

APPENDIX 2

International Labour Organisation International Labour Conference Ninety-fifth Session, Geneva, 2006

PROPOSED RECOMMENDATION CONCERNING THE EMPLOYMENT RELATIONSHIP

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Ninety-fifth Session on 31 May 2006, and

Considering that there is protection offered by national laws and regulations and collective agreements which are linked to the existence of an employment relationship between an employer and an employee, and

Considering that laws and regulations, and their interpretation, should be compatible with the objectives of decent work, and

Considering that employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship, and

Considering that the protection of workers is at the heart of the mandate of the International Labour Organization, and

in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

Further recognizing that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance, and

Recognizing that national policy should be the result of consultation with the social partners and should provide guidance to the parties concerned in the workplace, and

Recognizing that national policy should promote economic growth, job creation and decent work, and

Considering that the globalized economy has increased the mobility of workers who are in need of protection, at least against circumvention of national protection by choice of law, and

Noting that, in the framework of transnational provision of services, it is important to establish who is considered a worker in an employment relationship, what rights the worker has, and who the employer is, and

Considering that the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities, and society at large, and

Considering that the uncertainty as to the existence of an employment relationship needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship in a manner appropriate to national law or practice, and

Noting all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship, and

Having decided upon the adoption of certain proposals with regard to the employment relationship, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation; adopts this ... day of June of the year two thousand and six the following Recommendation, which may be cited as the Employment Relationship Recommendation, 2006.

I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due;

(d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting

appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must

be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

23. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

RESOLUTION CONCERNING THE EMPLOYMENT RELATIONSHIP

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 95th Session, and

Having adopted the Recommendation concerning the employment relationship,

Noting that Paragraphs 19, 20, 21 and 22 recommend that Members should establish and maintain monitoring and implementing mechanisms, and

Noting that the work of the International Labour Office helps all ILO constituents better to understand and address difficulties encountered by workers in certain employment relationships,

Invites the Governing Body of the International Labour Office to instruct the Director-General to:

1. Assist constituents in monitoring and implementing mechanisms for the national policy as set out in the Recommendation concerning the employment relationship;
2. Maintain up-to-date information and undertake comparative studies on changes in the patterns and structure of work in the world in order to:
 - (a) improve the quality of information on and understanding of employment relationships and related issues;
 - (b) help its constituents better to understand and assess these phenomena and adopt appropriate measures for the protection of workers; and
 - (c) promote good practices at the national and international levels concerning the determination and use of employment relationships;
3. Undertake surveys of legal systems of Members to ascertain what criteria are used nationally to determine the existence of an employment relationship and make the results available to Members to guide them, where this need exists, in developing their own national approach to the issue.