only be employed in sixteen job classifications (in 1986, then twenty-six in 1996), the law was substantially liberalized and now dispatch workers can be employed in nearly every sector. Article 4(1) only prohibits worker dispatching in port transport services, construction work, security services, and medical professions.

The law provides that a client cannot receive services from a dispatched worker for the same work (except as below) for more than one year. The service period can be extended up to three years, but the client must first listen to and give consideration to opinions of the union comprising a majority of the workers on the work for which the worker dispatching is to be carried out. However, workers that fall under the twenty-six “special job categories” listed in the Cabinet Order face no limitations on years of service under dispatch.³⁴ A dispatch contract can also be arranged on fixed-term for a project of

three years or less, “fixed-days” jobs, jobs to cover workers on maternity, child care and family care leave and jobs of workers on long-term care leave.

Under Article 40-3, the client company “shall endeavour” to employ the dispatched worker concerned based on the request from the worker himself/herself whose contract with the dispatching business operator will expire. The client companies falling under this obligation are those who have received services from the same dispatched worker for the same type of work from the dispatching business operator for more than one year within the possible dispatching period and have the intention to employ a worker in order to continue the work concerned for a longer period of time. This does not apply to the twenty-six special job categories.

Under the 2012 revision, very short term dispatching is now prohibited. Article 35-3 generally prohibits day labour (1-day contracts) due to the instability of the employment, and also bars fixed-term contracts of less than 30 days. Short-term contracts were often exploited and used for illegal dispatching.

Another revision, Article 23-2, provides that a dispatching business operator which belongs to the same group companies shall not provide more than eighty per cent of the total working hours of dispatched workers to its group companies. In Japan, large groups of companies have used dispatch work to minimise direct hire by setting up their own internal dispatch agencies that they effectively control that supply workers only to that group of companies. Now, a worker dispatch agency must limit the percentage of dispatched worker working hours they provide to companies belonging to the same group as the agency to 80%. The purpose is of course to have the agency’s dispatch workers directly employed by the client company, rather than continue on as dispatch workers.

Another recent protection provides that when a client uses the services of a dispatched worker in violation of the Act, including use for a period exceeding that for which the dispatching was possible, the client is considered to have offered a labour contract to the dispatched worker concerned on the same terms and conditions. This provision enters into force on October 1, 2015. However, these provisions do not necessarily require a client to employ the dispatched workers as a regular employee. Further, if the client company was unaware of the illegality of the relationship, the provision does not apply. However, it is believed that this will be interpreted narrowly in implementing regulations so that the company cannot simply plead ignorance and evade the protection of the law. For example, it is the case that a dispatched worker will be disguised as belonging to one of the twenty-six job categories for which there is no cap on the dispatch period. If a

company were to receive the services of dispatch worker which exceeds the dispatch period as they don’t actually belong to one of the twenty-six job categories, the employer would be deemed to have offered a contract of employment.

The Act also now prohibits the dispatching company from dispatching a worker, who has been separated from employment, to the client for whom the dispatched worker had previously performed work, within one year following the separation from employment (Article 35-4). Similarly, the client is prohibited from employing a dispatched worker who has been separated from employment within one year (Article 40-6). The reason for this amendment is to discourage clients from dismissing employees and hiring them back through a dispatch arrangement under inferior terms and conditions of employment.

Finally, Under Article 30-2, the dispatching company is now required to try to ensure equal treatment between dispatched workers and the directly employed workers engaged in the same type of work. Under the amendment, a dispatching business operator shall endeavour to take measures to promote shifting dispatched workers who are retained on fixed-term contracts to being retained on contracts without fixed-terms. When a dispatching business operator determines the wages for dispatched workers, it shall (i) consider balancing the wages of dispatched workers with those of the regular workers who engage in the same type of work in the same client company, (ii) disclose information such as the ratio on the difference between the fees received for worker dispatching and the wages of the workers dispatched over the fees received for worker dispatching and (iii) clearly indicate the fees received for worker dispatching to each dispatched worker at the time of the commencement of their employment and of each dispatch. If a worker dispatch contract is cancelled for the convenience of a client company, at the time of such cancellation the receiving company shall be obliged to ensure that new employment opportunities are provided for the dispatched worker. The dispatching business operator and the client company shall stipulate these matters in every worker dispatch contract. Under Article 40(3), the client company is required to provide sufficient information to the dispatching business operator.

There is no legal restriction on subcontracted workers or dispatched workers joining the trade union of their prime contractor or of the client where the dispatched worker performs his/her task. If the subcontracted or dispatched worker joined a union that concluded a collective agreement, then the agreement also applies to them. In regards to bargaining with the primary employer, in accordance with common law, “in the case in which not the employer of the dispatched worker but a business operator accepted a worker dispatching service from the employer and

engages the dispatched worker in his/her own business, and the operator holds a position to be able to control and make a decision on the basic working conditions of the worker in a practical and concrete manner, to the extent to which the operator can be considered as the employer, even the operator's commitment is partial." In such case, the client where the dispatched worker performs the task would have an obligation to accept collective bargaining. In reality, however, there are many cases in which collective bargaining is rejected by the client and thus the right of dispatched workers to bargain collectively are infringed.

Subcontracting

The question of subcontracting in Japan is largely regulated from the viewpoint of competition law and fair trade. For example, in order to protect small and medium enterprises from abuses by parent and counterparty companies with a dominant bargaining position, laws such as the Anti-Monopoly Act, Act Against Delay in Payment of Subcontractor Proceeds, Etc. to Subcontractors, and the Act on the Promotion of Subcontracting Small and Medium Enterprises have been enacted.

STATISTICAL DATA OF PRECARIOUS WORK

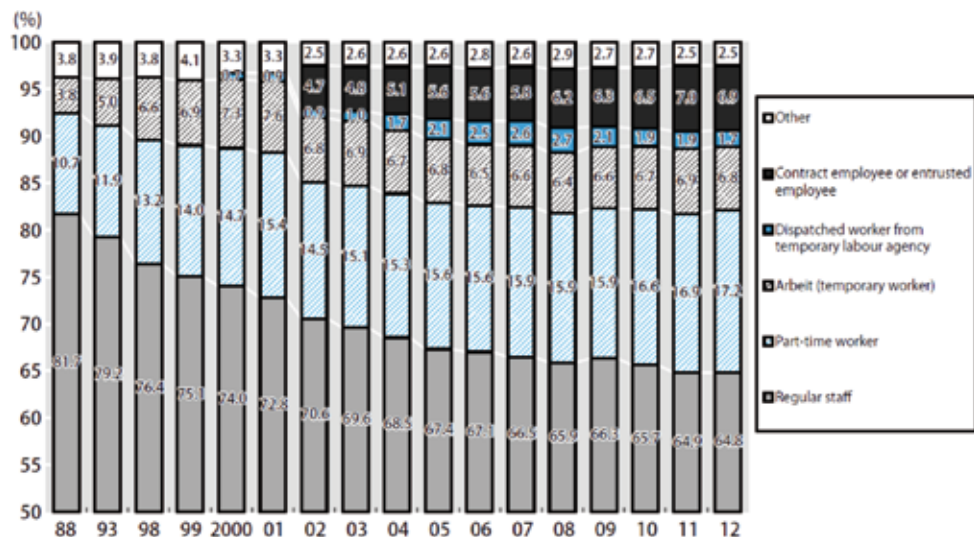
As official statistics demonstrate, use of precarious forms of employment is on the rise. As the first chart below demonstrates, the share of regular work has shrunk to just under 65% of the workforce in 2012. At the same time, other forms of work have increased, though dispatch work has contracted from its peak

of 2.7% in 2008. Precarious work can be found throughout the economy. Part-time work is particularly clustered in the accommodations, food and beverages sector (60%), though also high in the retail and personal services sector. Dispatch work is highest in IT (8.5%), though also present in manufacturing (4.9%), transportation (3.7%) and finance and insurance (5.6%). Contract employment is highest in education (9.7%). Non-regular employment is about 25% in large firms over 1000, and increase to roughly 40% as the size of the firm decreases (though the highest proportion is in firms from 50-99 workers – 42.3%).

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Workers engaged in fixed-term contract and worker dispatching service are often subjected to the fear of their contract not being renewed and as such they have difficulties exercising their rights, such as to take annual paid vacation leave, request extra payment for overtime and to join or form trade unions. The ILO reports a significant wage gap between regular and non-regular workers (using June 2010 data). While the compensation for full-time regular workers is 310,000 yen, it is just below 200,000 for full-time non-regular workers, and just below 90,000 for part-time workers.³⁵

The wage gap also has a gender dimension. The ILO report finds an overall estimated wage gap between regular and non-regular workers of 86 percent for male fixed-term contract workers and 82 for female workers. The differential is 94



(%)

Industry and size of enterprise	Total	Regular staff	Workers other than regular employees	Form of employment							
				Contact employees	Entrusted employees	Transferred workers	Dispatched workers	Temporary workers	Part-time workers	Others	
Total (2007)	(100.0)	100.0	61.3	38.7	3.5	2.4	1.5	3.0	0.7	22.9	4.7
	[100.0]	[62.2]	[37.8]	[2.8]	[1.8]	[1.2]	[4.7]	[0.6]	[22.5]	[4.3]	
Industry											
Mining and quarrying of stone and gravel	(0.1)	100.0	83.9	16.1	2.6	4.2	1.9	1.0	0.5	3.4	2.3
Construction	(6.3)	100.0	84.8	15.2	3.2	2.1	1.2	1.9	0.7	3.0	3.1
Manufacturing	(21.3)	100.0	72.7	27.3	2.2	2.6	1.7	4.9	0.4	10.5	5.1
Electricity, gas, heat supply and water	(0.4)	100.0	91.7	8.3	0.8	2.1	1.5	1.4	0.0	1.5	1.0
Information and communications	(3.5)	100.0	77.3	22.7	3.9	1.3	3.0	8.5	0.3	3.9	1.7
Transportation and postal services	(6.7)	100.0	70.0	30.0	3.9	5.5	2.0	3.7	1.5	10.1	3.6
Wholesale and retail trade	(21.1)	100.0	49.0	51.0	3.0	1.6	0.9	1.8	0.6	38.6	4.5
Finance and Insurance	(3.5)	100.0	71.4	28.6	2.5	2.8	6.8	5.6	0.1	8.9	1.9
Real estate and goods rental and leasing	(1.5)	100.0	61.5	38.5	4.0	4.5	3.0	2.3	0.2	19.2	5.3
Scientific research, professional and technical services	(2.7)	100.0	77.6	22.4	4.3	2.3	3.6	4.1	0.3	6.0	1.8
Accommodations, food and beverage services	(7.8)	100.0	27.3	72.7	1.9	0.7	0.2	0.6	1.6	60.0	7.6
Living-related and personal services and amusement services	(3.8)	100.0	45.4	54.6	4.9	1.8	0.9	1.4	2.4	36.8	6.4
Education, learning support	(3.1)	100.0	56.5	43.5	9.7	1.8	0.4	1.7	1.7	23.1	5.1
Medical, Healthcare and welfare	(9.9)	100.0	66.8	33.2	3.6	1.5	0.5	1.1	0.3	21.5	4.8
Compound services	(1.4)	100.0	71.6	28.4	4.3	2.0	0.3	0.4	0.7	11.3	9.4
Services (not elsewhere classified)	(6.7)	100.0	51.6	48.4	6.4	4.7	2.5	4.0	0.7	24.3	5.7
Size of enterprise											
1,000 employees and more	(5.5)	100.0	74.5	25.5	4.1	2.3	2.0	5.1	0.3	7.7	3.9
500-999 employees	(6.0)	100.0	66.3	33.2	4.3	2.3	1.7	6.5	0.4	13.2	4.7
300-499 employees	(4.7)	100.0	62.8	37.2	4.7	3.0	1.6	5.0	0.4	17.8	4.8
100-299 employees	(16.4)	100.0	62.1	37.9	4.3	3.2	1.6	3.8	0.6	19.9	4.6
50-99 employees	(18.1)	100.0	57.7	42.3	4.0	2.9	1.7	3.3	1.2	24.8	4.4
30-49 employees	(8.7)	100.0	60.1	39.9	3.2	2.8	1.2	2.2	0.5	24.9	5.0
5-29 employees	(40.7)	100.0	60.1	39.9	2.6	1.6	1.4	1.6	0.8	27.0	4.9
Sex											
Male	(58.2)	100.0	75.3	24.7	3.1	3.2	2.2	2.2	0.5	10.3	3.3
Female	(41.8)	100.0	41.9	58.1	4.0	1.2	0.6	4.0	1.0	40.5	6.7

Source: The Report of *Survey of the Diversification of Employment Status, 2011*, Ministry of Health, Labour of Welfare

Notes: 1) Figures in [] are the ratio of 2007.

2) Figures in () are the ratio in each industry, size of enterprise, and gender (total =100).

percent for male regular dispatched workers and 90 for female workers. For registered dispatch workers, the gap is 81 for males and 80 for females. The biggest difference is for part time workers, where the gap is 69 percent for males and 52 percent for females.

Of note, the Committee on the Elimination of Discrimination against Women, the UN body supervising the implementation of the Convention on the Elimination of Discrimination against Women (CEDAW) found in 2009 that the disproportionately high number of women on temporary contracts violated of the Convention.

45. [The Committee] is also concerned about the persistence of a very high gender-based wage gap of 32.2 per cent in hourly earnings among full-time workers and of an even higher gender-based wage gap among part-time workers, the predominance of women in fixed-term and part-time employment and illegal dismissal of women due to pregnancy and childbirth. The Committee also expresses concern regarding the inadequate protections and sanctions within existing labour laws.³⁶

The Committee recommended that:

the State party take concrete measures, including temporary special measures in accordance with article 4, paragraph 1, of the Convention and the Committee's general recommendation No. 25, to eliminate both vertical and horizontal occupational segregation and close the gender-based wage gap between women and men, as well as measures to prevent the practice of illegal dismissal of women in cases of pregnancy and childbirth.³⁷

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

Trade unions have seen membership decline, in part due to the use of indirect forms of employment. RENGO has made organizing precarious workers a priority of their work.

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

- Promote fixed-term and dispatched workers to join/organize a trade union

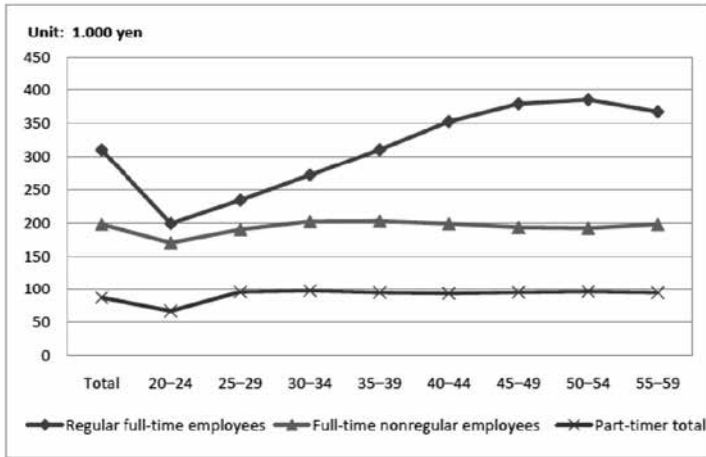
- Improve treatment of fixed-term contract and dispatched workers
- Convert the contract of fixed-term and dispatched workers to regular employment, and promote their capacity building
- Promote the application of social/labour insurance of fixed-term and dispatched workers

Specifically, RENGO has determined to organize nationwide campaigns aiming at maintaining or upgrading the legal standard of the minimum wage by region through promotional activities at 300 locations across Japan. The union is also organizing nationwide campaigns aiming at the prevention of the deterioration of the rules for labour protection such as the Worker Dispatching Act. Additionally, the union is organizing nationwide labour consulting activities for non-regular and unorganized workers, including setting up telephone line for free-consultations at the prefectural trade union offices. Staff provides consultations on a daily basis and promote the joining of a trade union.

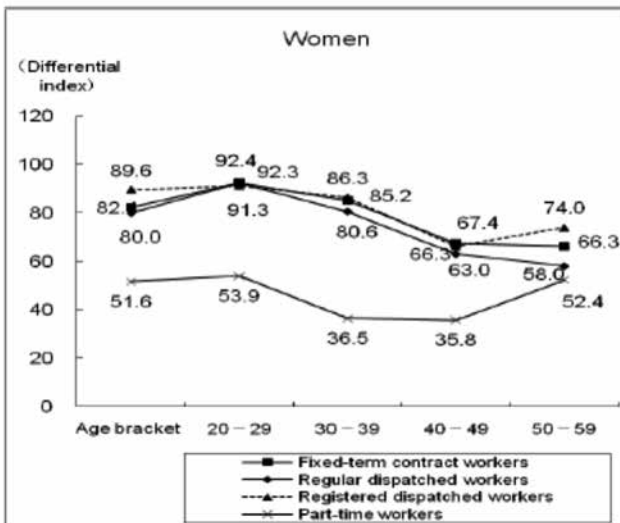
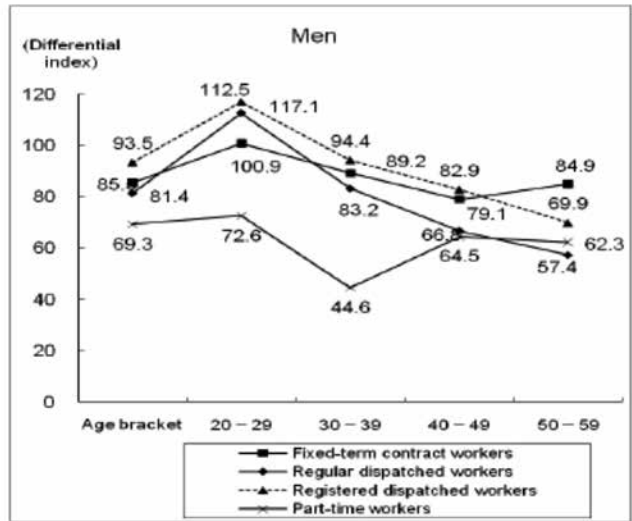
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Wage differential index by gender and age after major grouping by academic background and occupation (regular employees = 100)



REPUBLIC OF KOREA



Precarious work is particularly acute in Korea, where over a third of the workforce is now labouring under some form of precarious work arrangement. This has created a two-tiered labour market (and indeed society), with little mobility between these two. Precarious workers earn roughly 40% less than regular workers doing the same or similar work. Women workers are also disproportionately affected, making up a larger share of the precarious workforce.

Though this has been a serious problem since the 1990s, the IMF is finally raising the alarm. In a speech delivered at Seoul National University on 5 December 2013, Managing Director Christin Lagarde stated:

A key problem [in the labour market] is duality. Regular workers have high levels of job protection and decent wages and benefits. Non-regular—or temporary or part-time—workers have low wages, little employment security, inadequate training, and weak social insurance coverage. They make up about a third of the labour force.

She also noted that women's participation in the labour force is the lowest in the OECD, at about 60% a full—23% below Korean men. The gender earnings gap is also the highest in the OECD. Indeed, the ILO Committee of Experts has also suggested that the concentration of women in precarious forms of employment may violate the country's obligations under ILO Convention 111 on employment discrimination and urged the government to:

take the necessary measures, including through the qualitative and quantitative strengthening of enforcement, to protect fixed-term, part-time and dispatched workers against discrimination, particularly women, and to provide information on the impact on precarious employment of the set of measures taken in 2011, including measures with a view to converting non-regular employment into regular employment and measures for the protection of subcontracted workers.³⁸

Precarious work is found throughout the Korean economy, from manufacturing, to IT services to education. For example, the use of precarious work in the shipyards of Ulsan is common-

place. Hyundai Heavy Industries builds massive ships, not by directly employed workforces built instead by dozens of separate crews each headed by a subcontracted employer, which are responsible for a small section of the ship. The pay is very low and workers are often frightened to report injuries on the job, which are common, for fear of losing their jobs. Past efforts to unionize workers were crushed, though workers are trying to rebuild though fear of blacklisting and being frozen out of the trade prevents many workers from joining a union.³⁹

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

The Labour Standards Act is partially applicable or inapplicable to: 1) any business or workplace that ordinarily employs fewer than 5 workers; 2) any business or workplace with employees of only relatives living together; and 3) a worker who is hired for domestic work. The government justifies the partial application of the Act to those in the first category due to 'a limitation of the labour inspection' and 'actualities of small businesses'.⁴⁰ Those in the second category are excluded from the application of the Act since legal interference by the state in family relations is regarded as undesirable.⁴¹ The government argues that the law does not apply to domestic workers as any inspection by the state cannot be carried out without invasion of privacy. However, there is growing criticism of this position within Korea together with a demand for measures to protect domestic workers and to include them within the application of labour laws.⁴²

Temporary Fixed-Term Contracts

The *Act on the Protection of Fixed-term and Part-Time Employees* was enacted on 21 December 2006 ("the Act"). Under article 3(1), the Act applies to businesses or workplaces ordinarily employing five workers, though some of the provisions may apply to smaller businesses by Presidential Decree under article 3(2). The Act covers State and local government agencies regardless of the number of workers they ordinarily employ under Article 3(3). Under the Act, as amended in 2007, employees may hire workers on fixed-term contracts for any reason regardless as to whether it is temporary in nature. The Act does not limit fixed term contract work to any particular economic sectors.

Under article 4(1), an employer may hire a worker on a fixed-term contract for a total consecutive employment period not exceeding two years. Although the Act does not limit the number of renewals, the maximum length of a fixed term contract is 2 years⁴³. Further, if a fixed-term contract is repeatedly renewed, the total consecutive employment period shall not exceed two years.

Under Article 8(1), the employer is not supposed to treat in a discriminatory fashion a fixed-term worker on account of his employment status relative to workers in the same or similar kinds of work under a regular contract. If the worker does experience discriminatory treatment, he or she may file a claim within 6 months (amended in 1 Dec 2012) under Article 9. A correction order may be made by the Labour Relations Commission under Article 12. Failure to comply with the correction order may lead to less than 0.1 billion won for fine for negligence. Despite these protections in law, in practice short term contract workers suffer worse working conditions than permanent employees in relation to pay, working hours, holidays and other entitlements including pension rights, disability allowances and unemployment benefits.⁴⁴ Short term contract employees have no protection against periods of unemployment, sickness, injury and retrenchment.⁴⁵ They also have limited access to protective equipment and skills training opportunities.⁴⁶

Unlike workers on indefinite contracts, short term contract employees are not protected from redundancy. In Korea, employers must provide 30 days' notice of retrenchment under Article 26 of the *Labour Standards Act*.⁴⁷ However, the 30 day notice requirement does not apply to the following precarious workers under Article 35:

- A worker who has been employed on a daily basis for less than three consecutive months
- A worker who has been employed for a fixed period not exceeding two months
- A worker who has been employed as a monthly-paid worker for less than six months
- A worker who has been employed for seasonal work for a fixed period not exceeding six months; and
- A worker in a probationary period.

Furthermore, government approval is not required for re-trenchment.⁴⁸ All workers, including short, fixed-term contract employees, are however protected from dismissal without justifiable reason under article 23 of the *Labour Standards Act*.

Under Article 4(2) of the Act on the Protection of Fixed-term and Part-Time Employees, a fixed-term contract is converted to a permanent contract after a period of two years. However, near the expiration of the two year period, many employers make a large number of employees with almost two years of service redundant. There are no mechanisms to prevent employers making short contract employees redundant prior to reaching the maximum 2 year period. However, an employer cannot continuously renew a short term contract for a period longer than 2 years under article 4(1) of the Act.

Misclassification

Article 2(1) of the Labour Standards Act defines the term 'worker'. According to case law, there are specific indicators to test the whether there is a dependency. Those indicators are characteristics of remuneration, whether the work is carried out according to the instructions and under the control of an employer, whether the work is carried out at one specific workplace, etc. After considering all those factors comprehensively, it is decided whether a person carrying out work is under an employment relationship. However, workers who perform the following occupations are automatically classified as independent contractors:

- freight operators and drivers (such as concrete mixer truck drivers, dump truck drivers, cargo truck drivers, on call drivers, couriers and water metre checkers)⁴⁹
- private tutors
- golf-course caddies; and
- insurance salespersons

In practice, independent contractors in Korea are regular wage workers subject to the direction and control of the business. Usually, independent contractors work under an individual contract with an employer who controls their wages, hours and working conditions. Since the 1990s, there has been an increase in the number of self-employed workers in Korea. In the construction sector, companies regularly force employees to become independent contractors. In 2006, independent contractors constituted over 90% of ready-mixed cement drivers and dump truck drivers.⁵⁰ Independent contractors are not

covered by any labour legislation and must pursue contractual issues through the courts.

In recent years, the courts have been more willing to expand the definition on employees so that an independent contractor can be classified as an employee under the *Labour Standards Act*. Workers who have been misclassified by an employer as an independent contractor must pursue remedies and penalties through the courts. The courts may order that the independent contractor be deemed an employee and the employer must comply with the provisions of the *Labour Standards Act*. This may open the employer to penalties under the penal provisions in Chapter XII of the *Labour Standards Act*.

Triangular Employment

Dispatch Workers

The *Act on the Protection of Dispatch Workers* was enacted in 1998. It regulates how workers may be hired by a dispatching (sending) company for work at a third party (using) employer. The owner of a dispatching business dispatches workers and the recipient company uses the dispatched workers for a maximum of 2 years. The period of service is limited to one year under Article 6 but may be renewed once for another year.⁵¹ Under Article 5, workers may be dispatched in jobs given their nature and required professional knowledge, skills or experience. The regulations specifically designate 26 such jobs including work requiring expert knowledge.⁵² However, Article 5(1) specifically excludes dispatch work in the operation of the direct production process in the manufacturing industry. Article 5(3) also excludes work on a construction site, stevedoring, seamen's work harmful and hazardous work and other work unsuitable on grounds of worker protection. The scope of occupational categories where dispatch labour is legal may be expanded by Presidential Decree. In 2009, the Ministry of Labour announced that it intended to expand the occupations allowed for dispatch workers. There is no limit on the amount of dispatch workers in a single workplace.

Before using dispatch labour, under Article 5(4), the primary user employer is supposed to have "sincere consultations" with the trade union representative (if representing the majority of workers), or if no such union, a person representing the majority of workers. This rarely happens in practice however. If the employment continues past the two years, the dispatched worker will be considered a direct employee under Article 6.

Under Article 20, the owner of the dispatching company and the owner of the recipient company enter into a written contract which outlines work hours, wages, health and safety and other work related issues. A dispatch worker is to enjoy equal treatment in comparison with workers performing the same work in the business of the using employer under Article 21. Under Article 34, both the sending and using companies are considered employers and the using employer is liable in circumstances where the dispatch company fails to pay wages.

In reality, however, dispatch work is insecure as principal employers terminate the contracts and are not held accountable as employers. Dispatch workers almost always earn less than regular workers and it is difficult for them to join or form a union and to participate in union activities as their contract may be easily terminated. Dispatch workers do not have the right to bargain with the principle “user” firm since the direct employment relationship is with the dispatcher even though the contracting company decides their working conditions. Employers, when confronted with pressure to bargain, will terminate the contract without any legal ramifications.

Less than 1% of workers are provided by temporary labour agencies.⁵³

There are many cases where workers are dispatched under the guise of inter-company subcontracts to avoid the prohibition to use dispatch workers in manufacturing. For example, a large corporation will incorporate a subsidiary company to which workers are dispatched by an inter-company subcontract. The law does not adequately protect workers who are illegally employed in disguised employment relationships. For example, Choi Byeong-seung, was a dispatched labourer working at a Hyundai Motor plant in Ulsan for more than two consecutive years. He is a member of the Hyundai Motor Irregular Workers' Union. In 2005, Choi Byeong-seung was unfairly dismissed by Hyundai for his union activities. In January 2011 and February 2012, court decisions identified him as ‘illegally dispatched labour’ and not ‘subcontracted labour’. The courts recognized him as a full time employee directly employed by Hyundai. Hyundai denied implementing the judgment in an announcement in August 2012.⁵⁴

Following Hyundai's denial, the Korean Metal Workers' Union (KMWU) initiated industrial action for the regularization of all subcontracted workers who work for more than two years. Hyundai responded with 15 legal actions requesting damages of 16.2 billion won. Approximately 1,000 workers were disciplined over taking industrial action including 104 dismissals and 659 suspensions. The ILO Committee on Freedom of Association (Case 2602) examined the case and requested the

government to develop appropriate mechanisms to strengthen the protection of subcontracted/agency workers' rights in consultation with the social partners.⁵⁵ Recently, the KMWU also complained to the Committee on Freedom of Association about anti-union acts against workers who were illegally disguised as subcontracted workers in the Kiryung Electronics factory.

Subcontracting (Construction)

Subcontracting is similar to dispatch work, but differs as to supervision. It is considered a subcontract when the supervisor is the supplying company, and worker dispatching when the supervisor is the user company. Subcontracting is widely used in the construction industry, especially in building construction where the production process is separated into numerous activities. Under article 29(2) of the *Framework Act on the Construction Industry*, subcontracting is only permitted when a general contractor subcontracts some tasks to specialized contractors.⁵⁶ Despite this, multi-layer subcontracting is common practice in Korea. Hierarchical contracting-out is prevalent in construction as workers are recruited through subcontractors or other labour intermediaries.⁵⁷

Under Article 29(1) of the Framework Act on the Construction Industry, a construction company must not subcontract out all or most of the construction work for which they were contracted. Article 29(3) stipulates that a contractor cannot subcontract part of their contracted construction work to a constructor of the same category of business. Furthermore, a subcontractor cannot re-subcontract their subcontracted construction work to others under article 29(4).

The Korean construction industry consists of a multi-layer subcontracting system as follows:

- General contractors
- Subcontractors
- Intermediaries; and
- Workers.⁵⁸

Due to the complicated structure, it is difficult to identify employers, employees and an employment relationship. Construction workers are employed by subcontractors in temporary agency work and nominal self-employment for the period of the particular project.⁵⁹ Multi-layer subcontracting occurs when intermediaries or foremen provide labour to a general contractor and a subcontractor outsources labour requirements to another contractor. A construction company is able to easily hide behind

numerous layers of subcontractors to avoid responsibility over the workers who were hired by the subcontractors or intermediaries.⁶⁰ In 2006, three tier subcontracting constituted 70% of building sites and some had five tiers of subcontracting.⁶¹ Foremen do not have employer liability despite recruiting and managing workers and distributing remuneration.⁶²

A general contractor or a subcontractor is legally responsible for paying wages to a worker hired by a labour contractor or foreman. Under article 44-2 of the revised *Labour Standards Act of 2007*, the direct upper-tier contractor is jointly liable with the subcontractor to pay wages to a worker of a subcontractor when the subcontractor fails to pay wages to the worker. Article 93 regards a primary contractor as an employer in relation to accident compensation. A subcontractor is regarded as an employer if they are supposed to pay compensation under a written agreement with a primary contractor under article 90(2). Article 90(3) allows a primary contractor to ask the worker to demand compensation first from the subcontractor who has agreed to responsibility for compensation. This does not apply where the subcontractor is missing or is adjudged bankrupt.

Subcontracted or agency workers are not covered by the collective agreements that apply to directly employed workers. The Supreme Court holds a negative view of a user enterprise being a party to a collective agreement as it considers that a party to collective bargaining must first be a party to an employment contract.⁶³ Employees may only bargain with the subcontracting entity.

STATISTICAL DATA OF PRECARIOUS WORK

Kim, Yu-sun, a research fellow with the Korea Labour and Society Institute, provides basic statistics on precarious work in Korea.

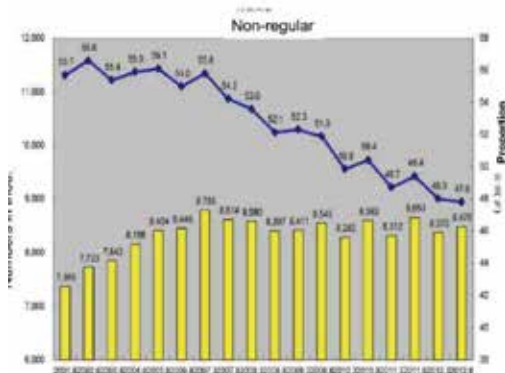
The first slide shows that while declining, nearly half of all workers are in irregular employment, though the government claims a smaller, though still remarkable, amount of one-third of all workers.

Looking at specific forms of irregular work, Kim, Yu-sun found that 15 per cent of workers were on fixed-term contracts, down slightly from a high point in 2005.

In house subcontracting is particularly prevalent in companies with 300 or more workers. Official statistics show that 41.2% of such firms hired workers through subcontracts – totalling roughly 326,000 workers. A quarter of those workers are concentrated in shipbuilding, with significant numbers in the services sector, steel and electronics.

I. Size of non-regular workers

1. Total

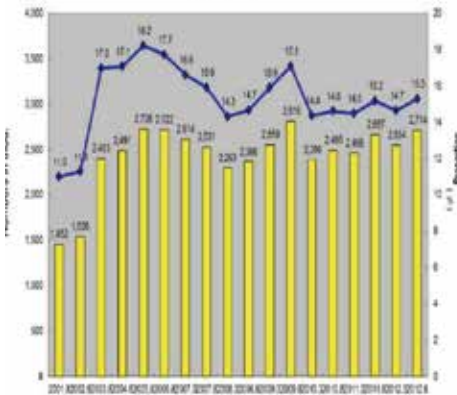


- 8.48 million as of Aug 2012 (47.8% of the total workers)
- Migrant workers (760,000), in-house subcontracted workers are not included
- Gov. estimates 5.91 million (33.3%)
- Since March 2007, the share of non-regular workers has declined

2-1. Fixed-term workers



Fixed-term



- 18.2% in Aug 2005
- 14.3% in March 2008
- 15.3% in Aug 2012
- 17.1% in Aug 2009 is a result of Gov-led Job Hope Project.
- Fixed-term workers take 14~15%, which is almost fixing.
- Effect of Fixed-term Workers Protection Act is limited.
- At max 3.9% dropped

2-3. Indirect employment (Dispatched, service, on-call)



Indirect employment (Dispatched, service, on-call)



- Indirect employment 10.0%(Dispatched 1.2%, service 3.8%, on-call 4.9%) ; Data is not available for in-house subcontracting.

In-house subcontracting



<Table1> Subcontracting of firms with 300 and more (Aug 2010)

Sector	Enterprises				Workers			
	Over 300 persons		Ratio (C/A)	over 300 persons			Ratio H/(E+H)	
	Total (A)	Contractor (C)		Total (E)	Contractor (G)	Subcontractor (H)		
Total	1,939	799	41.2	1,831,545	1,000,108	325,932	15.1	
Building	14	14	100.0	53,629	53,629	85,119	61.3	
Electricity	50	29	58.0	54,122	33,968	6,095	10.1	
Electronics	127	77	60.6	194,484	155,017	24,832	11.3	
Motors	14	14	100.0	77,311	77,311	15,075	16.3	
Steel	31	27	87.1	38,317	36,721	28,512	42.7	
Machine	53	40	76.9	47,212	41,045	10,517	18.2	
Metal	64	44	68.8	38,308	28,696	6,117	14.4	
Chemical	127	87	68.5	96,201	72,638	16,786	14.9	
Office	59	36	61.0	100,828	78,542	14,873	12.9	
Sales	81	41	50.6	77,997	46,838	13,864	15.1	
Service	690	201	29.1	608,388	230,197	66,599	9.9	
Others	630	189	30.0	446,768	147,508	37,543	7.8	

Source: Ministry of Employment and Labor, "Subcontracting of firms with 300 and more 2010"

- 41.2% of firms with 300 and over use 330,000 subcontracted workers (15.1%)

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Although it is unlawful to unreasonably discriminate against irregular workers, for example under article 8(1) of the *Act on the Protection of Fixed-Term and Part-Time Employees*, employers consistently subject precarious employees to discrimination in wages and working conditions. Vulnerable employees suffer from high job insecurity, unstable employment and are unable to exercise their union rights for fear of losing their jobs. Indeed, the wage gap between regular and non-regular workers is roughly 50%!

In Korea, non-regular employment has contributed to a widening income inequality and relative poverty. The gender wage gap, the highest in the OECD, is partly attributed to non-regular employment. Women are more likely to work in irregular employment and are concentrated in positions with low skills and pay. 70% of women workers are precariously employed and earn only 43% of the wages of regular male workers.

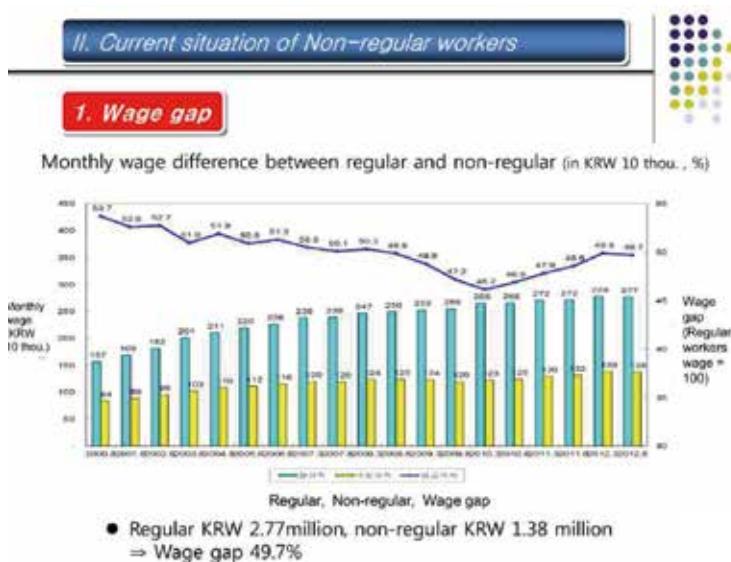
IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

Independent contractors are prohibited from forming trade unions on the basis that they are not workers with employment contract with employers.⁶⁴ The courts previously recognized

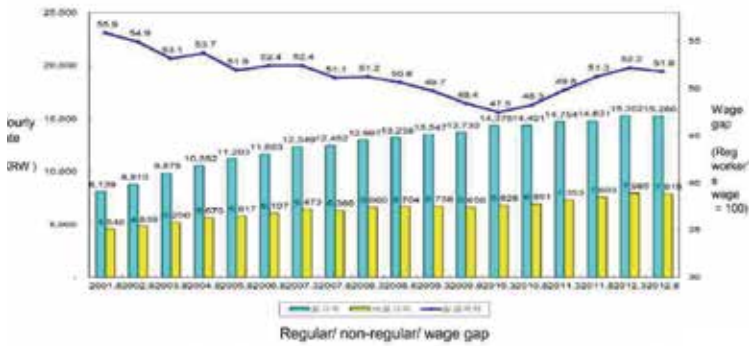
some types of independent contractors as workers. Since 2007, the Korean government has forced the de-certification of unions of independent contractors whose legal status as unions was previously recognized.⁶⁵ In 2009, the Government ordered unions to expel self-employed workers from the union or they would cancel the registration of the union.⁶⁶ When irregular workers organize a union, the employer dismisses the unionized workers by ending the contract with the intermediary contractor and maintaining contracts with non-union contractors.

The *Trade Union and Labour Relations Adjustment Act* was amended on 1 January 2010 and has been in force since 1 July 2011. Articles 2(4)(d) and 23(1) prohibit unemployed workers, including dismissed workers, from joining a union and provides that non-union members are ineligible for trade union office. These provisions have an adverse impact on irregular workers, especially short term contract workers.

Multi-layer subcontracting is an obstacle for trade unions to organize workers and engage in effective collective bargaining.⁶⁷ Consequently, Korean unions formed locality wide organisations rather than enterprise level unions in an attempt to change the subcontracting system.⁶⁸ Courts have ruled that the rights to organize, to bargain collectively and to take collective action may only be exercised within an employment relationship⁶⁹. The courts rely on the definition of “employee” under article 14 of the *Labour Standards Act* and article 2(1) of the *Trade Union*



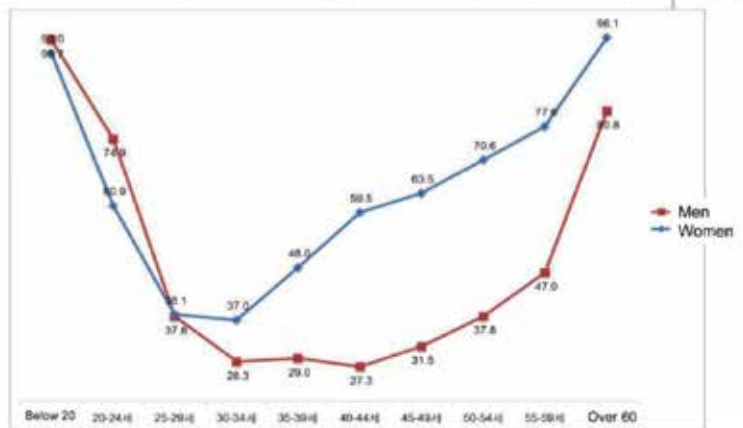
Trend of hourly rate between regular and non-regular workers (KRW, %)



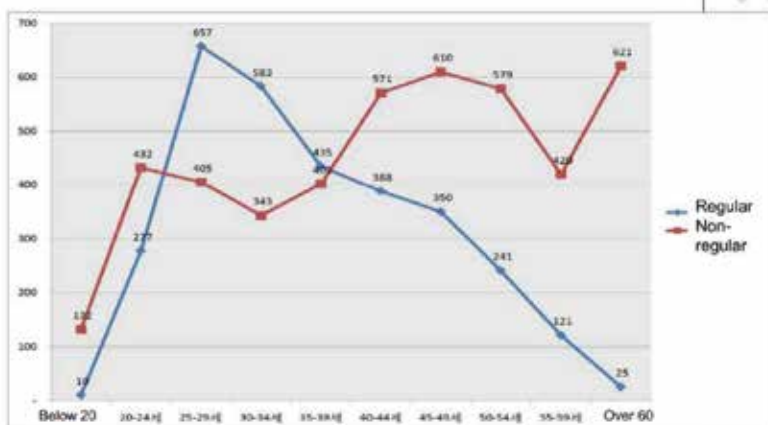
- Regular KRW 15,286, Non-regular KRW 7,918 ⇒ Wage gap 51.8%

4. Non-regular workers by gender and age

Non-regular workers by gender and age(Aug 2012, %)



Women's employment type trend by age (Aug 2012, in thousands)



and *Labour Relations Adjustment Act* as the basis for their decisions. Workers who have contractual arrangements other than an employment contract are prevented from exercising collective labour rights.⁷⁰

In Korea, trade union density is 10.3% (as of 2012, MOEL statistics).⁷¹ Trade union density is 3.2% for precarious workers and 3.6% for construction workers (who are mostly precarious workers).⁷² Although trade union density is low, unionization of precarious workers has increased in the construction industry over the last 10 years.⁷³ For example, there has been an increase in the unionization of construction machinery operators who are usually self-employed.⁷⁴ In Korea, industrial relations are focused on the enterprise level and collective bargaining is limited to trade union members.⁷⁵ As a result, collective agreements cover only 10% of wage workers.⁷⁶ Low trade union density produces low coverage of collective agreements and the majority of precarious employees are excluded from the protection of trade unions.⁷⁷

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

The KCTU and FKTU have been actively organizing precarious workers. Legislative activities are at the centre of trade union actions against precarious work. Unions aim to legislate measures: 1) to discourage or limit the use of workers in precarious employment, 2) to guarantee employment security, and 3) to reduce any gaps between regular workers (non-fixed-term workers) and precarious workers in terms of working conditions such as wages and benefits.

In relation to the Act on Protection, etc. of Fixed-Term and Part-time Workers, unions argue that the two year cap should be maintained and that the Act should be revised to limit the use of fixed-term workers based on objective criteria. The law must also guarantee the same working conditions including the same wage levels to fixed-term workers with other regular workers once fixed-term workers are converted to regular workers.

In relation to the Act on Protection, etc. of Dispatched Workers, unions aim to legislate clear criteria on subcontracting and dispatching since disguised subcontracting is rampant. When subcontracting criteria in law are not respected or when workers dispatch occurs in a sector not permitted to use it, it should be regarded as illegal dispatch and workers concerned should be considered as regular workers. Further, the principle of direct employment for consistent and continuous work

should be stipulated in the Labour Standards Act. The definition of employer and employee should also be extended.

Improvement of discrimination remedy system is also one of major issues to mitigate (and eliminate in the long term) the wage gap between regular workers and non-regular workers. The remedy procedure should provide a systematic framework for a non-regular worker conducting a same or similar work with a regular worker to claim and improve their own working conditions. In order to improve the effectiveness of discrimination remedy system, trade unions or workers' representatives should have the ability to file claims on behalf of workers. The application period should also be extended to within six months from the day when the employee recognizes discriminatory treatment or within six months after labour contract is terminated. Further, an article or a clause should be created in the Labour Standards Act, stipulating equal pay for equal value labour. Also, workers in similar work such as subcontracted workers and non-fixed-term workers at the workplace concerned should be allowed to apply for discrimination remedy.

Additionally, incentives should be developed for hiring non-regular workers as regular ones. A public notification system for jobs for non-regular workers should be in place and companies with higher rates of non-regular workers should receive disadvantages when applying for government bids including procurement contracts. In the public sector, there should be established the principle of hiring regular workers and leading the effort for changing the employment status from non-regular to regular.

In addition to legislative initiatives, the KCTU reports on their long term organizing plan on precarious work. Since 2000, organizing precarious workers has been a priority for KCTU. The strategic organising is divided into 3 phases - a planning (2000~2002), formation (2003~2005) and implementation (2006~2013). The implementation phase has been carried out in two stages. The first stage of the project got started in 2006 and 23 organizers were allocated to the organizing activities of KCTU's affiliates and regional branches through 2009. KCTU aimed to raise the problems of precarious work as a social agenda and broadened the social solidarity. Organising precarious workers became a key priority and all of the affiliates and regional branches concentrated their resources on this activity.

In the 2nd stage, the KCTU and its affiliates and regional branches were actively involved in organizing precarious workers and developing a social agenda regarding precarious work. As a result, it organized new members and established new unions in various sectors. In 2013, precarious workers established their own unions at companies including in E-mart, Home Plus,

Samsung Electronic Services, and some cable TV companies. Precarious workers at Incheon International Airport and in public schools expand their organizational capacities through strike. As of December 2013, precarious workers accounted for 20% of total membership of the KCTU, twice the number of 10 years ago.

The 3rd stage of the KCTU organizing project will be conducted for 5 years (2014~2018), targeting industrial complexes, wholesale & retail services, youth, and migrant workers. KCTU will launch an extended fundraising campaign targeting \$20 million. These resources will be put into policy research, education and training of organizers, publishing free newspapers, podcasts, supporting organizing campaigns by the affiliates and branches, and networking activities. It aims to organise one million precarious workers as new members.

NEPAL



There is a very high level of informal and precarious work in Nepal. Employers fail to comply with existing labour laws and Nepal has no properly functioning institutions that support the enforcement of the Labour Act.

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

In Nepal, the *Labour Act 1992* ("the Act") is the basic law regulating labour and employment. Under section 2(b), the Act is applicable to a small proportion of Nepal's economy as it only applies to enterprises employing 10 or more workers. The following industries or sectors are also excluded from the scope of the Act as a result of Section 88:⁷⁸

- Public enterprises
- Banking and financial institutions
- Municipal corporations
- Journalists (covered by the Working Journalist Act of 1994);
- Civil servants (who are covered by the *Civil Service Act 1992*);
- Education workers; and
- Non-governmental organizations

Foreign workers working in Nepal are also excluded from the protection of the Act.⁷⁹ Section 4A of the Act allows foreign workers to be employed only if the employer is able to demonstrate that there are no Nepalese workers available to perform the same tasks. Despite this provision, many employers engage foreign workers to avoid complying with the provisions of the Act.⁸⁰ On 8 October 2011, the Government commenced a process to bring foreign workers working in Nepal under the Act though this has yet to be concluded.

The Act simply does not operate in practice in the vast informal economy where workers are often employed under temporary, casual or short term contracts or third party contracting arrangements. Under section 4(2) of the Trade Union (First Amendment) Act, workers in the informal economy or who are self-employed may form a union if there are at least 500 members working in the same occupation. Prior to the amendment of the Trade Union Act, workers in the informal economy were not specifically protected in relation to their trade union rights.

If there are less than 10 workers, they must nevertheless be given an appointment letter and are covered by the minimum wage. Workers cannot form enterprise unions but can join national level unions. In practice, the law is simply not applied to foreign companies, though there is no exception in law.

Temporary Fixed-Term Contracts

Section 7 of the Act provides considerable flexibility to employers to meet fluctuations in demand. Under Section 7, non-permanent employees may be utilized to cover unexpected increases in production for any period of time and any specified work except work “permanent in nature”. Section 7 also states that the worker may be appointed on a contract basis if the remuneration, service period and conditions of service are explicitly outlined in the contract. Section 4(3) provides that workers engaged in piece rate or contract work of a permanent nature in any enterprise must be made permanent in accordance with section 4(2).

Section 4(2) states that the worker is on probation until they complete a continuous period of service of one year during which they must show satisfactory “*performance, honesty, discipline, dedication to work, attendance, etc.*” The term “continuous period of service of one year” is defined in Section 14 as the period of 240 days worked by any worker within a period of 12 months in any enterprise. If the employer keeps renewing short term contracts, they should be converted to permanent contract. However, the Supreme Court allowed project based contracts to be of a longer length than 240 days.

The conversion to a permanent contract is not automatic and most employers avoid these provisions by not issuing new employees with a letter of appointment. If the employer does not issue a letter of appointment, the worker has no evidence of their commencement date from which to calculate the end of their probation period. The worker also has no written evidence in relation to the amount of their wages or the conditions of their employment. In 2012, almost 61% of employers of factories did not provide employees with a letter of appointment.⁸¹ Furthermore, in 2012, 77% of employers did not

reappoint employees as permanent after completing 240 days of service.⁸² It is typical for employers to fire workers before the 240 day period is met.

Wages and working conditions are much worse for workers without regular wage employment. There is approximately 30% difference in remuneration between a permanent and non-permanent employee.⁸³ Workers who have completed their probationary period and acquired permanent status are eligible for various allowances and an annual wage increment under section 4(4) of the Act. Permanent workers receive the following entitlements which the employer is not required to provide to workers on fixed-term contracts:

- If the operations of the enterprise are curtailed or shut down for a temporary period, a permanent worker is to be put on reserve on half pay under section 11(3).
- A permanent worker in a seasonal enterprise is paid 25% of their remuneration as a retaining allowance during seasonal closures under section 13(3) of the Act.
- The requirement to pay an annual increment pursuant to section 21 applies only to permanent workers. The annual increment or increase in salary is to be a half-day’s remuneration; and
- Workers, except persons working “*on daily wages, piece-rate or contract basis*”, must be paid weekly, fortnightly or monthly under section 23 of the Act.

Fixed-term contract workers are not protected from termination of employment. Section 10 of the Act restricts employers in dismissing permanent workers. Permanent workers cannot be terminated unless the formalities prescribed under the Act or the regulations or by-laws made under the Act are satisfied. The Act’s provisions allow only three ways a permanent employee may be dismissed as follows:

- Section 15 provides for the compulsory retirement of a worker at the age of 55
- The employment of a permanent worker may be terminated by reason of retrenchment in circumstances identified in section 12 (contract workers are specifically excluded under 12.4); and
- Section 52 permits the dismissal of a worker for particular types of misconduct (section 50 requires an employer to provide notice to a permanent employee of the alleged misconduct and the punishment that may be imposed).

Many employers use contract workers to replace or avoid the employment of direct employees who are protected by dismissal provisions under the Act. Employers claim that the termination provisions encourage them to replace regular employees with casual workers. In the public sector, which pays relatively well, many workers have been replaced by workers under contract and who are paid substantially less.

Misclassification

There is no clear test to determine the existence of an employment relationship. Under the Act, there is no definition of "employment relationship". The Act does not identify the differences between a worker or employee and a genuinely self-employed independent contractor. Section 2 defines employees and workers as follows:

"... (c) "Employees" means persons engaged in the administrative functions of the establishment.

(d) "Workers" means persons employed in return for payment of salary or wage in any production process or in the work of providing services, for building work, working on land or with machinery, or any part thereof used for the purpose, or any work related or incidental thereto. The term includes workers who work on a piece rate contract or agreement basis".

Of course, one of the biggest problems is that nearly all workers never receive an appointment letter, making it difficult to establish the nature of their employment relationship.

Triangular Employment

The Act does not limit the sectors or situations in which work may be subcontracted or supplied by an agency. In Nepal, contract labour is usually a triangular relationship and workers provide their labour through an intermediary or "thekedar". The principal employer requests that the thekedar hires labour which results in the thekedar working as an employment agent who is not bound to government regulatory mechanisms. Under the Act and in practice, contract workers are employees of the thekedar and not of the enterprise that receives the benefit of the labour, controls which workers are hired, dismissed or disciplined, directs the work and determines hours of work, terms and conditions of employment. Of course, if the thekedar has more than 10 workers, it is covered by the labour law. The Act does not limit the amount of the workforce that may be subcontracted or supplied by an agency. A significant proportion of workers in most enterprises are subcontracted workers.

Collective agreement obligations are often avoided by an employer by replacing its employees with outsourced workers who are not covered by a collective agreement. Multi-party relationships enable the beneficiary employer to avoid direct responsibility for the payment of wages and other entitlements as technically, under the Act, responsibility is with the direct employer. This denies workers the capacity to enforce their claims and rights against the business which has received the benefit of their labour and has the assets to meet those claims. The beneficiary employer is able to distance itself from claims for improvements in wages and conditions or the resolution of grievances raised by workers. There is limited opportunity to engage in enterprise collective bargaining in the informal sector as the principal employer is not visible in multi-employer relationships.

However, at KSPL, workers successfully challenged the company's own in-house outsourcing company upon demonstrating it was a fraudulent entity meant to evade the law.

Enforcement

The current penalties and sanctions do not provide adequate compensation or encourage compliance and effect deterrence. In Nepal, there is a complicated judicial system. The Labour Office, the Department of Labour, the Labour Court and the Appellate Court all have roles in the adjudication of claims under the Act and the imposition of fines, penalties or other orders.

If action is taken in contravention of the Act, it is declared invalid by order of the Labour Department under section 58 of the Act. Complaints relating to offences punishable under the Act may be filed through the Labour Office under section 59(1). Section 59(2) provides that the complaint must be filed in the Labour Office within 3 months from the date of the offence. Section 59(2) also states that complaints in relation to the failure to comply with an order must be filed within 6 months from the date of the offence.

Under section 55(a) of the Act, it is considered misconduct when a manager or general manager wilfully violates or disregards the Act. If the misconduct is proven, the Government may punish the manager or general manager with a fine between Rs 1,000 (\$10 USD) and Rs 5,000 (\$50 USD) under section 55(2). Section 57 states that a person who acts in contravention of the Act may be punished by the Labour Department with a fine of between Rs 1,000 and Rs 5,000 for each offence according to its nature and gravity. If the person continues to commit the offence after it has been proven that the person committed the offence, the person must be punished with an additional fine

of Rs 100 for each day thereafter. This section appears to only apply in circumstances where there are no other provisions for punishment under other sections of the Act. A person who is dissatisfied with the punishment awarded or an order issued may file an appeal within 35 days from the date or receipt of notice of the punishment or order.

The Labour Court was established under section 72 of the Act. It deals with some first instance claims and appeals. It functions as an Appellate Court in circumstances when there are challenges to decisions of the Labour Office/Department. The Appellate Court, which is the second-tier of Nepal's court hierarchy, functions as a labour court in districts where there are no labour courts established according to section 72(3) of the Act. The Supreme Court of Nepal hears appeals from the Labour Court and the civil Appellate Court. It also has jurisdiction to examine the constitutionality of the decisions of any court or tribunal. In 2000, a National Human Rights Commission was formed by the United Nations.

The Labour Court hears rights disputes pursued by individuals including claims for dismissal and underpayment of wages under sections 59 and 60. There is only one Labour Court judge in Nepal and cases are only heard in Kathmandu. There is an excessive backlog of cases and the procedures of the Labour Court are costly and legalistic.

The absence of implementation of court decisions and the low level of penalties that may be imposed by the Labour Court do not constitute sufficient incentive for employers to abide by the law. For example, the maximum financial penalty for contempt of court is 5,000R -which is approximately US \$50. As there is no financial incentive, workers and trade unions are reluctant to invest time and financial resources in court cases. Individual workers do not have the knowledge of the labour laws or the financial resources to engage lawyers to pursue matters through the Labour Court. The trade unions have very limited trained staff and financial resources to institute proceedings on behalf of their members. Individual claims are usually rejected by the Labour Court on technical legal grounds without any consideration of the merits of the case. In other situations, many cases are frustrated by unmeritorious appeals.

There is also a dispute settlement procedure in section 73 of the Act. The procedure allows workers to make individual written claims or complaints against the general manager in relation to employment matters and progress those grievances to the Labour Office and Labour Court. The dispute settlement procedure also outlines time frames for the progression of the dispute. However, many workers do not utilize the dispute settlement procedure. There is a high unemployment rate in

Nepal and workers fear retribution from their employer over lodging a claim.

The Labour Office is severely under-resourced and inspectors are untrained and inexperienced. It has an extremely poor reputation and is accused of corrupt practices and bias. There are only 10 labour or factory inspectors in Nepal. They have backgrounds in mechanical engineering and concentrate on health and safety. As a result of the lack of transport, many inspectors carry out their duties on foot.

STATISTICAL DATA OF PRECARIOUS WORK

There are no reliable statistics on the extent of contract labour in Nepal. It is difficult to estimate the number of contract labour and intermediary contractors in different sectors as contract employees are exchanged frequently and not listed on the master rolls with permanent employees. Although employers are required to maintain separate registers of workers and employees under section 9 of the Act, most employers disregard this obligation when employing contract workers.

In July 2012, it was estimated that approximately 9 million people are working in the informal economy in Nepal and are not protected by labour legislation.⁸⁴

Of those in the non-agricultural sector, 4 out of 5 are hired informally.⁸⁵ Most of the small scale manufacturing establishments employ labour on contracts. All tea plantations, regardless whether they are owned by the Government or private sector employers, engage workers on contract labour.⁸⁶ There are numerous workers employed on piece-rate arrangements working in large formal sector enterprises mostly engaged in production.⁸⁷ Small traders, whole sellers, retailers and small-scale restaurants are more likely to hire labour on a piece-rate or daily-wage rate basis. In 2011, there were 9,786,000 self-employed workers consisting of 5,740,000 females and 4,046,000 males.⁸⁸

In Nepal, the rate of informal employment is 8% higher for women than men.⁸⁹ Women workers engaged in informal employment constitute approximately 90% of the non-agricultural employment sector.⁹⁰ Tibetan refugees working in the carpet industry in Nepal are engaged under triangular arrangements.⁹¹ These workers are not protected by the provisions of the Act.

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Many workers in precarious employment work long hours and suffer gender discrimination in wages and conditions of work. Often, there is no fixed working time for contract employees. If a contract worker is paid piece rate, they work as much as possible, sometimes up to 12 to 18 hours a day, 7 days per week.⁹² Employers regularly violate the minimum wage structure, especially in unorganized sectors, and the majority of employees are paid less than the minimum wage. Workers in vulnerable employment do not receive overtime payments or social security. The chance of employing child labour is more likely in the contract labour sector. Due to the decline of employment conditions in Nepal, there is an increasing trend in the migration of Nepalese workers abroad, especially young people.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

The Act fails to provide sufficient protection to union members from discrimination by reason of their union activities and effective dissuasive penalties. There is no express provision for the protection of workers' organizations against acts of interference. In 2012, 60% of enterprises created obstacles for the formation of unions and 35% of enterprises punished or harassed union activists.⁹³ Furthermore, section 30 of the *Trade Union Act* gives special powers to the Government to restrict trade union activities considered to be against the economic development of Nepal. Further, many employers do not bargain in good faith. The Act provides for legal recognition of collective agreements under Section 79; however, collective agreements may be signed but are not implemented. After agreements are reached, unions regularly have to take strike action to secure their implementation.

Under section 4(2) of the *Trade Union (First Amendment) Act*, workers in the informal sector or who are self-employed may form a union if they have at least 500 members working in the same occupation. The Labour Department does not maintain a regular record keeping system about the renewal and registration of unions. There are logistical issues involved in organizing contract labour and union density is mostly concentrated in the formal sector. There is confusion over who is the employer in triangular relationships. Trade unions cannot pursue grievances of contract labour formally with the subcontractor and the primary employer is not visible. There is limited industrial dispute as there are rare occasions for dialogue between the primary employer and workers.

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

Despite these obstacles, trade unions are popular due to their efforts to reduce employer reliance on exploitative forms of contract work. In 2005, the General Federation of Nepalese Trade Unions (GEFONT) had over 300,000 members. In August 2012, trade union membership increased to 330,619 members with 30 affiliates.⁹⁴ During its fifth national congress in 2009, GEFONT changed its organizing strategy to address different employment classifications. GEFONT decided to organize all workers including workers in precarious employment. It gained power through the unionization of the agricultural industry which mostly consists of workers in irregular employment. GEFONT's strategy of organizing the informal economy is to compel government and policy makers to make changes to employment matters such as increases in the minimum wage and ensuring it applies to all workers.

Unions have attempted to organize female workers through campaign activities. GEFONT has carried out substantial work on gender equality issues. In 2011, there is one third representation of women workers in GEFONT and each of its affiliates.⁹⁵ There are some national federations affiliated to GEFONT who have 100% women members including the Nepal Home-Based Workers Union, National Beautician Union of Nepal and Nepal Health Volunteers Trade Union. In March 2010, GEFONT organized a national women's conference called "Equal Rights, Decent work and Respectful Life" designed to empower women.

Trade unions are campaigning for the enforcement of labour legislation, the regularization of employment contracts for precarious workers and improvements in social security. Additionally, unions are seeking to expand the scope of the labour law so that it applies to all, removing the 10 person threshold which excludes many enterprises. Domestic workers must also be covered. Similarly, the minimum wage must be applicable to all. Some seek to introduce both enterprise level bargaining and industrial level bargaining so that industrial level agreements would apply to all relevant enterprises.

NEW ZEALAND⁹⁶



In New Zealand, workers are facing growing levels of precarious (or “insecure”) work, leaving workers feeling unwanted. It is damaging for them, their families and their communities. The growth of precarious work has resulted from many factors including a cost cutting approach to work rather than investment in people, outsourcing, weakened trade union rights and employment laws, and the subordination of worker rights to the interests of trade liberalisation and flexibility.

LEGAL FRAMEWORK OF PRECARIOUS WORK

According to the OECD, New Zealand’s employment protection laws for insecure workers are relatively weak. New Zealand has the fourth lowest level of protective regulation in the OECD relating to temporary contracts (including the lowest level of regulation on temp agency work in the OECD). Certain industries are essentially contractor-only.

Exclusions

Section 6 of the Employment Relations Act of 2000⁹⁷ contains specific provisions effectively excluding sharemilkers and film and television production workers from employment status.⁹⁸ The exclusion of film crew was the result of a controversial amendment made on 29 October 2010 at the urging of film director Peter Jackson and Warner Brothers in order to film *The Hobbit* series of films in New Zealand.

Temporary Fixed-Term Contracts

Short-term contracts fall broadly into two categories: fixed-term contracts and casual work contracts.

Fixed-term contracts

Rules relating to fixed-term employees are primarily set by section 66 of the Employment Relations Act 2000.⁹⁹ This holds that a fixed-term agreement will not be valid unless there is a genuine reason based on reasonable grounds for the agree-

ment to end, and that the employee is advised of when and how their employment will end along with reasons. Genuine reasons do not include a work trial or to limit their rights under the Employment Relations Act 2000 or the Holidays Act 2003. The way in which the employment will end and the reasons for it ending must be set out in writing. Failure to meet these requirements will allow an employee to either treat the fixed-term as ineffective (and their employment of indefinite term) or, after their employment ends, as a dismissal subject to the usual requirements of justification for a dismissal of indefinite term (which it will likely fail). For example, in *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152 Chief Judge Colgan found that an unpaid pre-employment trial constituted an unlawful fixed-term agreement (because the work trials are not a genuine reason for a fixed-term contract and the agreement was not in writing, in violation of section 66).

Seasonal work is often fixed-term employment, though it is possible for seasonal employment agreements to continue in force during the off-season so long as the employment relationship is intended to be ongoing.¹⁰⁰ If the fixed-term agreement is less than six months' duration, employees will not qualify for paid sick or bereavement leave,¹⁰¹ or occasional entitlements such as paid parental leave¹⁰² or flexible working requests.¹⁰³

There is no limit to the length of short-term contracts except for requiring a genuine reason for the expiry of the contract. This reason could potentially be for several years. The requirement for a genuine reason is ongoing with each renewal. There is no restriction on the number of contracts that may be offered. An invalid fixed-term contract may be converted to a permanent contract at the election of the worker

Casual employees

The leading case on casual employment is *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 255. In that case, the Court stated:

[40] ... *The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.*

[41] *The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there*

are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist will largely be a question of fact.

In *Jinkinson*, Judge Couch went on to summarise indicia used in Australia and Canada to determine casual employment. These indicia have been applied by New Zealand courts¹⁰⁴ and include:¹⁰⁵

- engagement for short periods of time for specific purposes
- a lack of regular work pattern or expectation of ongoing employment
- employment is dependent on the availability of work demands
- no guarantee of work from one week to the next
- employment as and when needed
- the lack of an obligation on the employer to offer employment or on the employee to accept another engagement
- employees are only engaged for the specific term of each period of employment

The line between casual employment and fixed-term employment is a blurry one and there is no statutory definition of casual work. Case law has attempted to define the line between the two with limited success. In *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103, two kinds of temporary employment were explored:

[37] *The difficulty is that both casual and fixed-term employment are "temporary" employment in the sense of being an engagement by the employer of the employee for a specified period at the conclusion of which that employment will end in a way that is agreed in advance, does not amount to a dismissal of the employee and does not entitle the employee to unjustified dismissal personal grievance rights. Given that temporariness is a common feature of both types of employment, their distinguishing characteristics include both the length of the arrangement but, most importantly, the absence or presence of predictability and regularity. Casual employment is characterised by irregularity of engagements and the shortness of their limited durations, in this case being potentially as short as a shift or a few shifts. That is to be contrasted with fixed-term employment which has set hours and days of work (albeit for a finite period) so that the employee and the employer may predict and rely upon when the employee will be at work.*

[38] *The other difference is that, unlike casual employment, fixed-term employment must be related to a specified project or situation such as the replacement of an employee on parental leave or long term accident or sickness. That said, however, some short casual engagements are to cover short and unexpected periods of sickness and like absences from work.*

[39] *Although for fixed-term employment... there can be no expectation of ongoing employment beyond the conclusion of the specified project or situation, there is no such requirement for a specified project or situation for casual employment. The employer need not justify to the employee why it needs him or her for the proposed work assignment.*

[40] *Another difference between these types of temporary work lies in the legitimate expectation of certainty of work. In the case of a fixed-term arrangement, the employer can have an expectation of work by the employee for the whole of the contracted period and the employee can likewise have that expectation with the consequences of certainty of income, unavailability for social activities during work time, and the like. In the case of casual engagement, that certainty is much more limited temporally. So although, for example, if an employee nurse is offered work on a shift and accepts, the employer can expect that the nurse will work that shift and the nurse can expect to retain the remuneration and other benefits of it, that is the end of those expectations unless and until there is express agreement on a further engagement. Neither party can have any additional legitimate expectation of offer or acceptance of such further engagement.*

Given the much greater protections for fixed-term employees compared to casual employees, this is a significant issue.

Casual employees will almost never qualify for service-based entitlements such as sick or bereavement leave. In unionised worksites with current collective agreements, casual employees have a modicum of protection through being covered by the terms of the existing collective agreement for the first 30 days of employment. However, changes proposed in the Employment Relations Amendment Bill 2013 would remove even this protection.¹⁰⁶

It is well established that casual employees often have a poor understanding of their employment rights (WEB Research and Department of Labour (2004)). This finding is reinforced by data from Statistics New Zealand (2012a): For example, 33.1% of casual workers believed they had no leave entitlement and 15.3% said they did not know what their leave entitlement was. 41.2% said they had a leave loading added to their pay. This is the answer that best fits a truly casual relationship.

Issues with fixed-term and casual work

The Department of Labour (2007) has usefully summarised the legal issues relating to temporary and casual employment:

Redundancy: A recurring issue was employees' entitlement to redundancy compensation and whether the employer had followed the correct procedures e.g. notice and consultation, when implementing the redundancy. It was usually found that temporary and casual employees were excluded from redundancy compensation provisions.

Change in employment status: When moving from a casual or temporary position to permanent employment, problems were sometimes encountered, including:

- a. conflicts caused when employees were unwilling to give up second jobs
- b. the employment relationship not surviving the negotiation of new terms and conditions
- c. the new status not being reflected in a new employment agreement
- d. how to calculate an employee's length of service to determine eligibility to entitlements such as long service leave.

Employees moving from permanent to casual employment also experienced problems, including alleged duress to accept reduced terms of employment.

Personal Grievances: Casual and temporary employees faced a number of obstacles when attempting to bring a personal grievance before the Authority. Under the ERA only three casual employees have successfully brought personal grievances. It has been difficult for a casual worker to show that they have been unjustifiably dismissed as opposed to the period of the engagement coming to an end. A casual employee cannot bring an unjustified disadvantage claim if an employer does not offer them further work. Between engagements a casual worker is not considered to be an employee and therefore they lack the standing to bring a claim.

The obligation of good faith does not apply when there is no employment relationship (i.e. between casual engagements). This situation means expectations around communications between the parties between assignments can be unclear, and can result in a dispute.

Even if an employee was successful with a personal grievance or other claim, the results are not usually economically beneficial – reinstatement is unlikely for a casual worker, and when calculations around recovery of lost wages are made, wages recovered are often very low.

Leave: A public holiday will rarely be an “otherwise working day” for a casual employee. This means they will not receive any payment for the day if they do not work, and they will not be entitled to an alternative holiday if they do work. Casual and temporary employees are at risk of missing out on some of the other benefits of the Holidays Act 2003, and the Parental Leave and Employment Protection Act 1987 (“PLEPA”) if they do not meet the threshold length of service requirements. Even if they are eligible for special leave it does not mean they are always able to access it. Some provision has been made in PLEPA to accommodate parents who, because of the nature of their jobs, would not meet the service requirements. Casual and temporary employees repeatedly engaged by the same employer are also unlikely to qualify for long service leave if “continuous employment” is a prerequisite.

Misclassification

Section 6 of the Employment Relations Act 2000 states that (with the exception of film production workers, real estate agents and sharemilkers) the Court must look at the real nature of the relationship between the parties to determine whether they are an employee or not. Statements by the parties as to the nature of their relationship are not to be treated as determinative. Rather the Court should look at the whole of the relationship including who has control over the worker’s everyday work, their degree of independence, how integrated they are into the “employer’s” business and fundamentally whether they are in business of their own account. Aside from the specific exemptions for categories of workers this approach is fundamentally similar to ILO Recommendation 198. Either party to a putative employment contract may apply to the Employment Relations Authority for a determination of their status. Penalties to an employer for misclassifying a worker as a contractor are effectively damages consequential on any failure to provide minimum employment rights such as paid leave (and perhaps compensation for unjustified termination).

Triangular Employment

New Zealand is rated as having the lowest level of protection in the OECD relating to subcontractors. The law establishes no limits on the sectors or situations in which work may be subcontracted or supplied by an agency, nor limits on the amount of the workforce that may be subcontracted or agency labour.

The law assigns no joint liability to the primary employer jointly for the wages, working conditions and other benefits of the worker in the case the subcontractor fails to follow the law or collective agreement. Subcontracted or agency workers cannot bargain directly with the user employer except sometimes very indirectly through the use of multiple employer collective agreements (alongside union members of the host employer). In rare cases both employers or the user employer may be found to be the ‘real’ employer and allow for a remedy of direct employment.

The law does not provide for dissuasive sanctions for violations of the law relevant to precarious workers. The Employment Relations Authority may levy penalties of up to \$20,000 for corporations or \$10,000 for individuals. The Inland Revenue Department may levy significant fines and penalties for breaches of tax obligations and Immigration New Zealand provides harsh penalties for exploitation of illegal migrants. Labour inspection for any of these forms of precarious work is sparse. Labour inspections are infrequent due to the low numbers of labour inspectors (35 for 2.2 million workers).

STATISTICS ON PRECARIOUS WORK

The NZCTU estimates that as of December 2012, 192,200 workers were in various forms of temporary employment, including casual work, fixed-term, temp employment agency, or seasonal work. Among them, the largest category was casual workers, making up 91,600 or 47.7% of them. Fixed-term (56,600), Temp-Agency (14,600) and seasonal workers not classified in one of these other categories (26,200) made up the rest. In all, there were 51,000 seasonal employees, spread across the different categories, making up 26.5% of all temporary workers. Women were in the majority among casual workers and fixed-term workers, but males were the majority in the other two groups and among seasonal employees in general. Temporary employees tended to be younger than permanent workers. In 2012, temp-agency workers were .8% of the workforce, with 38.4% male and 61.6% female.

The fast food sector has long been characterised by its casualised workforce, but fixed-term agreements are now very common in the education sector. They are also more common in government departments, where once they were relatively rare. In the retail sector, more and more workers are on part-time hours, with additional hours allocated on a casual basis. New forms of insecure work are appearing, including zero hours contracts, in which workers have to be available for work but are not guaranteed any set number of hours.

Across all kinds of insecure work, some groups of workers are more frequently affected than others – in particular, low paid women workers, young workers, Māori and Pacific workers, migrants and people with disabilities. For example:

- 58% of temp workers are female.
- 55% of temporary workers are under the age of 35.
- 12.9% percent of Maori workers are temporary

In 2012, temporary workers were earning less than their permanent counterparts, through both fewer hours but also lower rates of pay. The median weekly earnings for temporary employees were \$487 compared with \$901 for permanent employees. Casual workers had the lowest median earnings at \$300 a week. Median gross hourly earnings were also higher for permanent employees than temporary workers at 22.88 and 17.00 respectively.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

Sharemilking and film production workers are excluded from the protection of the employment relationship (such as restrictions on unfair dismissal, minimum wages and ability to take industrial action) by legislation. Trade unions have been very much affected by the growth of insecure work given the difficulties of organising casual and temporary workers. Some unions have embarked on campaigns to highlight the issues facing workers on casual employment contracts and on fixed-term agreements which has raised the profile of the unions. Unions and collective bargaining can provide a degree of protection against insecurity. But in many New Zealand workplaces, union representation is non-existent or low and is discouraged by the employer.

According to the Survey of Working Life, 1,319,000 employees (71.5%) say they are not union members (a smaller number than official union registration statistics suggest). Collective bargaining rates are low: 1,100,000 employees (59.7%) are on individual employment agreements, another 302,100 aren't aware of any agreement or don't know if they are on one, and an estimated 1,231,000 (66.8%) work in businesses which have less than 10% coverage by collective employment agreements that de facto provide a base of conditions for workers on individual agreements in those firms.

TRADE UNION PRIORITIES TO COMBAT PRECARIOUS WORK

1. Legislative and policy changes to the Act governing industrial relations in New Zealand: The Employment Relations Act. Currently there are a number of private Members Bills in parliament and these provide a vehicle for advancing issues on insecure work and promote the importance of the issue. If there is a new Government next year then the CTU will be advancing changes in the Industrial legislation and pressing for some anti-workers legislation to be overturned in the first 100 days and then time to develop up and introduce new employment law.

2. Using collective bargaining to promote and strengthen secure work which includes clauses on :

- Restrictions on the number or proportion of casual workers.
- A casual pay loading.
- Protections around the use of fixed-term agreements to provide for more opportunities for continuous and/or permanent employment.
- Provisions for accumulation of leave by casual workers.
- Protections and entitlements for workers beyond the enterprise, through industry and supply chain agreements

3. Supporting union campaigns: Many affiliates have campaigns which come under the ambit of insecure work; The Living Wage campaign has gained significant traction in New Zealand with a strong base of support across union's community and is marked by a new relationships style of working across civil society groups. There are many other campaigns too including pay equity, sector specific groups who are particularly at risk e.g. young workers and migrant workers. The CTU plays a coordinating role in supporting and joining up these campaigns.

THE PHILIPPINES



LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

The Philippine Labour Code states that all rights and benefits apply to all workers, whether agricultural or non-agricultural. However, Article 82 provides several exceptions, including government employees, managerial employees, field personnel, members of the family of the employer who are dependent on him/her for support, domestic helpers, persons in the personal service of another, and workers who are paid by results as determined by the Secretary of Labour in appropriate regulations. Public sector workers are covered under a separate law.

Temporary, Fixed-term Contracts

Article 280 of the Philippine Labour Code contemplates 4 different types of employment contracts:

Regular and Casual Employees: The provision of a written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.

Thus, the 4 types of employment contract are:

- Regular employees – those who have been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer;
- Project employees - those whose employment has been fixed for a specific project or undertaking, the completion or

termination of which has been determined at the time of the engagement of the employee;

- Seasonal employees – those whose work or service is seasonal in character, and the employment is deemed to last only for the duration of the season; and
- Casual employees - or those who are not regular, project or seasonal employees.

A fifth type was recognized in case law – a *fixed-term employee* – one who has been hired for a definite period whose employment is to end only at the expiration of the period stipulated in the contract. The determinant in fixed-term employment is not be the activities that the employee is called upon to perform, but rather the date certain agreed upon by the parties for the commencement and termination of their employment relationship.¹⁰⁷ The term period is further defined to be a time of definite length or the period from one fixed date to another fixed date.¹⁰⁸

Supreme Court decisions stipulate that fixed-term employment is valid only under certain circumstances. In *Brent School, Inc. v. Zamora*, the court established the criteria under which term employment does not circumvent the law on security of tenure:

1. The fixed period of employment was *knowingly and voluntarily* agreed upon by the parties *without any force, duress, or improper pressure* being brought to bear upon the employee and absent any other circumstances vitiating his consent; or
2. It satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms *with no moral dominance* exercised by the former over the latter.

The Labour Code does not limit the situations or purposes in which a worker may be hired under a fixed-term contract, nor does it limit the economic sectors in which fixed-term contracts can be used. The length of contracts is not generally limited and is decided by the parties. However, for project employees, the term or duration of engagement is fixed for a definite or specific project or undertaking (which may range from one day to several months depending on the availability of contracts or projects), co-extensive with the Service Agreement or with the specific phase of work for which the employee is engaged and defined in an employment agreement/contract and made clear to the employees at the time of hiring. For seasonal employees, employment is for the duration of the season. For casual employees, the duration of the contract is less than one year. Any employee who renders at least one year of service, whether such service is continuous or broken, shall be considered a

regular employee with respect to the activity in which he/she is employed and his/her employment shall continue while such activity usually exists.

The Department of Labour and Employment (DOLE) Department Order No. 18-A, issued on 5 December 2011, declares that repeated hiring of employees under an employment contract of short duration or under a Service Agreement of short duration with the same or different contractors is prohibited - Section 7, A (7).

Supreme Court rulings on renewals of such types of jobs have been instructive:

Project employees: If such an employee is given successive contracts of employment where the worker continued to do the same kind of work, it is clearly manifest that his/her tasks were necessary or desirable in the usual business or trade of the employer, and thus may be considered regular employees as defined under Article 280 of the Labour Code.¹⁰⁹

Seasonal employees: Seasonal employees who are rehired after every season are considered merely on leaves of absence with pay.¹¹⁰

Casual employees: Once a project or work pool employee has been 1) continuously, as opposed to intermittently, rehired by the same employer for the same task; and 2) these tasks are vital, necessary and indispensable to the usual business or trade of the employer, then the employee must be deemed a regular employee¹¹¹

Fixed-term employees: the practice of hiring workers on a uniformly fixed contract basis and replace them upon the expiration of their contracts with other workers on the same employment duration is contrary to law.¹¹² The Supreme Court pronounced that the scheme of the employer in hiring workers on a uniformly fixed contract basis of five months and replacing them upon the expiration of their contracts with other workers with the same employment status was designed to prevent the “casual” employees from attaining the status of regular employment. It was a clear circumvention of the employee’s right to security of tenure and to other benefits like minimum wage, cost-of-living allowance, sick leave, holiday pay, and 13th month pay.¹¹³

The law provides for equal benefits between workers on fixed-term contracts and indefinite contracts. Article 82 of the Labour Code states that the benefits accorded by the law on hours of work, weekly rest periods and holidays, service incentive leaves and service charges shall apply to employees in all

establishments and undertakings, whether for profit or not. DOLE Department Order No.18-A, assures contractual workers of all benefits and privileges accorded to a regular employee provided in the Labour Code, including service incentive leave, rest days, overtime pay, holiday pay, 13th month pay and separation pay, retirement benefits, social security and welfare benefits, rest days, etc.

Social protection is mandatory under the law, but not respected in practice. Workers are discouraged to file cases to enforce their rights due to the attendant costs and time for resolution. In practice, many workers are employed for the same kind and amount of work as regular employees. As such their work is as essential to the business of the employer, but they are denied the status and attendant benefits of a regular employee. Wages and benefits are lower or fewer.

In cases of *regular employment*, illegally dismissed workers are entitled to reinstatement without loss of seniority rights and other privileges with full back wages, inclusive of allowances, and other benefits or their monetary equivalent computed from the time of dismissal up to the time of actual reinstatement (Article 279 of the Labour Code). In several Supreme Court decisions, project, casual, seasonal and fixed-term employees who were unjustly dismissed (and later conferred with regular status) are entitled to the same rights and benefits as provided under Article 279 of the Labour Code).

While the Supreme Court has recognized the validity of fixed-term employment contracts in a number of cases, it has consistently emphasized that when the circumstances of a case show that the periods were imposed to block the acquisition of security of tenure, they should be struck down for being contrary to law, morals, good customs, public order or public policy.¹¹⁴ In one case, the Court decided that a worker who was hired continuously for the same nature of tasks are considered regular/permanent worker and as such, the dismissal is illegal.¹¹⁵ Such pattern of re-hiring and the recurring need for worker's services are testament to the necessity and indispensability of such services to petitioners' business or trade. Such being the scenario, the worker is considered a regular employee.¹¹⁶

A project employee does not automatically become regular or permanent even if the employee is rehired many times. However, a project employee or a member of a work pool may acquire the status of a regular employee when the following occur: 1) there is a continuous rehiring of project employees even after the cessation of a project¹¹⁷; and 2) the tasks performed by the project employee are vital, necessary and indispensable to the usual business or trade of the employer.¹¹⁸

In practice, workers who have been in fixed-term contracts for years have had to resort to filing employment regularization cases to be able to enjoy the benefits of permanent/regular status.

Further, the law provides that employer can terminate the services of a regular employee only for authorized and just causes (Article 282, 283 and 284 of the Labour Code) which must be shown by clear and convincing evidence. The law and various Supreme Court decisions stipulate stringent procedural requirements and due process in terminating employment. In all cases of termination of employment, the standards of due process (i.e., written notice, hearing or conference, written notice of termination) laid down in Article 277 (b) of the Labour Code, as amended and related jurisprudence apply. However, under project employment, no prior notice of termination is required if the termination is brought about by the completion of the contract or phase for which the worker has been engaged. This is because completion of the work or project automatically terminates the employment.¹¹⁹ Instead of requiring the giving of a notice of termination to the affected project employees upon the completion of the project or any phase thereof, the law merely requires that the employer should render a report to the Department of Labor and Employment (DOLE) on the termination of their employment.

In a fixed-term employment, lack of notice of termination is of no consequence because when the contract specifies the period of its duration, it terminates on the expiration of such period. An employment contract for a definite period terminates by its own term at the end of the mutually agreed period fixed by the parties.¹²⁰

In organized companies, unions provide the employer a list of workers who have rendered more than 6 months of service for regularization.

Misclassification

For an employer-employee relationship to exist, the following elements are generally considered:

- (1) the selection and engagement of the employee;
- (2) the payment of wages;
- (3) the power of dismissal and
- (4) the power to control the employee's conduct.¹²¹

In determining whether the relationship is that of employer and employee or one of an independent contractor, "each case must be determined on its own facts and all the features of the relationship are to be considered." [56 CJS 45] Independent contractors are those who exercise independent employment, contracting to do a piece of work according to their own methods and without being subjected to control of their employer except as to the result of their work.¹²²

In *Rosario Brothers, Inc. v. Ople*, the Court ruled that tailors and similar workers hired in the tailoring department, although paid weekly wages on piece work basis, are employees not independent contractors. Accordingly, as regular employees, paid on a piece-rate basis, petitioners are not entitled to overtime pay, holiday pay, premium pay for holiday/rest day and service incentive leave pay. They should be paid, however, their 13th month pay under P.D. 851, since they are employees' not independent contractors.¹²³

In practice, workers had to resort to filing regularization or illegal dismissal cases in order to enjoy rights and privileges as regular workers. If successful, they are entitled all of the rights and benefits under Article 279.

Triangular Employment

Articles 106¹²⁴ and 109¹²⁵ of the Labour Code prescribe the conditions for regulating subcontracting and the rights and obligations of parties to this arrangement. Several other laws and rules apply:

- Article 248 (c) which disallows contracting out of services or functions being performed by union members when such will interfere with, restrain or coerce employees in the exercise of their rights to self-organization;
- Article 280. which classifies employees into regular, project or seasonal employees;
- Article 2180 of the Civil Code, under which the principal, in a civil suit for damages instituted by an injured person, can be held liable for any negligent acts of the employees of a labour-only contractor;
- Republic Act No. 5487 and its implementing rules, which regulate the operation of security agencies;
- Department Order. No. 3 and No. 19 (for subcontracting arrangements in the construction industry); and

- Contractual stipulations, provided these are not in conflict with Labour Code provisions, jurisprudence, and D. O. Nos. 3 and 19.

Department Order 18-A, further clarifies government policy on contracting and subcontracting arrangements. The new rules apply to all parties of contracting and subcontracting arrangements where there exist employer-employee relationships including manpower service cooperatives and janitorial and security agencies. These rules limit the activities to those that fall under legitimate contracting or subcontracting. Activities shall be considered legitimate if all the following circumstances occur (Section 4):

- The contractor must be registered in accordance with the Rules and carries a distinct and independent business and undertakes to perform the job, work or service on its own responsibility, according to its own manner and method, and free from control and direction of the principal in all matters connected with the performance of the work except to the results thereof;
- The contractor has substantial capital and/or investment; and
- The Service Agreement ensures compliance with all the rights and benefits under Labour Laws.

The rules also specifically prohibit labour-only contracting, which refers to an arrangement where (Section 6):

- The contractor does not have substantial capital or investments and the employees recruited and placed are performing activities which are usually necessary or desirable to the operation of the company, or directly related to the main business of the principal within a definite or predetermined period, regardless of whether such job, work or service is to be performed or completed within or outside the premises of the principal; or
- The contractor does not exercise the right of control over the performance of the work of the employee.

The following are also declared prohibited for being contrary to law or public policy (Section 7, Department Order No.18-A):

1. Contracting out of jobs, works or services when the same results in the termination or reduction of regular employees and reduction of work hours or reduction or splitting of the bargaining unit.
2. contracting out of work with a "cabo"¹²⁶

3. Taking undue advantage of the economic situation or lack of bargaining strength of the contractor's employees, or undermining their security of tenure or basic rights, or circumventing the provisions of regular employment, in any of the following circumstances:
 - i. Requiring them to perform functions which are currently being performed by the regular employees of the principal, and
 - ii. Requiring them to sign as a precondition to employment or continued employment, an antedated resignation letter, a blank payroll, a waiver of labour standards, or a quitclaim releasing the employer or contractor of liability.
4. Contracting out of a job, work or service through an in-house agency.
5. Contracting out of a job, work or service that is necessary or desirable or directly related to the business or operation of the principal by reason of a strike or lockout whether actual or imminent.
6. Contracting out of a job, work, or service being performed by union members when such will interfere with, restrain, or coerce employees in the exercise of their rights to self-organization as provided in Art. 248(c) of the Labour Code, as amended.
7. Repeated hiring of employees under employment contracts of short duration or under a service agreement of short duration with the same or a different principal which circumvents Labour Code provisions on Security of Tenure.
8. Requiring employees under a sub-contracting arrangement to sign a contract for a fixed period of employment which is shorter than the term of the Service Agreement.
9. Refusal to provide a copy of the Service Agreement and the employment contracts between the contractor and the employees deployed to work in the bargaining unit of the principal's certified bargaining agent to the sole and exclusive bargaining agent (SEBA).
10. Engaging or maintaining by the principal of subcontracted employees in excess of those provided for in the applicable Collective Bargaining Agreement (CBA) or as set by the Industry Tripartite Council (ITC).

There is no legally-mandated cap on the number of subcontracted or supplied by agency. Section 7(10) of the new Rules (D.O. 18-A, series of 2011) provide that the ITC will set the limit of subcontracted employees. However, some CBAs expressly limit the company's right to outsource parts of its operations.

In *Goya vs. Goya, Inc.*, the Court ruled: "This management prerogative of contracting out services, however, is not without limitation, [it is subject to the limitations found in law, collective bargaining or the general principles of fair play and justice¹²⁷]. In contracting out services, the management must be motivated by good faith and the contracting out should not be resorted to circumvent the law or must not have been the result of malicious arbitrary actions. In the case at bench, the CBA of the parties has already provided for the categories of the employees in the Company's establishment. These categories of employees particularly with respect to casual employees serve as limitation to the Company's prerogative to outsource parts of its operations especially when hiring contractual employees. With the provision on casual employees, the hiring of PESO contractual employees, therefore, is not in keeping with the spirit and intent of their CBA".

In practice, non-regular employment (to mean probationary, casual, contractual/project-based, seasonal workers and apprentices/learners) constitutes a significant part of total employment. In 2010 for instance, non-regular employees comprised 40 of every 100 rank-and-file employees in the Philippines. Several bills are pending in Congress (Parliament) specifically prohibiting the (1) engagement by the principal of subcontracted employees in excess of 10 percent of the principal's total workforce and (2) limiting the permissible number of casual and contractual employment to 20 percent of an organization's total workforce.

Importantly, in case of violations against labour-only contracting, or any of the prohibitions under the law regarding contracting, the principal employer shall be deemed the direct employer of the contractual employees, and is solidarily liable with the contractor or subcontractor for wages, working conditions, and other benefits in case the subcontractor fails to follow the law or collective agreement. (Arts. 106 and 109). Further, Department Order 18-A provides for solidarity liability of the principal and the contractor in the event of violation of any provision of the Labour Code.¹²⁸

Since in the case of legitimate job contracting or subcontracting, it is the contractor or subcontractor which is the employer of the workers, pursuant to Book III, Rule VIII-A, Sec. 8 (d) of the Omnibus Rules, the workers may bargain only with the contractor or subcontractor. The rules stress that contrac-

tor's employees have the right to self-organization, collective bargaining and peaceful concerted activities (Section 8, e). But the difficulties are great: there are many instances where the employer just replaced the subcontractor, or the subcontracted workers, at will.

There are reported cases where non-regular workers, other than forming their own unions, are covered by collective bargaining agreements negotiated by unions composed mostly of regular rank and file workers. According to Bitonio (*Labor Flexibility and Worker's Representation in the Philippines*, 2005), summarizing an official survey and commenting on its results:

"Twenty-two percent of the firms surveyed had unions. Although 78.5% of these unions had non-regular workers as members with ten unions made up entirely of non-regular workers, union membership of non-regular workers is still relatively thin. Only 84 or 27.5% of firms indicated that their unions have at least 1-9% non-regular workers in their membership. The survey also shows that among the establishments with unions, the order of preference is agency hiring (39.8%), casual work (26.5%), contractual work (18.3%) and part-time work (16.5%).

Where non-regular workers are union members, they generally constitute a minority of the membership. The incidence of non-regular work in unionized firms, of itself, raises interesting questions. First, the collective bargaining tradition historically excludes non-regular workers from union membership or membership in the bargaining unit.¹²⁹ The presence of non-regular workers in unions, as well as the fact that there are unions comprised entirely of non-regular workers, is an interesting departure from this tradition. Second, further inquiry may be made on non-regular and regular workers in the same bargaining unit. The presumption is that they have mutuality of interests, even if non-regular workers may not enjoy the same degree of tenurial security. Could the firm's decision to employ non-regular workers be made independent of the union? Or could this be the union's way of assimilating rather than opposing the employment of non-regular workers?"

Enforcement and Dissuasive Sanctions

Under the Labour Code, the Secretary of Labour and Employment has inspection and enforcement powers to determine violations or to enforce the Labour Code or any labour law, wage order or rules and regulations issued. (Art. 128 (a); Book III, Rule X, Sections 1 and 2). However, these inspections have been limited by order of the Secretary of Labour to a few instances to make way for a regime of self-inspection where

employers are asked to assess and declare their compliance with these labour laws. Government inspections are limited to compliance with labour (i.e., wages and benefits) and technical safety (i.e., OSH) standards. More often, violations or presence of precarious work are discovered as a result of complaints or cases filed with concerned government agencies. In 2007, about 17 (or 5%) of the total 340 notices of strikes involved contracting out of services normally performed by union members. Companies with 200 workers or more are exempted from inspections (they are covered by self-assessment). This is despite official statistics showing that large enterprises are the ones increasingly resorting to non-regular employment (at 32% compared to just 23% in smaller enterprises).

STATISTICAL DATA OF PRECARIOUS WORK

In the 2012 "ILO Decent Work Country Profile", the ILO reported:

Precarious paid employment (short-term/seasonal/casual workers and those who worked for different employers on day-to-day or week-to-week basis) varied across sectors but was more apparent in industry than in agriculture and services. In 2010, the industry sector had 26.5% of its workers in precarious work (40% in construction) which was more than twice those in agriculture (12.7%) and in services (12.4%). By sex, slightly more men employees (15.8%) were in precarious work than women (12.8%). The proportions have stayed almost unchanged since 1995.¹³⁰

Short term/seasonal/casual workers in 2010 were estimated at 4.513 million, 1.7 times higher than the 2.629 million one and a half decade earlier. Among them, about two-thirds are men, 68.0% in 1995 and 64.7% in 2010. The share of women in 1995 slowly peaked to 35.9% in 2007 then inched down to 35.3% in 2010.

By sector, the proportion of these workers predominated in services. Accounting for about two-fifths (41.8%) in 1995, the share grew to nearly one-half (48.0%) of total short-term/seasonal/casual employment in 2010 while the rest were distributed between agriculture (24.4%) and industry (27.6%), both experiencing declining shares to total.¹³¹

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Precarious work arrangements are “low paying and do not provide the usual non-wage benefits and social security normally found in regular employment contracts.”¹³² The prevalence of precarious work has the impact of keeping wages and benefits generally low. Employers often threaten to replace regular with precarious workers, while “bribing” regular workers with slightly better wages and benefits compared to those of precarious workers on the condition that they don’t challenge the hiring of precarious workers. Precarious workers tend to be assigned to multiple jobs in multiple sites, to irregular or very limited hours of work and/or long work shifts/work days or work weeks, and are required to do work with little to no health and safety equipment, benefits or social security.¹³³

The ILO Decent Work Country Report also states:

Workers in unstable and uncertain forms of employment such as the ones mentioned are often low-paid. Since 2001, their average real daily basic pay has remained about 70 per cent of the all-employee average (see Table 3, Chapter 3). The pay of women relative to men was consistently lower and the wage gap observed to be widening through time, 7.7 per cent in 2001 to 11.9 per cent in 2010. Those in the services sector had a lower average real daily basic pay than in industry, in contrast to that of the all-employee pay where those in services were paid more.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

There are no legal barriers for precarious workers to join a union. However, in practice, workers in precarious work are generally unaware of their labour rights. Those who are aware hesitate to exercise their rights for fear of losing their jobs. In practice, due to vigorous employer resistance, unions are unable to conclude collective agreements that cover workers in addition to regular employees. Further, the long and tedious administrative process of union registration, delays in issuing orders for certification election, illegal challenges by employers (under the law, employers are bystanders in union organizing) make organizing short-term workers even more difficult

Union membership is reduced by illegal conversion of regular jobs to non-regular ones. Potential membership are discouraged from joining, as there is fear among workers in short-term

contracts that joining a union would lead to job loss. Based on statistics, industries with the highest proportion of non-regular employment have very low unionization rates, namely construction; hotels and restaurants; real estate; and wholesale and retail. Union density has fallen from 30.2% of wage and salary earners in 1995 to 8.7% in 2011. Similarly, CBA coverage in the private sector went down from 608,876 in 1993 to 227,620 in 2011.

However, where a CBA covers non-regular workers, conditions have improved. Unionized firms have a lower rate of dismissed non-regular workers (6.5%) than non-unionized firms (8.7%). With respect to retrenchment, non-unionized firms have a lower rate of retrenched non-regular workers at 3.2% as against unionized firms at 5.1%.

SINGAPORE



The phenomenon of precarious work is a serious problem in Singapore. Contract workers, such as those from the cleaning and security sectors, are most affected by labour outsourcing. At the same time, more companies are choosing to employ workers on fixed-term contracts. In 2012, Singapore had 192,200 resident employees on term contracts, a 0.1% increase from 188,400 in 2011. Among them, 83,900 of them are under contracts of at least a year, and 108,200 are under short-term contracts of less than a year. These workers comprise 11.5% of the workforce. Roughly 32,700 of the contract workers are in the cleaning and labour work industry, while the services sector takes up another 36,000 contract workers. The contract workers from these low-wage sectors are most vulnerable in terms of being deprived of statutory benefits due to their lack of knowledge of employment laws.

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

Under the Employment Act, an employee is defined to exclude:

- Any seaman;
- Any domestic worker;
- Any person employed in a managerial or an executive position; and
- Any person belonging to any other class of persons whom the Minister may, from time to time by notification in the Gazette, declare not to be employees for the purposes of the Act.

As regards a person employed in a managerial or an executive position, if he/she is in receipt of a salary not exceeding S\$4,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive

payments and any allowance however described), he/she shall be regarded as an employee. Despite the exclusion from the Employment Act, there are no restrictions for unions to represent workers under the Singapore Industrial Relations Act.¹³⁴

Fixed-term Contracts

Workers under term contracts are covered under the Employment Act (EA), Work Injury Compensation Act, Central Provident Fund (CPF) Act, Retirement Age Act, Industrial Relations Act and the Trade Union Act. The existing labour laws protect term contract workers under contract of service as long as the workers fulfil the conditions stipulated therein for eligibility. Contract workers who have worked with the employer for more than three months will be entitled to their statutory benefits such as paid annual leave and sick leave. For contract workers who work less than thirty-five hours each week, they will be considered as part-time workers, and their entitlement to statutory benefits will be prorated accordingly to the number of hours worked in a year. The law does not stipulate the duration of contract to be covered nor does it impose any special requirement or limitations in the use of such contracts.¹³⁵ Such contracts can be used in any sectors, for any length of time, and without any limitation in renewals.

In the Public Sector, there are regulations stipulating that a Ministry may not appoint an officer on contract for more than 4 years.

Currently, the law does not provide for the contract to be converted to a permanent contract if the employer exceeds the term of the contract, but the Employment Act is undergoing review to address this issue. In the case of termination of the contract (justly or unjustly), the employer is merely obliged under common law principles to pay the employee's salary until the end of the fixed-term contract.

Misclassification

The Employment Act provides no statutory test for determining the existence of an employment relationship, but courts apply standard common law principles. If the employment relationship has been misclassified, civil courts or labour courts can deem the relationship to be an employment relationship. If the employer is determined to have misclassified a worker, the employer would be ordered to make good the statutory contributions and benefits of which employee had been deprived.

Triangular Employment

There is no legal framework in place regarding the outsourcing of contracts. Most contract workers in low-wage sectors are outsourced workers, engaged by a third party contractor and deployed to carry out non-core services such as cleaning and security. One of the most common issues faced by outsourced contract workers is the resetting of statutory benefits with a change in contract or contractor. Under the Employment Act, specifically for Annual Leave entitlement, all workers will receive additional day of leave with each additional year of service to up fourteen days of leave. However, without a legal framework in place, the numbers of days of leave for outsourced workers tend to reset with a change in contractor or contract. This is even if the outsourced contract workers have been working at the same location for more than a year.

Outsourced contract workers also experience stagnating wages. For the past decade, the real wage increase for the bottom 20th percentile was a negligible 0.3%. In addition, outsourced workers face the problem of lack of training opportunities, lack of career progression and job insecurity. It is also challenging for outsourced contract workers to get terms better than the provision for under Employment Act. The outsourced contract workers' fate is dependent on the duration of the contract, and whether the contractor has factored in additional budget for training and better employment terms under the contract cost. Lack of knowledge or awareness of labour laws put these workers at great disadvantage.

Of note, however, Section 65(1) of the Employment Act provides for joint liability:

Where a principal, in the course of or for the purposes of or in pursuance of or in furtherance of the interests of his trade or business, contracts with a contractor for the supply of labour or for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, and any salary is due to any workman by the contractor or any subcontractor under the contractor for labour supplied or for work done in the course of the execution of such work, the principal and the contractor and any such subcontractor (not being the employer) shall be jointly and severally liable with the employer to pay the workman as if the workman had been immediately employed by him, and where salary is claimed from the principal, this Act, with the exception of section 33 relating to priority of salary, shall apply as if reference to the principal were substituted for reference to the employer, except that salary claimed shall be calculated with reference to the salary of the workman under the employer by whom he is immediately employed.

However, the law limits the joint and several liability to a maximum of 1 month salary. In the construction industry, the principal will not be liable unless it is also a construction contractor.

STATISTICAL DATA OF PRECARIOUS WORK

According to the Singapore Ministry of Manpower's "Labour Force in Singapore 2012" survey, 192,200 workers (out of 1.67 million) are working under fixed duration contracts. 108,200 are working under contracts of less than a year, and 85,000 on contracts of less than 3 months. Roughly 40,000 are on contracts of one year, and 43,500 on contracts of more than one year. Young workers appear most likely to have contracts of less than 1 year (39,000 contracts for workers between 15-24 compared to 16,100 for workers 60 and over). Similarly, contracts of less than a year are more coming with lowest levels of education attainment (24,300 with primary education or below compared with 10,600 with a degree). The vast majority of short-term contracts are given to workers in the service sector, including wholesale and retail trade, transportation, accommodation and food service and administrative support. However, the single biggest category is public administration and education, with 36,000 under term contracts. Contracts of less than a year are clustered in retail and food service (16,500 and 15,900 respectively).

Term contracts are almost equally distributed among male and female workers, with men slightly more likely to have a term contract than women. There were 97,900 male workers with term contracts as compared to 94,200 women. However, if one looks at contracts of one year or less, women fare slightly worse, with 52,700 men with such contracts and 55,500 women. There were 45,200 men with contract terms of one year or more, and 38,700 women.

TRADE UNION POLICIES AND ACTIONS AGAINST PRECARIOUS WORK

Following the SNTUC Ordinary Delegate Conference 2005, the Unit for Contract and Casual Workers (UCCW) was set up in 2006 to look into how to help the low-wage contract workers in Singapore. UCCW adopted a three prong approach to enhance the economic and social well-being of low-wage contract and casual workers:

- To look into the basic welfare of low-wage contract workers
- To encourage and support low-wage contract workers to increase their employability through skills training and upgrading

RESIDENT EMPLOYEES AGED FIFTEEN YEARS AND OVER ON TERM CONTRACT BY CONTRACT DURATION AND SELECTED CHARACTERISTICS, JUNE 2012
(Exclude Full-Time National Servicemen)

Characteristics	Total			Less Than One Year (Includes Casual / On-call)			One Year Or More		
	No. ('000)	Share (%)	Incidence (%)	No. ('000)	Share (%)	Incidence (%)	No. ('000)	Share (%)	Incidence (%)
Total	192.2	100.0	11.5	108.2	100.0	6.5	83.9	100.0	5.0
Sex									
Males	97.9	51.0	11.3	52.7	48.7	6.1	45.2	53.9	5.2
Females	94.2	49.0	11.7	55.5	51.3	6.9	38.7	46.1	4.8
Age (Years)									
15 - 24	47.9	24.9	37.0	39.1	36.1	30.2	8.8	10.5	6.8
25 - 29	18.9	9.8	10.2	5.7	5.2	3.0	13.3	15.8	7.1
30 - 39	30.3	15.8	6.7	10.9	10.1	2.4	19.4	23.1	4.3
40 - 49	30.3	15.8	7.0	14.9	13.7	3.4	15.4	18.4	3.5
50 - 59	33.9	17.6	10.3	21.6	19.9	6.5	12.3	14.6	3.7
60 & Over	30.9	16.1	21.3	16.1	14.9	11.1	14.8	17.6	10.2
Highest Qualification Attained									
Primary & Below	33.0	17.2	17.0	24.3	22.4	12.5	8.7	10.4	4.5
Lower Secondary	16.4	8.6	12.7	11.6	10.7	9.0	4.9	5.8	3.8
Secondary	35.0	18.2	11.3	23.4	21.7	7.5	11.6	13.8	3.7
Post-Secondary (Non-Tertiary)	29.0	15.1	15.2	20.8	19.3	10.9	8.1	9.7	4.3
Diploma & Professional Qualification	35.1	18.3	11.0	17.5	16.2	5.5	17.6	21.0	5.5
Degree	43.6	22.7	8.2	10.6	9.8	2.0	33.0	39.3	6.2

Note:

1) Incidence refers to employees on term contracts of the specific duration as a percent age of resident employees in the respective socio-economic groups.

c. To communicate and advocate responsible outsourcing practices and fair employment terms to employers

In 2008, Centre for Contract and Casual Workers (C3W) was set up as an one-stop service centre where contract and casual workers can receive training, career guidance and direct assistance from UCCW all under one roof. A new training initiative, "U Train U Gain", was developed by UCCW, to enable the employability and employment of low-wage contract workers. A "3-M" Framework was set up to ensure that the low-wage contract workers are able to "Move Up within the company", "Move Within companies in the same industry" and to "Move Across to another industry". This is achieved through skills training and upgrading, allowing the workers to acquire vocational skills, portable skills and employability skills, gearing the workers for better employment opportunities.

UCCW has been collaborating with the tripartite partners and organizing outreach events such as roadshows and seminars, to actively engage and educate low-wage contract workers on their employment rights, Workfare Scheme⁷ and training schemes available.

UCCW has managed to gather more than 15,000 low-wage contract workers in their database, and has been constantly seeking for more initiatives to benefit the low-wage contract workers in Singapore.

Progressive Wage Model (PWM)

It is recognized that contract workers under the low-wage sectors do not have a career progression in place for them. To provide guideline for these workers, the SNTUC initiated and introduced PWM in 2012 to help workers to achieve sustainable real wage increases and to improve productivity through skills training and use of technology. The PWM is built upon existing initiatives such as the Workfare Income Supplement (WIS) scheme, the National Wage Council (NWC) recommendations for low-wage workers and all the social transfer programmes in Singapore. Unlike the minimum wage, PWM is not based on single level of legislated wage. Instead, PWM builds a route map of career progression and wage milestones which the workers can aim to achieve.

One of the success models is the cleaning industry. The Tripartite Cluster for Cleaners (TCC) was initiated by SNTUC in 2012 to develop and recommend a set of salary structures commensurate with skills, productivity, job nature and job scope for the cleaning industry. The PWM for cleaning industry encompass specific wage ladders tailored for each job sector. Each wage ladder consists of a series of wage points and allows workers

at all levels of the ladder to upgrade and progress to the next wage points. To develop the wage ladders and wage points for the PWM for cleaning industry, several factors are considered:

- a. The workers' wage if kept pace with productivity growth
- b. Consultation and feedbacks from key stakeholders such as major industry players and enlightened service buyers
- c. Wages earned by workers of similar profile in other
- d. Productivity based factors which look at the competency in operating machineries, skill set and qualification, and the job scope of the workers

These PWM recommendations by the TCC were then incorporated into the National Environment Agency (NEA) Enhanced CleanMark Accreditation Scheme (EAS), where accredited service provider will have to pay their outsourced contract workers according to the PWM wage guideline. From 1st April 2013, all government ministries and statutory boards will have to procure from NEA accredited service providers¹⁸. Government and SNTUC are actively calling out for private service buyers to practice best sourcing and procure only from accredited service providers. To ensure the success of PWM in the private sector, various strategies and programmes are implemented by the tripartite partners. These strategies and programmes will include encouraging companies to adopt IGP and BSI. Moving forward, all cleaning companies in Singapore will be licensed¹⁹, to ensure that all cleaners will be paid appropriate wages and have a career progression in place for them.

SRI LANKA



In Sri Lanka, employers have used the financial and economic crisis to demand lower wages and less favourable working conditions of workers. As they do not have a permanent contract, precarious workers are mostly unprotected by the labour legislation. As many short, fixed-term contract workers are rehired, it is evident that such arrangements are offered to avoid the higher costs of hiring permanent workers. Labour laws are under constant attack and the Sri Lankan government does little to implement or enforce the law. Indeed, the government has relaxed the regulatory and administrative safeguards on employment termination by introducing flexible forms of employment and abolishing trade union consultation and governmental approval.

As precarious workers are not covered by the Labour Code, they are unrecognized, unregistered, unprotected and socially excluded. Their position is compounded by the difficulties experienced by unions in organizing precarious workers.

LEGAL FRAMEWORK OF PRECARIOUS WORK

Exclusions

The *Labour Code of Sri Lanka* ("the Code") is the principal national labour legislation of Sri Lanka. However, employment contracts are not covered by the statute and instead are dealt with under common law principles. Thus, there is no regulation whatsoever of, e.g., fixed-term contracts in the Code. There are however some limited provisions that apply to some fixed-term contract workers in the *Termination of Employment of Workmen (Special Provisions) Act* and in different Ordinances or Decisions of Labour Commissioners.

Fixed-term contracts

The law does not regulate the use of fixed-term contracts. In 1994, the National Workers' Charter of the Government of Sri Lanka ("the Charter") attempted to regulate the use of fixed-term contracts by introducing a classification structure

and streamlining the labour legislation. The Charter classifies workers into the following four categories:

- Regular workers
- Temporary workers
- Probationary workers; and
- Fixed-term contract workers

The purpose of the classification structure was to prevent employers hiring temporary workers to perform permanent work. Under the Charter, employers are prohibited from using fixed-term contracts for any regular employment. However, the Charter never came into force. Consequently, employers engage their workforce on precarious employment conditions to avoid social protection and other statutory duties under permanent working contracts. As short, fixed-term contract workers are not protected by national labour law, there has been a considerable decline in permanent or full time employment and growth in casual and fixed-term contractual labour. Workers on such contracts often have little opportunity to obtain permanent employment. It is also common for employees to not receive a written contract outlining the terms and conditions of their employment as contracts are not required to be in writing.

Under the *Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971* ("TEWA"), amended in 2003, an employer may only dismiss an employee in the following situations:

- Serious disciplinary issues (section 2(5))
- Employee provides written consent (section 2(1)(a)); or
- Prior approval of the Labour Commissioner (section 2(1)(b)).

However, under section 3(1), the TEWA does not apply in the following circumstances:

- an employer who employs an average of 15 workmen during the period of 6 months prior to the month in which the employer seeks to dismiss the workman
- to the termination of employment of any workman who has been employed by an employer for a period of less than 180 days in the continuous period of 12 months commencing from the date of employment if the termination occurred within that period of 12 months

- to the termination of employment of any workman who has been employed by an employer where such termination was effected by way of retirement
- to the Government, Local Government Service Commission, local authority, co-operative society or public corporation in its capacity as an employer; or
- to the termination of employment of any workman who has been employed by an employer in contravention of the provisions of any law.

Thus, workers on short fixed-term contracts of less collectively less than six months in a year may not be covered by the law. If an employer terminates a worker in contravention of the TEWA, the Commissioner may order an employer to reinstate the worker and to compensate any lost remuneration and other benefits since the date of termination, pursuant to Section 6. Under section 6A, the Commissioner may order the employer to pay to the employee a sum of compensation based on years of service where the termination is the result of the closure by the employer of any trade, industry or business.

Under section 6B(1), the Commissioner only has the power to make the orders under section 6 and 6A of the TEWA upon application by the workman within 6 months of the termination. If an employer fails to comply with orders issued under sections 6 or 6A, the employer is guilty of an offence and is liable on conviction after summary trial before a magistrate to imprisonment for a term not less than 6 months and not exceeding two years under section 7(1) of the TEWA. However, despite these statutory provisions, short, fixed-term contracts provide employers with substantial flexibility and control as workers may be hired and fired as needed by the employer.

In the garment sector, companies outsource a part of the work to individual workers who work at home and are paid on a piece rate. They are especially vulnerable as they have no job security, little or no social protection and no union representation and are unorganized. Comprehensive data on short term contracting in the Sri Lankan garment industry is not available. In recent years, unions have reported an increase in the use of successive short, fixed-term employment contracts and in the majority of circumstances, there is no written contract.

Misclassification

There is no clear test to determine the existence of an employment relationship in Sri Lanka. Employment relationships are broadly defined as dependent workers and independent workers. The *Industrial Disputes Act* and the *Termination of*

Employment of Workmen (Special Provisions) Act broadly define “workmen” and do not distinguish between probationary and fixed-term workers.¹³⁶ Legal protection is only afforded to some dependent workers. Independent workers or persons working from their own homes are unregulated. As there are no labour laws that cover home base workers, there is no standard definition of “home based worker”.

Independent contractors are not protected by the Code in relation to conditions of employment, remuneration, occupational safety, social security, freedom of association and collective bargaining. There is no minimum wage for any category of home based worker. Consequently, home based workers must bargain for their pay. Due to the absence of a clear employment relationship, there is a high level of home based work and lack of regular employment in Sri Lanka.

Sometimes, an employer issues a letter of appointment or contract which is worded to show that that the work is not performed under a contract of employment. In these circumstances, the worker is entitled to lodge a claim with the courts to determine whether a contract of employment exists. However, the court processes are costly and resource intensive and it is unlikely that a worker will pursue an employer for misclassifying the working arrangements and converting it to an employment relationship.

Independent contractors are not entitled to pursue labour or industrial disputes through the Labour Commissioner or Labour tribunals. Independent contractors must pursue employment disputes under the contract law of Sri Lanka through the civil courts. Independent contractors may complain to the police and utilize the national laws that apply to all individuals such as harassment or theft matters. However, most independent contractors do not file claims in the civil courts as they are time consuming and expensive.

Furthermore, legal protection for home based workers or independent contractors arise from their contracts. It is only mandatory to issue a letter of appointment or an employment contract under the *Shop and Office Employment Act* which applies to employment in shops and offices. It is not mandatory to issue an employment contract in other industries. In the rural home based sector, which includes coir rope making performed by women at home, there is no written contract and these workers cannot access justice unless they are able to use a relevant national law. For example, a home based worker cannot challenge an unlawful termination under the Code.

Triangular Employment

Subcontracted workers are not directly employed by the companies for which they provide services. Due to the often multiple layers involved in subcontracting arrangements, it can be very difficult to determine the employer who is responsible for protecting workers’ rights. The law establishes no limitations on the use of subcontracting arrangements or agency labour. It is common for companies to hire workers through a labour contractor or third party, especially companies that provide cleaning, security or clerical services. There are also dependent subcontracted workers who are home based.

The law does not hold the primary employer responsible in circumstances where a subcontractor does not comply with the law or the collective agreement. Under triangular employment relationships, the worker is officially employed by an agency or contractor despite actually performing work for another company.

Agency workers cannot join the same union and be party to the same collective agreements as permanent workers. Triangular employment relationships make it difficult for unions to organize workers and employees are denied the opportunity to join a union or to join the union at their workplace and bargain collectively. The bargaining occurs between the user enterprise and the agency when the terms of the contract between them are fixed. Workers and trade unions do not have a say in these terms and have no knowledge of them. However, it is these contractual terms which establish the boundaries of the possible matters workers may negotiate with the agency.

Employees are engaged by labour contractors that provide labour services to third party companies. Depending on market requirements, the working locations of these workers may change from time to time. Consequently, these workers are distanced or isolated from their direct employer as they do not work in the same location. As only a limited number of workers from each company work in a particular workplace, these workers are also distanced from their fellow workers and have limited opportunities to discuss or voice grievances. Triangular relationships force workers outside the scope of collective agreements and diminish the bargaining unit which results in lack of union capacity to bargain effectively.

The labour administration fails to enforce existing legislation and to ensure compliance with legal standards. The Department of Labour does not prosecute employers for engaging in unfair labour practices.¹³⁷ There is an unreliable court system in Sri Lanka. There are lengthy delays involved in pursuing matters and the adversarial procedures allow one party in a dispute to prolong cases indefinitely. The judicial system does not

encourage mediation or non-judicial dispute resolution. Legal tradition dictates that the Courts and Labour Commissioners have a major role in determining the scope and interpretation of law in Sri Lanka. The *Industrial Disputes (Amendment) Act, 1990. No. 32* attempted to streamline the procedure for dispute resolution in Sri Lanka. Under the *Industrial Disputes Act*, the Government may refer a dispute to adjudication or arbitration. However, the award of an Industrial Court has greater influence than an award of an arbitrator as it cannot be repudiated. An arbitrated award may be repudiated after 12 months.¹³⁸

STATISTICAL DATA OF PRECARIOUS WORK

There is limited information on precarious work in Sri Lanka which is not readily available. Below is available 2010 data.

In 2010, there was a higher proportion of males (65.4% of total employment) in informal work arrangements compared to females (57.1% of total employment).¹³⁹ Males received higher wages than females working in precarious employment arrangements. It is more likely that young people and older workers are employed in precarious employment.

Educated and skilled workers, such as managers, are less likely to be employed in informal employment. 75% of employees in the informal sector have less than a junior secondary level education. There is an emerging trend for home based workers to be engaged in higher skilled occupations such as software developers.

In 2010, 4.8 million or 62.6% of the total population of Sri Lanka worked in the informal economy. Precarious workers worked in the following industries:

- 85.6% in agriculture (including workers producing for the domestic market and in the export-oriented plantation sector)
- 51.0% in non-agricultural sector
- 83.2% in construction, mining, quarrying, electricity and gas and water supply
- 56.1% in the hotel and restaurant sector; and
- 45.1% in manufacturing.

In 2010, there were 2.3 million workers who were self-employed. Some independent contractors produce for larger manufacturing companies who export their products. For example, small tea producers sell their green leaves to factories to process the tea and sell it in the work market. Roughly 51% of independent contractors worked in the agricultural sector and 33% in the services sector. 75% of own account workers were male. Skilled agriculture, fishery and craft workers in elementary occupations are on temporary or wage earners who do not have a permanent employer and constantly move between different employers. The majority of sales and service workers and plant and machine operators and assemblers are temporary contract workers.

IMPACT OF PRECARIOUS WORK ON WORKING CONDITIONS

Permanent workers receive higher wages than temporary or casual workers. For example, a permanent plant and machine operator and assembler is paid Rs 5,200 more each month than a temporary contract worker and Rs 3,600 per month more than a casual worker. Short term contracting is the main form of employment in the garment sector. A large labour surplus has expedited the use of short term contracts in the garment sector. The majority of these employees are young women workers (15-24 years old) with little training, education and skills. Their working conditions are precarious including long hours, low wages and no social protection. It is estimated that Sri Lanka's living wage is LKR 12,504 (US\$116) per month for garment workers living in free trade zones areas and LKR 10,183 (US\$ 94,46) for garment workers living outside free trade zones. Despite this, most workers in the garment sector earn an average of LKR 8,779 (US\$81) inside the zones and LKR 7,364 (US\$68) outside (with bonuses, overtime, attendances included).

Precarious workers are employed with insufficient knowledge of their job. As they are hired for a period of time, short term contract employees receive little or no job training and are not offered promotion opportunities. Precarious workers suffer irregular working hours including excessively long involuntary overtime. They also experience less favourable working hours, conditions and wages than permanent employees. As employment contracts are continuously renewed, workers do not benefit from experience-related salary increases.

The intense pressure, long working hours and nature of the work are detrimental to the health of precarious workers. Poor health is especially a concern to precarious workers whose employment contracts may not be renewed due to ill health and a lack of a permanent job adversely affects their income earning

potential. Precarious workers are susceptible to work accidents and many different occupational diseases and are unlikely to be protected by illness and disability benefits.

In 2010, there were 145,795 workers working in the hotels and restaurants sector in Sri Lanka. Many of these workers were temporary seasonal workers who do not benefit from social protection. The sector also has the longest working hours in Sri Lanka. More than 65% of workers in the hotels and restaurants sector work for more than 50 hours each week. More than half of the workers in some hotels are variable workers who are hired for a short period during the tourist season. Generally, workers are hired for approximately 5 months. Their contracts are terminated at the end of the season with the assurance that they will be rehired in the next tourist season. Wages are determined by piece rates in brick-making, construction, agriculture and other forms of home based work. Child labour is often used in these industries as the piece rates are fixed at very low levels. Unpaid family workers are in home based generating activities including agriculture. Nearly 92% of unpaid family workers (0.7 million) are in the informal sector and 72% of unpaid family workers are females.

IMPACT OF PRECARIOUS WORK ON TRADE UNIONS

The *Industrial Disputes Act No. 43 of 1950* applies to all workers and employers in the private sector and is administered by the Commissioner General of Labour. In 1999, the *Industrial Disputes (Amendment) Act, No. 56 of 1999*, made it an unfair labour practice for any employer to prevent a worker from becoming a member of a legitimate trade union or harassing a worker to withdraw from membership of a trade union. In Sri Lanka, only 7 workers are required to register a union.¹⁴⁰

There are very few workers' organisations in the informal economy. In most circumstances, short, fixed-term contract workers cannot form or join unions. The high level of precarious employment arrangements has had an impact on the ability of workers to organize and to form and join trade unions. In 2013, the National Association for Trade Union Research and Education (NATURE) identified the increase in the use of contract labour, temporary employment, out-sourcing, casualization and recruitment through labour contractors as obstacles to organizing workers¹⁴¹. The establishment of unions and their activities are restricted in the Free Trade Zones. Employers, especially those operating in the zones prefer to communicate directly with employees rather than through a trade union.¹⁴²

Standardized contracts and collective agreements are being replaced by individualized contracts based on individual bargaining between the employer and the worker. Short term contracting stimulates an increase in individualized labour contracts such as piece rate contracts. The shift to a decentralized and individual employment relationship favours the bargaining power of the employer and weakens the position of the employee and undermines collective efforts of the union. Due to their bargaining position, temporary and contractual workers are unable to negotiate their terms and conditions of work.

Precarious employment arrangements encourage a decreasing trade union membership density. There was a significant decline in trade union membership from 1975 to 2007. In August 2009, the density of union membership was estimated to be 10%¹⁴³. The restructuring of employment through sub-contracts, short term contracts, casual or temporary labour and out-sourcing has produced a negative effect on the position and influence of trade unions and union organising. Short, fixed-term contract workers are especially difficult to organize or to undertake collective actions due to their individual contracts. Further, workers do not consider it necessary to join a union as their employment contract may only be for 3 months. Those short, fixed-term contract workers who try to improve conditions through union membership are easily and legally dismissed at the end of their contract which makes them especially vulnerable.

The ILO and precarious work in the Asia-Pacific region

Most of the ILO's conventions and recommendations were developed long before precarious forms of work became more commonplace. As the employment relationship has been slowly transformed, it has become more difficult to apply international standards which, at the time of their drafting, assumed the existence of a direct, long-term employment relationship. There is to date no comprehensive ILO convention on precarious work, nor is one likely or desirable, as the phenomenon of precarious work is complex, takes many forms, is always evolving and touches upon multiple aspects of the employment relationship.

The standard most directly relevant is ILO Recommendation 198 of 2006, which provides useful guidance on the employment relationship, which can be applied, e.g., to unmask intentional misclassification of the employment relationship as an individual commercial transaction and to ascertain the actual employer in cases where an employer may attempt to hide behind intermediaries in an effort to shed their legal responsibilities. However, this standard is non-binding. That given, trade unions have nevertheless used several ILO conventions to contest the use of precarious forms of work in practice by employers and the promotion and use of these forms in law and practice by governments.

The issue of precarious work is now becoming the focus of some study by the ILO. In October 2011, ACTRAV, the workers' bureau of the ILO, held an important conference on the subject and has had published several reports and papers since then.¹⁴⁴ In February 2015, there will be a tripartite meeting of Experts on Nonstandard Forms of Employment, which would contribute to discussions on labour protection at the 104th Session of the International Labour Conference in 2015. The proposed agenda for the experts' meeting includes a review of growth of nonstandard forms of employment, their impact on the ability of workers to exercise their fundamental rights, the degree to which nonstandard forms of employment are included in existing international labour standards and national and sectoral experiences in the effective regulation of nonstandard forms of employment.¹⁴⁵ The discussion could lead to potential additional standard setting on aspects of precarious work in the future.

This section of the report provides a brief survey of the ways in which international labour standards have been used by unions in the Asia-Pacific to challenge precarious work. Of course, the low level of ratification of these technical conventions limits the ability to invoke ILO supervision, though the non-ratification of Conventions 87 and 98 presents no barrier to filing a complaint to the ILO Committee on Freedom of Association. Where ratified, we hope that more trade unions will make use of them in order to challenge the fact and impact of

precarious work on the exercise of the rights protected by those conventions in their country.

Which Conventions?

While many ILO Conventions could be invoked to challenge precarious forms of employment in law and in practice, below are some of the conventions most used for this purpose in the region.

Convention 81 - Labour Inspection Convention: Migrant workers may be in an irregular immigration status while employed in the host country. Too often, however, labour laws are not applied to migrants in an irregular status, or labour inspectors become involved in enforcing immigration policy – which is beyond their mandate. The convention has been used to reassert that the labour rights of migrant workers, regardless of status, be respected, and that labour inspectors refrain from immigration law enforcement or working jointly with immigration enforcement officers.

Convention 87 – Freedom of Association and Protection of the Right to Organize: One of the principle objectives of precarious forms of work is to make the exercise of freedom of association difficult if not impossible to exercise. The convention applies to “workers... without distinction whatsoever”¹⁴⁶, including workers in all manner of employment relationships, including the self-employed (and importantly when the self-employment is a ruse to obscure an actual employment relationship). Convention 87 has been invoked to contest forms of precarious employment which have undermined the exercise of the right to freedom of association, such as misclassification and illegal dispatch.

Convention 111 - Discrimination (Employment and Occupation) Convention: Often, women and migrant workers are hired under precarious forms of work at a higher rate than male or citizen counterparts. The purpose of Convention 111 is to eliminate “any distinction, exclusion or preference... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”¹⁴⁷ Protected classes include, among others, race, sex and national extraction. Thus, this convention can be used to challenge policies and/or practices that segregate the workforce so that women and migrants labour under forms of precarious work at far greater rates than their male or citizen counterparts.

Convention 122 - Employment Policy Convention: This convention commits states to adopt policies that “promote full, productive and freely chose em-

ployment.”¹⁴⁸ Laws and policies which allow workers to be exploited in various forms of precarious work can run afoul of the requisites of this convention.

Convention 150 - Labour Administration Convention: States are required to develop national labour policies and develop the systems necessary to carry out these policies, in consultation with representative organizations of workers and employers. However, groups of workers are often excluded from the scope of labour laws and policies. States are thus called on to extend the functions of labour administration to workers not currently considered “employed”, such as certain agricultural workers, self-employed workers, etc.¹⁴⁹ Laws that classify work as “self-employed” despite the existence of an employment relationship (e.g., subordination, remuneration), has been challenged under this convention.

Convention 158 - Termination of Employment Convention: A common form of precarious work is the short, fixed-duration contract. This contract is often used, among other purposes, to make it easier to fire workers, including those doing permanent and core work of the business. Indeed, a contract is simply not renewed, without the protections available for workers with permanent contracts. Further, the fear of non-renewal of a contract is a powerful tool employers use to discourage union activity. This convention protects workers by limiting the permissible reasons for dismissal, by establishing procedures to contest dismissals and requiring compensation in case of unjust dismissal. Importantly, it also calls on states to take “Adequate safeguards... against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.”¹⁵⁰

Convention 181 – Private Employment Agencies Convention: Many precarious workers are employed by employment agencies but perform work for a third party which benefits from the labour. The convention requires states to take measures so that workers recruited (regardless as to whether the agency becomes a party to the employment relationship) are “not denied the right to freedom of association and the right to bargain collectively.”¹⁵¹ Given that workers employed by an agency find themselves in a “triangular” employment relationship, the convention also requires states to allocate the responsibilities of the agencies and the primary user of labour – though it does not suggest how this is to be allocated.¹⁵²

Observations and Recommendations

Below are recent observations, conclusions and/or recommendations from ILO supervisory bodies, usually the ILO Committee of Experts, which respond to

trade union claims of violations of ILO Conventions. To date, the majority of work in this region has originated with trade unions in Japan and Korea.

CONVENTION 81

New Zealand:¹⁵³ In New Zealand, labour inspectors and immigration officers at times carry out joint inspections of workplaces. The Committee of Experts noted that the principal function of labour inspection is not to enforce immigration law and that given limited resources for inspections, it feared that inspections regarding conditions of work would be diminished compared to those inspections regarding immigration status. The Committee also cautioned collaboration between the labour inspectorate and the immigration authorities because migrant workers, who frequently suffer the greatest exploitation in employment, will likely fear inspections in the belief that they are there to enforce the laws relating to immigration status rather than the conditions of work. As the Committee of Experts explained, “To ensure effective and efficient collaboration by all workers with labour inspectors, foreign nationals residing illegally in the country, who are among those who presumably suffer most from abusive conditions of work, should not fear the double penalty of losing their jobs and being expelled.”

In conclusion, the Committee of Experts urged the government to,

... take measures to ensure that the powers of inspectors to enter workplaces liable to inspection are not misused for the implementation of joint operations to combat illegal immigration. It request[ed] the Government to take measures to promote collaboration by the services responsible for combating illegal immigration with the labour inspection services, in such a manner that these services notify the labour inspectorate of cases of illegal immigrants apprehended outside a workplace who are engaged in a labour relationship covered by the Convention. Labour inspectors should accordingly be in a position to ensure their protection in accordance with the powers conferred upon them under the terms of the Convention and national labour legislation.

See also:

Hong Kong- Observation (CEACR) - adopted 2010, published 100th ILC session (2011)

Malaysia- Observation (CEACR) - adopted 2012, published 102nd ILC session (2013)

Both raise similar concerns with regard to joint immigration and labour inspections.

CONVENTION 87

Korea:¹⁵⁴ In 2007, the KCTU filed a complaint to the Committee on Freedom of Association regarding forms of precarious work. The complaint focused on two distinct issues – illegal dispatch and the exclusion of certain truck drivers from the scope of the labour law.

Illegal Dispatch

According to the union, illegal dispatch occurs when irregular workers work inside the facilities of the principal employer alongside the regular employees, using the materials, tools and machinery belonging to the principal employer, under the instructions of, and subordination to the principal employer and to produce products sold by the principal employer. While doing the same work as directly employed workers, dispatched workers are paid less than 50–60 per cent of the wages of regular employees. Subcontracting is used to functions to disguise what is really an employment relationship. In one case, Kiryung Electronics, the union noted that a worker in an electronic factory had been “employed” by a subcontractor even though he had performed the same task for the primary employer for over ten years under the supervision of the same individual. It was also noted that subcontractors periodically changed, including the case of one worker who had been employed by seven different subcontractors while performing the same work for the same company. The union also referred to similar illegal dispatch at Hyundai Motor Company Asan and Hynix/Magnachip.

The Ministry of Labour had found that the subcontracting was actually illegal dispatch, but the union reported that the employment relationship was not regularized after the finding and that the public prosecutor tried to overturn the Ministry of Labour’s findings so as to characterize the dispatch work as a legal commercial supply relationship. Further, the union noted that the absence of “regular” employment made it almost impossible to organize and bargain collectively. As the principal employer is not technically a party to the employment relationship, almost all their union activities against the primary employer (as opposed to the subcontractor) could be deemed “illegal” and justify the application of criminal penalties under the “obstruction of business” clause.

In response, the Committee of Experts requested the government to,

develop, in consultation with the social partners concerned, appropriate mechanisms, including an agreed process for dialogue determined in advance, aimed at strengthening the protection of subcontracted/agency work-

ers' rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, so as to prevent any abuse of subcontracting as a way to evade in practice the exercise by these workers of their trade union rights.

It further urged the government to,

take all necessary measures to promote collective bargaining over the terms and conditions of employment of subcontracted/agency workers in the metal sector... including through building negotiating capacities, so that trade unions of subcontracted/agency workers in these companies may effectively exercise their right to seek to improve the living and working conditions of their members through negotiations in good faith.

Exclusion of Drivers

Under Korean law, freight operators and drivers are not considered workers but rather as self-employed. Thus, they are excluded from the protection of the labour law, including the right to form or join trade unions or to collectively bargain. In practice, however, these workers often work under an individual contract with an employer who controls their wages, hours and working conditions. The government said that such drivers could form a professional association to represent their interests, including the negotiation of rates with their counterparts, but that such an organization would not have the rights of a trade union.

The Committee of Experts objected to the exclusion of drivers from the labour code and,

once again request[ed] the Government to take the necessary measures to: (i) ensure that 'self-employed' workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining; and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate.

The Committee also urged the Government

to take the necessary measures to: (i) ensure that organizations established or joined by heavy goods vehicle drivers have the right to join federations and confederations of their own choosing, subject to the rules of the organizations concerned and without any previous authorization; and (ii) withdraw the recommendation made to the KCWU and the KTWU to exclude owner drivers from their membership, and refrain from any measures against these federations, including under Article 9(2) of the Enforcement Decree of the TULRAA, which would deprive trade union members of being represented by their respective unions. The Committee requests to be kept informed of all measures taken or envisaged in this respect.

CONVENTION 111

Korea:¹⁵⁵ The KCTU and FKTU provided information to the Committee of Experts concerning the high levels of precarious work in Korea and the impact that this has had on female workers. According to the government, as of March 2012, there were 5,809,000 non-regular workers, which represents a third of all wage earners. Of this number, 53.7 per cent are women. The hourly gross wage of female non-regular workers is only 42 per cent of the hourly gross wage of male regular workers. The Government claimed that a set of measures was adopted in 2011 to “removing irrational discrimination against non-regular workers and reinforcing the social safety net for vulnerable workers”.

The KCTU claimed that the percentage of the workforce in non-regular work is even higher than the official figure. They estimate it to stand at 47.8 per cent because the government excluded from its statistics persons in “special types of employment”. The KCTU also argued that fixed-term contracts are used excessively and should be limited to certain cases. The FKTU further noted that despite legislative protection, women on fixed-term contracts in practice face disadvantages and dismissal due to pregnancy, childbirth, and childcare. The FKTU underlined the high concentration of women workers in precarious employment and reported an increase in cases of sexual harassment and verbal abuse against non-regular workers.

In response, the Committee of Experts asked the Government to

take the necessary measures, including through the qualitative and quantitative strengthening of enforcement, to protect fixed-term, part-time and

dispatched workers against discrimination, particularly women, and to provide information on the impact on precarious employment of the set of measures taken in 2011, including measures with a view to converting non-regular employment into regular employment and measures for the protection of subcontracted workers.

The FKTU and KCTU also brought this matter before the ILO Conference Committee on Application of Standards in 2013.

CONVENTION 150

Korea:¹⁵⁶ In 2011, the Committee of Experts noted that “non-standard” workers had been excluded from the extension of the protection of labour administration in the Roadmap for Industrial Relations Reform. The Committee requested the Government to clarify which workers were excluded and why. The Government said that golf caddies, tutors, insurance agents and concrete truck drivers were excluded because they were not in an employment relationship. The Committee of Experts also referred to the conclusions and recommendations of the Committee of Freedom of Association in Case No. 2602 (above) concerning “illegal dispatch”, which is a form of false subcontracting that disguises employment relationship and deprives workers of the labour protections available under the Trade Union and Labour Relations Adjustment Act (TULRAA). The Committee of Experts urged the government to “provide details of the categories and number of workers engaged in non-traditional forms of work (“non-standard workforce”) and also on any measures taken or contemplated, to favour... the progressive extension of the protection of the labour administration system to categories of workers who are not, in law, employed persons.”

CONVENTION 181

Japan:¹⁵⁷ In 2009, RENGO filed a representation alleging non-observance by Japan of the Private Employment Agencies Convention, 1997 (No. 181). In 2012, the ad-hoc committee issued recommendations, which were supervised by the Committee of Experts in 2013.¹⁵⁸ The representation stated that a temporary worker at Iyo Bank did not have his contract renewed for the first time in 13 years after the worker requested an apology from a superior over alleged harassment. The official reason for the termination was the expiration of

the contract. The worker had been directly employed by Iyogin Staff Service, a separate legal entity but one wholly owned by Iyo Bank. RENGO argued that the relationship of the temporary employment agency with the worker in Iyo Bank case was a “registration-type dispatch” and that the worker’s duties violated the restrictions of temporary employment contracts set forth under the Worker Dispatch Law. The Matsuyama District Court had held for the worker, finding an implicit employment contract between the plaintiff and Iyo Bank. However, the appellate court overturned this finding, recognizing the definite term contract between the worker and Iyogin Staffing Agency as the only legally relevant contract. Under that contract, expiration of the contract’s term was a valid ground for dismissal. The Supreme Court upheld the decision of the appellate court. RENGO argued that the Supreme Court’s decision violated Article 1(1)(b) of Convention No. 181 under which the private agency assumes the role of an employer. RENGO argued that the temporary worker was denied the right to expect continued employment and failed to recognize the temporary work agency’s responsibilities as an employer.

Following the issuance of the Committee’s recommendations and the comments of the Committee of Experts in 2012 (published in 2013), the government of Japan had passed the 2012 Revised Worker Dispatch Law. The Committee of Experts largely limited its observations to requests to provide information on the operation in practice of the new law. RENGO noted however that a proposed ban on “registration-type dispatch” was removed from the bill, and thus the problem of registration-type workers was left unresolved. RENGO noted though that registration-type dispatch workers could be protected under the Revised Labour Contract Act.

Conclusion

The legislation and practice in many countries allow employers to hire workers in employment arrangements that put them at a significant disadvantage.

Such workers do not enjoy basic employment protections or benefits. They often work extremely long hours, in some cases out of fear of losing their jobs if they do not comply with their employers' every demand. Their work is often less safe, due to overwork and the lack of protective equipment and safety training. In some cases, the work assigned is physically more arduous. And, precarious workers face serious difficulties in organizing and forming or joining a trade union to protect their interests. As a result, wages are often only a fraction of that earned by their long-term, directly employed counterparts.

Indeed, in some countries, we have seen the emergence of a two-tiered labour force - directly employed (and often higher skilled) workers on one hand and a vast underclass that has little employment security and little hope of becoming regular workers on the other. Indeed, IMF Managing Director Christine Lagarde noted in a speech in Korea in December 2013 that, "A key problem [in the labour market] is duality. Regular workers have high levels of job protection and decent wages and benefits. Non-regular—or temporary or part-time—workers have low wages, little employment security, inadequate training, and weak social insurance coverage. They make up about a third of the labour force."¹⁵⁹

The impact of precarious work extends far outside of the workplace, making it difficult for workers to afford necessities such as adequate food, decent housing and transportation. Testimony collected by the Australian Council of Trade Unions, for example, shows workers regularly turned down for loans because they do not have regular employment. This puts incredible stress on individuals and their families, leading to depression and in some cases suicide. It also put tremendous stress on the society generally. In the long run, it does not benefit employers either, as the stress of precarity will certainly drive down productivity and create a highly resentful workforce with little allegiance to the company. The lack of demand created by the inability of workers to consume the good and services they produce will also drive down revenues.

In all countries, unions report that precarious work is a factor in the decline in union density and collective bargaining coverage where precarious work is most prevalent. However, unions are developing strategies to cope with these obstacles, through legislative campaigns to limit precarious work and to extend social protection to more workers. Unions are also taking employers to court, seeking to challenge illegal hiring practices. And, unions are getting about the core business of organizing workers and bargaining collectively, incorporating precarious workers into their ranks and using collective bargaining to improve

wages and working conditions and preventing or limiting the resort to more hiring into precarious forms of work.

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Not all countries in the Asia-Pacific region are included in this volume. However, as additional information becomes available, supplemental country profiles will be posted to the precarious work page on the ITUC website:
www.ituc-csi.org/precariouswork.

Endnotes

1. The “non-standard” employment concept is used by the ILO to describe precarious work, though in some countries or sectors, it is approaching the “standard”.
2. <http://www.actu.org.au/Publications/IndependentInquiryintoInsecureWork/default.aspx>
3. Fair Work Act 2009 (Cth), s.12.
4. See further Fair Work Act 2009 (Cth), Chapter 3, Part 3-1.
5. There are 122 modern industry and occupational awards. These are accessible via the Fair Work Commission’s website (<http://www.fwc.gov.au/index.cfm?pagename=awardsfind>).
6. See Clause 12, at http://www.fwc.gov.au/documents/modern_awards/award/ma000006/default.htm.
7. FWA, s. 123(1)(a).
8. See s 386(2)(a).
9. See, e.g., the Horse and Greyhound Training Award 2010, clause 10.4(d). A number of modern awards contain ‘casual conversion’ clauses, under which a casual employee who meets certain eligibility criteria may request conversion to permanent employment. An employer cannot unreasonably refuse such a request. See, e.g., the Manufacturing and Associated Industries and Occupations Award 2010, clause 14.4.
10. FWA, ss.357-359.
11. *Stevens v Brodribb Sawmilling Company Pty Limited* (1986) 160 CLR
12. *Hollis v Vabu Pty Limited* (2001) 207 CLR 21; *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3.16 See, e.g., *Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor* [2013] FCCA 397.
13. See, e.g., Schedule F (Outwork and Related Provisions) of the Textile, Clothing, Footwear and Associated Industries Award 2010.
14. See, e.g., Industrial Relations Act (NSW), s 127.
15. Australian Bureau of Statistics, *Forms of Employment, Australia*, Cat. 6359.0, November 2012 (April 2013).
16. International Labour Conference, *Report of the Committee on Application of Standards 2011* (Part II), p. 18 (“The Committee observed that a legislative reform process was under way and considered that the Government should intensify its efforts, in full consultation with the social partners and with the assistance of the ILO, to ensure that the final draft legislation would be fully in conformity with the Convention. In particular, the Committee trusted that the new legislation would ensure that civil servants, teachers, air and maritime transport workers, judges and domestic workers are fully guaranteed the rights under the Convention.”), available online at www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_157818.pdf.
17. In addition to the Synthesis Reports of Better Factories Cambodia, see, e.g., *Tearing Apart at the Seams: How Widespread Use of Fixed-Duration Contracts Threaten Cambodian Workers and the Cambodian Garment Industry*, Allard L. Lowenstein International Human Rights Clinic - Yale Law School (April 2011), available online at www.law.yale.edu/documents/pdf/Intellectual_Life/Cambodia_TearingApartattheSeams.pdf; *Short-Term Contracting in the Asian Garment Industry*, World Solidarity (Dec. 2009), available online at www.socialalert.org/k/images/STC/policy%20document%20on%20stc%20.pdf;
18. Article 89: If the labour contract is terminated by the employer alone, except in the case of a serious offence by the worker, the employer is required to give the dismissed worker, in addition to prior notice stipulated in the present Section, the indemnity for dismissal as explained below: Seven days of wage and fringe benefits if the worker’s length of continuous service at the enterprise is between six and twelve months. If the worker has more than twelve months of service, an indemnity for dismissal will be equal to fifteen days of wages and fringe benefits for each year of service. The maximum of indemnity cannot exceed six months of wage and fringe benefits. If the worker’s length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year.
19. Article 91: The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages. These damages are not the same as the compensation

in lieu of prior notice or the dismissal indemnity. The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage caused.

Article 94: Without prejudice to the provisions of Article 91, the damages owned in the case of a breach of the labour contract without valid reasons, as well as those owned by the employer as per provision of Article 89 above, are determined by the competent court and based on local custom, the type and importance of the services rendered, the worker's seniority and age, the pay deductions or payments for a retirement pension, and, in general, on all circumstances that can justify the existence and the extent of the harm incurred.

20. Article 166: Unless there is more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half days of paid leave per month of continuous service. Any worker who has not worked for two continuous months is entitled, at the termination of his labour contract, to compensation for paid annual leave calculated in proportion to the amount of time he worked in the enterprise. For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if he works an average of 21 days per month. The length of paid leave as stated above is increased according to the seniority of workers at the rate of one day per three years of service. Official paid holidays and sick leave are not counted as paid annual leave.

Article 167: The right to use paid leave is acquired after one year of service. If the contract is terminated or expires before the worker has acquired the right to use his paid leave, an indemnity calculated on the basis of Article 166 above is granted to the worker. Apart from this, any collective agreement providing compensation in place of paid leave, as well as any agreement renouncing or waiving the right to paid annual leaves, shall be null and void. Acceptance by the worker to defer all or part of his rights to paid leave until the termination of the contract is not considered as renunciation. Deferment of this leave cannot exceed three consecutive years and can only apply to leave exceeding twelve working days per year.

21. Article 169: The length of continuous service set in Article 166 must cover the entire period during which the worker has a labour contract with the employer, even if the work was suspended without a termination of the contract. Included in the period for which the worker is entitled to paid leave each year is as follows: Weekly time off; Paid holidays; Sick leave; Maternity leave; Annual leave and notice period; Special leave granted up to a maximum of seven days during any event directly affecting the worker's immediate family. On the contrary, special paid leave for personal reasons is not included when calculating the eligibility period for paid annual leave if the time off was not made up.

22. Stuart White and Chhay Channyda, Standards building up safety fears, Phnom Penh Post, 22 May 2013.

23. ILO and NIS, Cambodia Labour Force and Child Labour Survey 2012, November 2013, online at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_230721.pdf

24. SPMI research study, 2010, Praktek Kerja Kontrak dan Outsourcing di Sektor Industri Metal di Indonesia.

25. JAMSOSTEK (Jaminan Sosial Tenaga Kerja) is the social insurance fund for the private sector employees which provides 4 (four) programmes; employment injury, death, health insurance and provident fund for old age benefit.

26. John Evans and Euen Gibb, Moving from Precarious Employment to Decent Work, Discussion Paper No. 13, ILO 2009, p. 32-3.

27. Id. at 34.

28. Note, we do not in this report focus on part-time work, as part-time work is not necessarily precarious if freely chosen. We recognize that it can be precarious if workers who seek full-time work are nevertheless offered part-time work, particularly where the scheduling of that work is unpredictable and not for a set amount of hours. The data does not allow us to determine the nature of the part-time work in Japan.

29. Article 16 of the Supplementary Provisions of the National Public Service Act

30. Article 108-2, para 5 of the National Public Service Act, and Article 52, para 5 of

31. Article 16 of the Supplementary Provisions of the National Public Service Act, Article 58 of the Local Public Service Act
32. Article 22 of the Local Public Service Act, Articles 4 and 5 of the Act on Employment of the Fixed-Term Local Public Officers Engaged in Regular Services Contract
33. Article 22 of the Local Public Service Act, Article 4 and 5 of the Act on Employment of the Fixed-Term Local Public Officers Engaged in Regular Services Contract
34. 1) Software development; 2) Machinery design; 3) Operation of broadcasting equipment; 4) Production of broadcast programs; 5) Operation of business equipment; 6) Interpretation, translation, and shorthand writing work; 7) Secretarial work; 8) Filing; 9) Market research; 10) Financial arrangement; 11) Business document preparation; 12) Demonstrations of machinery; 13) Tour conducting work; 14) Building cleaning work; 15) Operation, checking, and maintenance of building equipment; 16) Reception and guide services, parking management; 17) Research and development; 18) Planning of the development of business operation systems; 19) Editing work in producing books; 20) Advertising design; 21) Interior coordinators; 22) Announcers; 23) OA instructors; 24) Telemarketing sales; 25) Sales engineer, financial products sales; 26) Stage sets and props designers and coordinators for broadcast programs.
35. Hamaguchi and Ogino, "Non-Regular Work: Trends, labour law policy, and industrial relations developments – the case of Japan", Working Paper No. 29, Oct 2011, p. 10.
36. UN, Committee on the Elimination of Discrimination against Women, 44th Session, 20 July - 7 August 2009, (CEDAW/C/JPN/6).
37. Id. at ¶46.
38. cite
39. See ITUC's Sept 2013 interview with Ha, Chang-min, chair of the KMWU HHI Local, standing before a mural of the union's founder, who self-immolated to raise the consciousness of the workers in the shipyards: <http://youtu.be/fU1xax14XF4>
40. Article 11 (1) and (2) of the Labour Standards Act, Art. 7 of Enforcement Decree of the Labour Standards Act/Table 1 of Addenda of the Enforcement Decree of the Labour Standards Act.
41. Art. 11(1) of the Labour Standards Act
42. Id.
43. Paul Vandenberg, "Is Asia adopting flexicurity? A survey of employment policies in six countries" (International Labour Organisation, 2008)
44. BWI World Council, "Policy Discussion – Policy Recommendations on Precarious Work" (BWI World Council, 10-11 November 2011) 3
45. Id at 1
46. Id at 3
47. Paul Vandenberg, "Is Asia adopting flexicurity?" at 12
48. Id at 15
49. Kang, Seong-tae, "Freedom of Association and Labor Law in Korea" (Hanyang University law School) 4-5
50. Aelim Yun, "Regulating multi-layer subcontracting to improve labour protection" (Korean Solidarity against Precarious Work) 5
51. Paul Vandenberg, "Is Asia adopting flexicurity? A survey of employment policies in six countries" (International Labour Organisation, 2008)
52. Computing professionals, business professionals, archivists and related information professionals (not librarians), philologists, translators and interpreters, telegraph and telephone communications engineering technicians (limited to assistants for examining reception in the area where it is poor), draughtspersons, computer assistants, image equipment operators (limited to assistants), radio and television broadcasting equipment operators (limited to assistants), other teaching associate professionals, administrative secretaries and related associate professionals, artistic,

entertainment and sports associate professionals, secretaries and keyboard operating clerks (excludes data entry operators and calculating machine operators), library, mail and related clerks, debt collectors and related workers, telephone switchboard operators (excludes where it is considered the core service in the concerned business), travel guides, cooks (excludes those cooks in tourism and hotels as stipulated in Article 3 of the Tourism Promotion Act), child-care workers, institution-based nursing aids excludes assistant nurses, home-based personal care workers, petrol pump attendants, motor vehicle drivers (excludes the jobs stipulated in subparagraphs 5 and 6 of Article 2 (2), telephone salespersons, charworkers and doorkeepers.

53. Paul Vandenberg, "Is Asia adopting flexicurity? A survey of employment policies in six countries" (International Labour Organisation, 2008)
54. An interview with Park, Hyeon-je, local chair of the KMWU Hyundai Motor Branch, with the ITUC regarding precarious work at Hyundai Motors, is available online at: <http://www.youtube.com/watch?v=OYffHgtAGTWE#t=10>.
55. http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057164
56. Aelim Yun, "Regulating multi-layer subcontracting to improve labour protection" at 3.
57. Id. at 2
58. Id at 1
59. Id.
60. Id at 2-3
61. Id 3
62. Id at 4
63. Id at 14
64. Kang, Seong-tae, "Freedom of Association and Labor Law in Korea" (Hanyang University law School) 5
65. Id.
66. Aelim Yun, "Regulating multi-layer subcontracting to improve labour protection" at 14
67. Id at 8
68. Id at 8
69. Id at 15
70. Id at 15
71. Id at 7
72. Id
73. Id at 10
74. Id
75. Id at 7
76. Id
77. Id
78. Mordy Bromberg, "The Labour Law of Nepal – Proposals for Reform" (A Report prepared for the International Labour Office, October 2007), page 50
79. Robert Kyloh, "From conflict to cooperation – Labour market reforms that can work in Nepal" (2008), page 64
80. Ibid.
81. Prof Dr Deve Raj Adhikari, "Decent Work: The Case of Nepal" (Paper submitted to the International Labour and Employment Relations Association World Congress, July 2012) 16

82. Ibid
83. Robert Kyloh, "From conflict to cooperation – Labour market reforms that can work in Nepal" (2008), page 65
84. Prof Dr Deve Raj Adhikari, "Decent Work: The Case of Nepal" (Paper submitted to the International Labour and Employment Relations Association World Congress, July 2012) 3
85. International Labour Organisation, "Asia-Pacific Labour Market Update"(October 2012), page 5
86. Dinesh P. Chapagain, "Contract Labour in Nepal", (ILO Seminar, June 2000)
87. Robert Kyloh, "From conflict to cooperation – Labour market reforms that can work in Nepal" (2008), page 53.
88. Umesh Upadhyaya, "Party Politics, Economic Agenda and Trade Unions: Nepali Context of Experience" (Paper submitted to VII Global Labour University Conference, September 2011) 5
89. ILO, "Asia-Pacific Labour Market Update" id at p. 5
90. Ibid
91. Chapagain, "Contract Labour in Nepal"
92. Ibid
93. Prof Dr Deve Raj Adhikari, "Decent Work: The Case of Nepal" (Paper submitted to the International Labour and Employment Relations Association World Congress, July 2012) 16
94. Ful Maya Tamang, "Promoting Freedom of Association and Decent Work for Workers in Precarious Employment" (GEFONT, August 2012) 2
95. Umesh Upadhyaya, "Party Politics, Economic Agenda and Trade Unions: Nepali Context of Experience" (Paper submitted to VII Global Labour University Conference, September 2011) 7
96. The NZCTU has produced a comprehensive report on the incidence of "insecure" work (a broader concept than precarious work) in New Zealand. Under Pressure: A detailed report into insecure work in New Zealand, which is available online at <http://union.org.nz/underpressure>. This report draws from it.
97. <http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58619.html>
98. Real estate agents are also mentioned but may be employees or contractors under the Real Estate Agents Act 2008.
99. <http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM59161.html>
100. The definition of employee in section 6 of the Employment Relations Act 2000 includes "a person intending to work" in s 6(1)(b)(ii).
101. Available after 6 months' current and continuous service or where an employee has worked an average of 10 hours per week (and at least 1 hour per week or 40 hours per month) for six months: s 63(1) of the Holidays Act 2003.
102. Available after working an average of 10 hours per week over the immediately preceding 6 or 12 months: s 7(b) Parental Leave and Employment Protection Act 1987.
103. Available after working for the employer for the immediately preceding six months: s 69AAB Employment Relations Act 2000.
104. See for example *Rush Security Services Ltd t/a Darien Rush Security v Samoa* [2011] NZEmpC 76
105. List of factors quoted from *Baker v St John Central Regional Trust Board* [2013] NZ EmpC 34 at [20]
106. http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL12107_1/employment-relations-amendment-bill
107. *Brent School, Inc. v. Zamora*, 260 Phil. 747, 758-762 (1990); *Asia World Recruitment Inc. v. NLRC*, 371 Phil. 745, 755-756 (1999); *Palomares v. NLRC*, (5TH Division), G.R. No. 120064, August 15, 1997, 277 SCRA 439, 447-449).

108. Escareal vs. NLRC, 213 SCRA 472 (1992)
109. (Caramol vs. NLRC, 225 SCRA; Philips Semiconductors s. Fadriquela, April 14, 2004, 427 SCRA 408)
110. Manila Hotel vs. CIR, 9 SCRA 184.
111. Management vs. NLRC, 148, Phil 580
112. [Cielo v. NLRC, 193 SCRA 410, 415-416 [1991; Samson v. NLRC, 253 SCRA 112, 124 [1996; Contri v. NLRC, G.R. No. 119253, 10 April 1997].
113. Purefoods Corporation v. National Labor Relations Commission, et al, 283 SCRA 133 (1997
114. Poseidon Fishing v. NLRC, GR No. 168052, Feb 20, 2006; Philips Semiconductors, Inc. v. Fadriquela, 427 SCRA 408, April 14, 2004; Pakistan International Airlines Corporation v. Ople, 190 SCRA 90, Sept 28, 1990.
115. Caurdanetaan Piece Workers Union v. Laguesma, 350 Phil. 35, 73 (1998).
116. Integrated Contractor and Plumbing Works, Inc. v. National Labour Relations Commission
117. Alcatel Philippines vs. Yolanda Delos Reyes, G.R. No. 164315, (July 3, 2009)
118. Maraguinot, Jr. v. NLR, 348 Phil. 580 (1998).
119. Cioco v. C.E. Construction Corporation, 437 SCRA 648 (2004)
120. New Sunrise Metal Construction v. Pia, 527 SCRA 259 (2007)
121. Viana v. AL Lagadan, et.al., 99 Phil. 408; Singer Sewing Machine Co. v. Drilon, G.R. No. 91307, 193 SCRA 270 (1991); Deferia v. National Labour Relations Commission, G.R. Nos. 92777-78, 195 SCRA 224 (1991); Hijos de F. Escaño, Inc. v. NLRC, G.R. No. 59229, 201 SCRA 63 (1991)
122. Elias Villuga v. NLRC, G.R. No. L-75038, August 23, 1993, 225 SCRA 537.
123. G.R. No. 53590, 131 SCRA 72 (1984)
124. Art. 106. Contractor or subcontractor. Whenever an employer enters into a contract with another person for the performance of the former's work, the employees of the contractor and of the latter's subcontractor, if any, shall be paid in accordance with the provisions of this Code. In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him. The Secretary of Labour and Employment may, by appropriate regulations, restrict or prohibit the contracting-out of labour to protect the rights of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinctions between labour-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer for purposes of this Code, to prevent any violation or circumvention of any provision of this Code. There is "labour-only" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.
125. Art. 109. Solidary liability. The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for any violation of any provision of this Code. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers.
126. "Cabo" refers to a person or group of persons or to a labour group which, in the guise of a labour organization, cooperative or any entity, supplies workers to an employer, with or without any monetary or other consideration, whether in the capacity of an agent of the employer or as an ostensible independent contractor.

127. DOLE Philippines, Inc. v. Pawis ng Makabayang Obrero, G.R. No. 146650, January 13, 2003, 395 SCRA 112, 116; 443 Phil. 143, 149 (2003).
128. Section 5 - "The principal shall be deemed the direct employer of the contractor's employee in cases where there is a finding by the competent authority of commission of prohibited activities as provided in Section 7 [other prohibitions] or violations of either Sections 8 [rights of contractor's employees] or 9 (violations of the required contracts)".
129. In the Philippines, membership in the bargaining unit is based on mutuality of interests, i.e., the members must be performing the same or similar functions in the same line of work.
130. ILO, ILO Decent Work Country Profile: The Philippines, 2012, p. 49.
131. *Id.* at p. 50.
132. Esguerra, Emmanuel F. (2010). Unemployment, Work Security and Labour Market Policies, In Search of a Human Face: 15 Years of Knowledge Building for Human Development in the Philippines. Human Development Network. Manila.
133. See the study of Prof. Divina Edralin of the De La Salle University, <http://www.slideshare.net/RaymundHabaradas/precarious-workthe-hotel-industry-experience>
134. Article 2: "employee" means a person who has entered into or works under a contract of service with an employer and includes an officer or servant of the Government included in a category, class or description of such officers or servants declared by notification in the Gazette by the President of Singapore to be employees for the purposes of this Act, but does not include any person or class of persons whom the Minister may from time to time by notification in the Gazette declare not to be employees for the purposes of this Act;
135. Article 9. —(1) A contract of service for a specified piece of work or for a specified period of time shall, unless otherwise terminated in accordance with the provisions of this Part, terminate when the work specified in the contract is completed or the period of time for which the contract was made has expired. (2) A contract of service for an unspecified period of time shall be deemed to run until terminated by either party in accordance with the provisions of this Part.
136. Article 48 of the IDA defines "workman" as "any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated."
137. Shyamali Ranaraja, "Emerging trends in employee participation in Sri Lanka" (ILO, January 2013) 42
138. Kamala Sankaran, "Labour laws in South Asia: The need for an inclusive approach" (International Institute for Labour Studies, 2007) 7-8
139. *Id.*
140. Shyamali Ranaraja, "Emerging trends in employee participation in Sri Lanka" (ILO, January 2013) 10
141. *Id.* p. 9
142. *Id.* p. 41
143. Leslie Devendra, "Challenges facing Trade Unions in Sri Lanka" ("Labour Issues in Development", National Association for Trade Union Research and Education, August 2009) 98.
144. For details, see http://www.ilo.org/actrav/what/events/WCMS_153972/lang--en/index.htm
145. See ILO Governing Body, Arrangements for the Meeting of Experts on Non-standard Forms of Employment, 9 June 2014, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--relconf/documents/meetingdocument/wcms_246672.pdf.
146. See Article 2, stating, "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

147. Article 1(a) states, "1. For the purpose of this Convention the term discrimination includes-- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."
148. See Article 1, stating, "1. With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.
2. The said policy shall aim at ensuring that--
(a) there is work for all who are available for and seeking work;
(b) such work is as productive as possible;
(c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin."
149. See Article 7.
150. See Article 2(3).
151. See Article 4, stating "Measures shall be taken to ensure that the workers recruited by private employment agencies providing the services referred to in Article 1 are not denied the right to freedom of association and the right to bargain collectively."
152. See Article 12, stating, "A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to:
(a) collective bargaining;
(b) minimum wages;
(c) working time and other working conditions;
(d) statutory social security benefits;
(e) access to training;
(f) protection in the field of occupational safety and health;
(g) compensation in case of occupational accidents or diseases;
(h) compensation in case of insolvency and protection of workers claims;
(i) maternity protection and benefits, and parental protection and benefits."
153. Observation (CEACR) - adopted 2009, published 99th ILC session (2010), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2313963,102775,New%20Zealand,2009.
154. CFA Case No 2602, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:2897870.
155. Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3084932,103123,Korea,%20Republic%20of,2012.
156. Observation (CEACR) - adopted 2011, published 101st ILC session (2012), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2700228,103123,Korea,%20Republic%20of,2011.
157. The report and recommendations of the tripartite committee is available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507469,en:NO
158. CEACR - adopted 2012, published 102nd ILC session (2013).
159. Christine Lagarde, Managing Director, International Monetary Fund, Securing the Future for Korea—an Address to Seoul National University Seoul, 5 December 2013, available at <http://www.imf.org/external/np/speeches/2013/120513b.htm>

