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Keywords for a 21st Century Workplace

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THE INSTITUTE OF DEVELOPMENT AND LABOUR LAW

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Keywords for a 21st Century Workplace

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Introduction

People make their own language as well as their own history, Raymond Williams, the originator of the keywords concept, suggested. This booklet is inspired in part by William's book of "keywords", and we have also had regard to a South African version.¹ However we do not pretend to be in the same league. Unlike these works, the scope of our enquiry is not general.

Further, although this booklet may be of use to academics, it is not intended as a work of scholarship. It is primarily intended as a resource, for those who are practically engaged with questions concerning the organization and regulation of work, be they in the labour movement, in civil society or government.

These are words and phrases that are often used in both confused and confusing ways. Some have historical or other baggage and many are contested, since the question as to how work is regulated, and indeed whether it should be regulated, has been contested both within South Africa and globally since the 1980s.

Over the same period there have also been profound social and economic changes. Our focus on "work" rather than "employment" is as a consequence of these changes. As the ILO put it at the time it adopted decent work as an objective, "almost everyone works but not everyone is employed" (ILO, 1999).

For a brief period during the 1980s, after the dismantling of the contract labour system, it was possible to believe that nearly everyone would be employed in the new South Africa, and that employment would be in what would then have been called a permanent job. With the advent of 1990s, and even more so in the new millennium, that belief is rapidly receding.

In this context, workers in employment, and society at large, face a dilemma. Do they abandon regulation altogether, as some have been advocating? Do they seek to utilise regulation to buttress their position? Or do they utilise regulation to protect those who are currently outside its reach? Related to these questions is the question of organization: do the old forms still work? Are the old forums for bargaining and representation still functional?

How these questions are perceived and addressed, is influenced by the language in which they are framed, and the language in which they are framed also influences what is prioritised. This booklet attempts to develop a language appropriate to current circumstances. Where the words we believe are key to understanding these circumstances have a legal meaning, this is provided, so as to provide the tools with which individuals or organisations can take up issues.

A draft of this booklet was presented at a workshop that took place in June 2010, under the main title "Work in Progress". This was both to emphasize the contemporary nature of the issues about work considered, and also to emphasize its provisional nature. This is a revised version of that draft. It nevertheless remains work in progress, which we hope will be enriched by further discussions and contributions. In due course it will also be published electronically.

The production of this booklet, and the work that has gone into it, has been made possible by the generous funding of FNV Mondiaal.

List of acronyms

| | |
|--------|---|
| BCEA | : Basic Conditions of Employment Act |
| COIDA | : Compensation for Occupational Injuries and Diseases Act |
| CCMA | : Commission for Conciliation Mediation and Arbitration |
| EEA | : Employment Equity Act |
| ILO | : International Labour Organization |
| LRA | : Labour Relations Act |
| NEDLAC | : National Economic, Development & Labour Council |
| OHSA | : Occupational Health and Safety Act |
| SDA | : Skills Development Act |
| UIA | : Unemployment Insurance Act |

Keywords for a 21st century workplace

Association

An association is the most basic form of membership-based organization (MBO). Any group of persons who have joined together under some agreement or constitution or rules for the purpose of carrying out some common object is an association. It is the object that defines the kind of association.

Examples: For example associations are commonly used to advance a sporting or educational or cultural or charitable object. Associations are also used to represent the interests of the members of groups of all kinds, including members operating businesses.

There are generally two types of business associations:

- Employers' organizations, whose object is to represent employers in relation to trade unions. The LRA provides for such organizations to register.
- Business or trade associations that represent their members' interests with regard to issues of trade and industrial policy, in relation to government and others.

In some cases a single association will fulfill both these objectives (e.g. the newly-formed Apparel Manufacturers of South Africa).

Any association having what the legislation refers to as a "non-profit objective may register", either in terms of the Non Profit Organizations (NPO) Act² or Companies Act³, in which case it will become a legal person. The other benefits of registration have been referred to above.

Bargaining councils

The LRA provides that a registered trade union(s) and registered employer organisation (s) may establish bargaining councils within a particular sector and area(s). The primary purpose of a bargaining council is to negotiate collective agreements.

The most controversial aspect of the bargaining council system concerns the extension of a collective agreement to non-parties ie to employees in the sector who are not members of the trade union, or to employers who are not members of the employers association (and their employees).

In the apartheid era the extension of collective agreements was controversial because it meant that trade unions representing predominantly white, skilled workers were determining wages of African workers, at a time when they were denied trade union rights. In the post-apartheid era extensions have been controversial amongst employers pleading poverty, particularly small businesses. The allegation that they

make is that the extension of bargaining council agreements stifles job creation by small and medium-sized firms.

Casual

In common language, “casual” is sometimes used to describe anyone who is not in standard employment, including part-time employees and temporary employees (see **casualisation**). However the term no longer has a precise legal meaning. The most sensible use of the term casual is to refer to what in North America is referred to as a “day labourer” ie someone who is hired on a day to day basis.

In terms of the old BCEA, a “casual employee” meant a day worker who was employed by the same employer on not more than three days in any week, but did not include a regular day worker.⁴ A regular day worker refers to someone who is employed on a regular basis for one day a week, such as a gardener. It is therefore clear that a casual employee was a temporary employee.

The definition in the old BCEA, or similar definitions, were adopted in certain Wage Determinations that remained in force after the repeal of the old BCEA. However there is no precise equivalent of “casual employee” in the new BCEA. Instead the new BCEA distinguishes between employees who work **less than 24 hours a month** for an employer and those who work 24 hours or more a month.⁵ Some commentators therefore regard a casual as someone who works less than 24 hours a month.

There are at least two criticisms one might have with the approach the new BCEA has taken. Firstly, it is not always easy for a worker to know whether he or she works 24 hours or more a month. Secondly, the part-time worker who is regularly employed but works less than 24 hours would not be covered (see **part-time employment**).

There are, for example, considerable numbers of domestic workers who “char” for different employers, and may well be employed for less than 24 hours a month (the equivalent of 5.5 hours a week) for each employer. Such workers would not be protected by provisions regulating hours of work, leave, and the provisions requiring an employer to provide his employee with particulars of employment⁶.

Casualisation

Like the term “casual”, this term has no precise meaning. In the literature about non-standard work, it is used as a “catch all” term to describe the ways in which employment is changing, and can be used more or less interchangeably with the terms “contingent” or “precarious employment”.

In South Africa, the term has been used by both organized labour and the Department of Labour in the above sense, to motivate for policy reforms.

However the term has also been criticized for conflating direct employment (whether part-time or temporary) and indirect or triangular employment, where employees are also commonly employed on a temporary basis, but through an agency or

intermediary or service provider. In the latter case the employment contract between a core business and its employees is replaced by a commercial contract between the core business and an agency or intermediary or service provider (see **commercial contract**). This is referred to as externalisation in this booklet.

An alternative usage of the term has been proposed, where casualisation has a more limited meaning, and refers only to direct employment that is part-time or temporary, and therefore not standard. (see **standard employment**). The object is thus to differentiate policy in respect of casualisation and externalisation.

Collective bargaining

Collective bargaining takes place when one or more employers engage with one or more organizations representing employees to try and reach agreement on issues of mutual interest.

The right to bargain collectively is protected by the Constitution, and one of the purposes of the LRA is to give effect to this right.⁷ The right to bargain collectively is also a fundamental right, as defined by the ILO (see **fundamental rights**).

The LRA gives effect to the right to bargain collectively by providing for the registration of trade unions and employers' organisations, by granting "representative" trade unions certain organisational rights, and by providing for the establishment of bargaining councils (see **organisational rights**). However the LRA does not impose a duty to bargain.

Bargaining may occur at the following different levels, namely at:

- Plant level;
- Company (or firm) level, where there is more than one plant belonging to the same company or firm;
- Sectoral level, where there are different employers in the same industry or sector.

The LRA encourages collective bargaining at sectoral level. However it has become increasingly difficult to bargain at a sectoral level, and arguably problematic, as a result of the increase of non-standard employment, and specifically as a result of externalisation.

Externalisation results in the fragmentation of the workforce in the physical workplace, with a section of the workforce employed by the person who controls that workplace, and other sections employed by service providers and the like (see **workplace, core business**). This also leads to fragmentation at the level of the sector (see **sector**).

If collective bargaining only takes place in respect of the employees of a core business, it will tend to widen existing gaps in wages and conditions of work of different sections of the workforce. One way to address this problem is to seek to

extend such agreements to employees employed by other employers. This has only been attempted in respect of agency workers in South Africa. In terms of the LRA it is currently only possible to extend a bargaining council agreement. Previously it was possible to extend other kinds of agreements as well.⁸

In the above instance the question that arises is how collective bargaining can be extended to employees that ostensibly belong to a sector other than that in which the core business operates (e.g. how can collective bargaining be extended by metal unions to employees of a contract cleaning company that work at firms in the metal engineering sector). A related question is whether collective bargaining can be extended to workers who are not employees.

The LRA applies only to employees, whereas the right to bargain collectively in terms of the Constitution applies to all workers (see **worker**). The question therefore arises whether and in what circumstances workers who are not employees may bargain collectively.

Practically, this is a question that has arisen in respect of soldiers wanting to negotiate with the defence force, and self-employed street vendors wanting to negotiate with the local authorities.

Policy questions:

Whether existing bargaining arrangements in services such as transport, (contract) cleaning and security serve to reinforce artificial divisions between workers in these sectors and the sector in which core business operates, and whether collective bargaining should take place in respect of the sector which they actually serve.

Whether the term “collective bargaining” should also be regarded as encompassing negotiations between parties that are not in an employment relationship, but where is an unequal power relationship, such as the relationship between a local authority and workers in the informal economy.

Commercial contracts

In its broadest sense, the term “commercial contract” applies to any contract that regulates a commercial relationship or transaction, and includes a contract of employment, which is regarded as a special kind of commercial contract (see **contract of employment**).

However in this booklet we are concerned to differentiate between the contract of employment, on the one hand, and contracts that regulate or govern the performance of work or a service (and therefore, in effect, the conditions under which workers work), yet which are not contracts of employment, on the other.

There are different kinds of contract in the latter category. However what they all have in common is that they are not governed by labour legislation. It is therefore convenient to refer to them as commercial contracts, bearing in mind this is a particular use of the term.

Before considering the conditions under which workers work, it is convenient to distinguish between two different situations in which such commercial contracts may be relevant, or in which such contracts are utilised.

- The first is a contract that regulate the conditions under which an individual worker (as opposed to an employee) is engaged; and
- The second is the contract entered into between a core business (see **core business**) and a service provider or contractor that governs the conditions under which employees of that service provider or contractor are employed, actually or in effect.

Three kinds of commercial contracts are identified in this booklet, but there are probably others: the contract of work, the contract of sale and the franchising agreement. The franchising agreement only applies in the second situation, and is discussed separately below (see **franchising**). However the first two may apply in both the above situations, as discussed below:

- A contract of work (the letting and hiring, or lease, of work) is a contract between a so-called independent contractor and the person who benefits from the work in question. This is regarded as a kind of lease (or letting and hiring) of a piece of work (as opposed to the lease of services, in the case of the contract of employment).

Examples: 1. A builder who undertakes to build a house.
 2. A service provider who undertakes to provide a service.

- A contract of sale (purchase and sale) is a contract between a seller and buyer and would apply where there is an independent producer producing goods for sale.

Examples : 1. A small-grower who produces fruit or vegetables.
 2. A homemaker or outworker who manufactures components of a product for a core business (see **homework** and **outwork**).

Sometimes service providers enter into separate “service level agreements”, that directly affect the conditions under which employees of a service provider work. This would probably be a sub-agreement of the main contract.

Policy question:

Both the independent contractor and the independent producer in the above scenario are often not truly “independent”. The policy question is whether (and under what circumstances) it is possible to regulate the commercial contracts that apply between them, or whether it is preferable for contractors and producers to organize themselves into co-operatives, to reduce their vulnerability and dependence.

Conditions of employment

The BCEA sets out what it refers to as “basic conditions of employment”, which are defined as any provision in either the BCEA or a Sectoral Determination which stipulate a “minimum term or condition of employment.” These include minimum wage rates, maximum daily and weekly ordinary hours of work, daily and weekly limits on overtime as well as the rate of overtime pay, annual leave, sick leave, notice and severance pay.

The phrase “term or condition” and “terms and conditions” is commonly used to encompass all the provisions of a contract, and also because, although there is a shade of difference between the legal meaning of “term” and “condition”, most people do not know what it is, so they use both words.

It is not necessary to use two terms when one will suffice. “Conditions of employment” in this booklet refers to all the provisions relating to a worker’s employment.

Contract of employment

This refers to a contract between an employer and an employee.

In some ways it is like any other commercial contract (in South African law, it is regarded as a kind of letting and hiring, and therefore a commercial contract), and the same fundamental rules apply (see **commercial contracts**).

If therefore it is “freely and voluntarily entered into” the courts will uphold it. Although it need not be in writing, the courts will regard the written word as binding.

In other respects, the contract of employment is different from other commercial contracts. For example:

- Minimum conditions in the BCEA amend equivalent provisions in all employment contracts, so the BCEA sets a floor of conditions beneath which employment contracts cannot go, even if agreed by the employee.
- Although a contract of employment does not have to be in writing, the BCEA requires an employer to provide an employee with “written particulars of employment”.⁹ Written particulars do not have to be signed by the employee, and include particulars such as the date of engagement, place of work, hours of work and wages.
- The LRA provides that every employee has the right not to be unfairly dismissed.¹⁰ So even if a contract of employment gives the employer the right to terminate employment on notice, it has still to be fair in terms of the LRA.
- A collective agreement may over-ride the provisions of the contract of employment.¹¹

The importance of having a written contract of employment is that it establishes conclusively that a worker is an employee as defined in labour legislation, and that labour legislation applies (see **employee**). It may be more difficult for a worker who does not have a written contract of employment to establish he or she is an employee.

A written contract also establishes who the employer is. This is not always obvious, particularly in situations where employment has been externalised.

In externalised employment, the employer is usually not the person for whom the employee actually works (see **externalisation**). It can therefore be argued that in this instance the contract of employment serves primarily to mask the real nature of the relationship (see **contract of employment**).

The term employment relationship is sometimes used to mean more or less the same thing as contract of employment, and sometimes to include workers who are not employees (see **worker, employment relationship**).

Contract labour / contract worker

In the history of labour in South Africa, contract labour has played a central role. It refers to a system originally developed in the mines, after the discovery of diamonds and gold at the end of the nineteenth century, in terms of which workers were engaged on fixed terms contracts and housed in single-sex compounds. Since the contract workers were from rural areas in South Africa as well as neighbouring states they were also called migrant workers.

Until the late 1970s African workers were not recognized as employees by the apartheid government, and were generally employed as contract workers in so-called unskilled jobs in all sectors of the economy, and became the back-bone of the non-racial trade union movement that helped bring about the end of apartheid. But by the 1990s, many sectors were laying off workers. Unskilled workers were generally the first to go.

So from the 1990s large numbers of workers who had been contract workers were either unemployed, or were employed by service providers or by labour brokers. In some instances retrenched workers were hired by service providers or labour brokers to work at the same business that retrenched them, generally at far lower wages than they had earned previously.

This process has to be understood in a global context and in this booklet is described as externalisation (see **externalisation**). There was an important attempt to regulate externalisation at an international level, in the late 1990s. The ILO proposed a new convention, on what it called contract labour. In terms of this new convention, contract labour was defined as follows:

“The term ‘contract labour’ means work performed for a natural or legal person (referred to as a ‘user enterprise’) by a person (referred to as a ‘contract worker’) where the work is performed by the contract worker personally under actual conditions of dependency on or subordination to the user enterprise and these

conditions are similar to those that characterize an employment relationship under national law and practice and where either:

- (i) the work is performed pursuant to a direct contractual arrangement other than a contract of employment between the contract worker and the user enterprise; or
- (ii) the contract worker is provided for the user enterprise by a subcontractor or intermediary.”¹²

However the proposed convention was not adopted in 1997, and after further debate at its Conference in 1998, was rejected. This was the first time in its history that the ILO had failed to adopt a convention generated through its procedures for setting labour standards, and was clearly a watershed for the organization. It now no longer uses the term contract labour.

The defeat of the proposed convention on contract labour can be ascribed to employer opposition, and a failure on the part of organized labour and national governments to understand the full dimensions of the phenomenon they sought to regulate. This is certainly true of organized labour in South Africa in 1997, and this suggests that the proposed convention on contract labour was perhaps premature.¹³

It was arguably also problematic to conflate two distinct uses of the commercial contract to supplant labour legislation. What the first form of contract labour gives rise to is still a relationship involving only two parties (in other words, a bilateral relationship). What the second form gives rise to is a relationship between at least three parties: what the ILO refers to as a user enterprise (and which we refer to as the core business), the worker concerned and her or his employer. It is entirely a different matter to regulate such a relationship, sometimes referred to as triangular employment.

The fact that the ILO no longer uses the term “contract labour” does not mean it has no validity. However it is ambiguous, for the abovementioned reason. In late 2010 the South African government introduced a series of bills to amend labour legislation, with the object of addressing, amongst other things “contract work”. However this term is not defined in these bills.¹⁴

Contractor / sub-contractor

A contractor is a person who enters into a contract (whether orally or in writing) to perform work for another (usually to provide goods and/or services), but is not an employee of that other person. A contractor may be either a natural person or legal person ie a company, cooperative or other legal entity.

It follows logically that a sub-contractor is simply a contractor who is engaged by another contractor (the main contractor) to help fulfil the main contractor’s obligations. However the term is also used more loosely than this. It has, for example, been defined by the ILO as meaning a person “who undertakes by a contractual arrangement with a user enterprise to have work performed for that enterprise.”

A legal distinction that may be relevant in determining whether a contractor is “independent” and “dependent” concerns whether a contractor performs work for another or a piece of work. This distinction, as discussed below, is far from clear-cut (see **independent contractor**).

Contingent employment

See non-standard employment.

Cooperatives

A cooperative is an association that operates as a business or enterprise, in accordance with cooperative values and principles. Cooperative values and principles are the principles adopted by the international cooperative movement.

Legislation provides that the cooperative may register as a legal entity, and sue and be sued in its own name, as is the case with a company as well as a trade union. In most countries it is the only kind of association that is permitted to operate as a business or enterprise.

An important difference between a company and a cooperative is that in a company it is the person that has the biggest share-holding that generally calls the shots. Cooperatives, however, operate democratically. This means that in a primary cooperative each member has one vote. In a secondary cooperative (which is a cooperative whose members are co-operatives) voting is according to the number of members each cooperative has.

Another important difference between a company and a cooperative is how capital is contributed and accumulated. In a cooperative, each member contributes to the capital of the cooperative. Members may also contribute by means of their labour.¹⁵

Like any other enterprise, a cooperative must be able to generate sufficient income to cover its running expenses, or it will not be sustainable. Additional income generated represents a surplus. In accordance with cooperative principles, a portion of any surplus must be retained in reserve. This portion of the surplus is not divisible amongst the members, and may only be used for developing the business, the education and training of the members, or the like.

The Cooperatives Act provides for the registration of cooperatives that have adopted a constitution that complies with cooperative principles¹⁶. A minimum of five members is required to form a cooperative, and there is no maximum number stipulated.

There are two ways in which cooperatives can operate as enterprises. One way is for the cooperative to provide services to its members. The other way is for the members to work together collectively in the cooperative. A cooperative in which workers have decided to work together collectively is called a worker cooperative¹⁷.

Examples: 1: Individual small growers decide to form a cooperative to market their produce, in order to cut out the middlemen. Such a cooperative would then be an agricultural marketing cooperative. Cooperatives providing marketing services are amongst the most successful form of cooperative.

2. Individuals decide to form a worker cooperative in which they will work together collectively, providing services to business, in competition with for-profit service providers.

The members of a cooperative are not employees and labour legislation does not apply to their relationship with the cooperative.

Unfortunately there are also groups that call themselves cooperatives, usually to get some benefit (e.g. to evade labour legislation), although they are not operating as such. These bogus cooperatives give cooperatives a bad name.

Policy question:

Should the members in scenario 2 above be regarded as employees to whom labour legislation applies?

Core business

In terms of business management discourse, “core business” refers to an activity. It is the activity on which a firm should focus, and is commonly advanced as a rationale for the outsourcing or down-sizing or retrenchment of workers that are not considered core to the business (see **outsourcing**).

In this booklet, the term core business refers to the natural or legal person for whom workers actually work that is not their employer. In ordinary speech, such persons will in most instances be regarded as a client. In some instances the ILO also refers to such a person as a “user enterprise”, ie a user of the services provided.

Decent work

This is a term coined by the ILO. Since 1999, the ILO regards it as reflecting its main purpose. On its website it describes decent work as summing-up the “aspirations” of working people. Aspirations are usually broad, and often vague. This is also the case with “decent work”.

The term is nevertheless important in that by referring to “work” rather than employment, the ILO is raising the question as to what kind of labour standards can be developed that apply to workers who are not employees. As the ILO put it at the time “almost everyone works but not everyone is employed.” (ILO, 1999)

In South Africa decent work is sometimes understood to mean employment in a standard job. This is a misuse of the term. It should go without saying that employment in a standard job ought to be decent, because it is protected by labour legislation. The issue is rather how to protect workers that are not in standard jobs.

“Decent work” is regarded as having four objectives. ¹⁸

A recent formulation of these objectives is as follows:

- “Creating jobs – an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods.”
- “Guaranteeing rights at work – to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation, and laws that work for their interests.”
- “Extending social protection – to promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe , allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of lost or reduced income and permit access to adequate healthcare.”
- “Promoting social dialogue- involving strong and independent workers’ and employers’ organisations is central to increasing productivity, avoiding disputes at work, and building social cohesion.”¹⁹

Obviously each of these objectives is broad and open to different interpretations (see also **labour standards**, **social protection** and **social dialogue**). It is also possible, and indeed inevitable, that greater weight will be given to one objective than another. Also, some objectives may be more or less difficult to implement in a given national context. There are also a variety of ways of implementing each objective, which in turn may give rise to a variety of subsidiary objectives.

Although there have been attempts to develop criteria for decent work, and it may be possible to measure compliance with certain criteria, it is perhaps best viewed as a qualitative rather than a quantitative concept. It may also be viewed as a basis for developing proactive programmes, rather than as a regulatory tool. At a national level, the ILO is seeking to implement the objective by developing Decent Work Country programmes.

Dependent contractor

This term describes a contractor who is economically dependent on another, as opposed to an “independent contractor”. It is therefore an attempt to recognise the existence of a grey area between those who are employees, to whom labour legislation applies, and the independent contractor, to whom labour legislation does not apply.

Although this is not a term that has been utilised in labour legislation in South Africa or recognised by the courts, it could be argued that the BCEA implicitly acknowledges the existence of such a category.

On the one hand the BCEA applies only to employees, and defines employee to exclude an independent contractor. On the other hand it empowers the Minister to make a sectoral determination specifying minimum conditions of work “for persons other than employees.”²⁰ One way to resolve the apparent conflict between these

provisions is to acknowledge the existence of contractors that are not genuinely independent.

Dependent contractor is a category recognised in legislation in some other jurisdictions (Canada, for example), whilst elsewhere the category “worker” is regarded as including a dependent contractor. In this booklet, we argue that the dependent contractor should be regarded as a worker who is in an employment relationship with the person for whom he or she works, notwithstanding the form of the contract he or she has entered into, by virtue of the fact he or she is economically dependent on such person.

Deregulation

Deregulation is one of the policy prescripts of neo-liberalism (see **neoliberalism**). Literally, it implies the removal of government regulation, although it is not concerned with all kinds of government regulation, but rather with those regulations that affect how business is done.

The idea behind deregulation is that regulations interfere with the free and unhindered operation of the market, and the markets should be left to regulate themselves. The financial crisis that began at the end of 2008 demonstrated the fallacy of this idea (see **regulation**).

Nowadays the more extreme policy of deregulation has increasingly given way to the notion of “appropriate regulation”. The World Bank is an important advocate of this policy through its study on the “cost of doing business”. In this study it seeks to benchmark various kinds of regulation in the different countries of the world. However this study has been sharply criticised on methodological and other grounds.

References:

Benjamin and Theron (2009).

Disguised employment

“Disguised employment” is a term adopted by the ILO in the Employment Relationship Recommendation (the Recommendation). It proposes, as one of a number of policy mechanisms to protect workers in an employment relationship, measures to combat disguised employment.

An example of a disguised employment relationship would be where workers enter into a contract with a firm stating they are independent contractors, whereas in fact they have always been regarded as employees, and their relationship with that firm is in fact one of employment.

The ILO’s attempt to define the objective of the policy measures proposed in the Recommendation is clumsy. It is to “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.”²¹

However the concept of disguised employment begs the question when, precisely, contractual arrangements can be considered to “hide the true legal status” of workers concerned, and when they can be considered legitimate.

The use of the term “disguised” strongly suggests that the worker alleging she or he is in a disguised employment relationship will have to prove there was an intention on the part of the “employer” to disguise or hide the true nature of the relationship. However it is always difficult to establish what a person’s intentions were in entering into a relationship.

In South Africa a presumption as to who is an employee has been adopted to overcome the aforementioned difficulty. However the presumption can be rebutted. It is also clear that not all workers in a dependent contractual relationship can be regarded as in disguised employment (see **dependent contractor, employee**). The concept of disguised employment is therefore of limited application.

Dismissal

Only an employee can be dismissed, in terms of the LRA. A worker who is not an employee of the person whom he or she alleges terminated his employment will not be able to refer a claim against that person to the CCMA.

The advantage of bringing a claim in the CCMA as opposed to the ordinary courts (such as the Magistrate’s Court) is that it costs very little for an employee to do so, and the case can be heard relatively quickly.

The following are examples of workers who would **not** have a claim against the person he or she regards as “the guilty party” in terms of the LRA (although he or she might have a claim in the ordinary courts):

- A contractor who is entirely dependent on someone else for his or her livelihood, if his or her contract is unfairly terminated by that person;
- If the client of a service provider unfairly terminates the employment of an employee of that service provider, the employee will not have a claim against the client.

Because only an employee can be dismissed, it is important to distinguish between the “right not to be unfairly dismissed”, which applies only to employees, and job security, which applies to all workers. It can be argued that a right to job security forms part of the “right to unfair labour practices” in the Bill of Rights, and also forms part of the concept of decent work (see **job security**).

Dismissal is always at the instance of the employer. This means that where there is a dispute about a dismissal (because the employer denies dismissing him or her) the employee will have to prove he or she was dismissed.

There are two circumstances in which an employee who resigns can succeed in bringing a case of unfair dismissal in the CCMA:

- Where the employer has made his or her continued employment intolerable (and it follows from the above that this must relate to something the employer has done or failed to do, and not just the employee's own subjective feeling);
- Where the employee's contract of employment has been transferred to a new employer (in terms of section 197 or 197A of the LRA) and the new employer has provided the employee with conditions of employment or circumstances that are substantially less favourable.²²

Domestic work / domestic worker

Domestic work means work pertaining to the home or household. Most domestic work is of course unpaid work performed by a member of the household. It is also gendered work, in that it is typically performed by women.

Domestic worker, however, is generally understood to refer to an employee who works in someone else's home, whether on a full-time or part-time basis. A char who works one or two days a week would be a part-time worker, and would typically have more than one employer.

Although internationally domestic workers are commonly excluded from labour legislation, this is not the case in South Africa. The LRA, the BCEA, OHSWA and the UIA apply to domestic workers,²³ although not COIDA.

The conditions of work of domestic workers are regulated by a sectoral determination, Sectoral Determination 7. The definition of domestic worker in Sectoral Determination is very broad, and purports to apply to "any domestic worker or independent contractor" that is entitled to, or receives, remuneration.

However it is not clear whether the Minister of Labour is entitled to make determinations for independent contractors, since the law in which he does so, the BCEA, only applies to employees, and specifically excludes independent contractors (see **dependent contractor**).²⁴

Employee

"Employee" is defined in identical terms in the LRA and BCEA. This definition is important, because only those who fit the definition of employees are protected by the legislation. The same definition is also adopted by the SDA and EEA

There is a different definition of "employee" in the OHSWA and UIA.²⁵ So it is possible that a worker who is not regarded as an employee in terms of the LRA and BCEA

may be entitled to compensation in the event of an injury at work or to unemployment insurance.

There are two parts to the definition of employee in the LRA and BCEA. In the first part, part (a), an employee is defined as “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration.”

The second part, part (b), is broader. It states “and any other person who in many manner assists in carrying on or conducting the business of an employer” is also an employee.

It might seem that part (b) is broad enough to include workers who otherwise might not be regarded as employees in part (a). However the definition has not been interpreted expansively by the courts, and the government recently proposed that part (b) be scrapped. It remains to be seen whether it will be.²⁶

Important categories of workers are either not regarded as employees, or are not able fully to exercise their rights as employees, even though they are defined as employees in terms of the legislation. The reasons for this are discussed elsewhere in this booklet.

Workers in disguised employment, for example, are not able to exercise their rights in terms of the legislation (see **disguised employment**). It seems that it was with this category in mind that the government proposed the adoption of a new presumption as to who is an employee. The presumption was adopted in 2002²⁷.

In terms of this presumption, a person is presumed to be an employee, until the contrary is proved, regardless of the form of the contract, if any one or more of the following factors are present:

- (a) The manner in which the person works is subject to the control or direction of another person;
- (b) The person's hours of workers are subject to the control or direction of another person;
- (c) In the case of a person who works for an organisation, the person is a part of that organisation;
- (d) The person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) The person is economically dependent on the other person for whom that person works or renders services;
- (f) The person is provided with tools of trade or work equipment by the other person;

However the fact that this is only a presumption means it can be rebutted. The presumption also does not apply to any person who earns in excess of the amount determined by the Minister of Labour in terms of section 6(3).

More importantly, the presumption is not likely to change the fact that there are large numbers of workers who are not regarded as employees, to whom labour legislation does not apply, or that there are large number of employees who not able to exercise their rights as employees.

The remedy the presumption provides is for a worker who is not regarded as an employee to bring an application to the CCMA for an advisory award. However this is not a very practical remedy. Few workers, while they are still employed, would risk jeopardizing their employment to do so.

There are two important reasons why the definition of employee in terms of the LRA and BCEA is likely to remain contested:

- The cost for employers of complying with labour legislation, relative to workers that are not covered by the legislation, are high. Here it is necessary to differentiate between the direct costs (such as compliance with the minimum standard set by the BCEA) and contingent costs, such as the costs associated with employees joining a trade union, and costs associated with an adverse finding for unfair dismissal at the CCMA. There is therefore a strong motive for employers to evade (or avoid) the legislation.
- As a consequence of externalisation in the late 1980s and subsequently, the employment relationship is no longer a bilateral relationship between employer and employee, characterised by reciprocal rights and duties (see **employment relationship**). As a consequence, there is arguably less clarity nowadays than previously as to what characterises the employment relationship.

Employer

The ordinary sense of the term employer is someone who pays another to work for her or him, either on an indefinite basis or for a fixed term. Although one might suppose it is clear who the employer is, often it is not.

There are, for example, situations in which labour law regards an employee as having more than one employer, or where an employee is seconded to work for someone else.

Externalisation has also created much uncertainty regarding who is the employer, because it gives rise to situations in which workers work for someone who is not the employer, or is not regarded as the employer, although that person may in certain circumstances be liable for the responsibilities of the employer (see **externalisation**).

The term “employer” is not defined in either the BCEA or the LRA, and must therefore be determined by reference to the definition of “employee”.²⁸ It is defined, however, in terms of OHSA, COIDA and the UIA. Each of these definitions is different.

The definition in terms of COIDA includes “any person controlling the business of an employer” and a labour broker.²⁹ In the case of OHSA, however, the definition of employer excludes a labour broker.³⁰ The intention, presumably, is that in the case of occupational health and safety, the client is always liable.

In 2011 the government proposed to introduce a definition of employer into the LRA and BCEA, as one of a number of measures in order to “ensure decent work by regulating sub-contracting, contract work and outsourcing”.³¹ It is unclear at the time of writing whether this amendment will be passed in its present form, or at all. However introducing a definition of employer, of itself, is unlikely to ensure that conditions of decent work prevail. By the same token it may be the core business rather than the ostensible employer that actually determines the conditions under which the employee is employed, and to whom the employee is accountable.

Employment

In a context in which jobs are scarce, globally and domestically, it is important to be clear what we mean by “employment”. There are at least three distinct senses in which the term “employment” may be used:

- in a broad sense, meaning work. Any person who works, in other words, is employed;
- in a narrower sense, to refer to an employment relationship. Any person in an employment relationship is employed, including those such as dependent contractors who may or may not be regarded as employees (see **employment relationship**);
- in the strict (or legal) sense, to mean employees who fall within the definition of an employee in terms of labour legislation.

When the government’s statistical agency counts how many people are employed as opposed to unemployed, it counts everyone who works a certain number of days as employed. Employment here includes all forms of work: employers, the self-employed, the (independent) contractor and employees as defined by legislation.

When people refer to employment in the informal economy, they generally mean employment in the broad sense (although many of these employees qualify as such in terms of labour legislation). However when people refer to the formal economy they mean someone who has a job with an employer. This could either mean a person in an employment relationship, or a person who is employed in the legal sense.

Someone in an employment relationship might be employed in the formal or informal economy. Someone employed in the legal sense could be employed in a standard or non-standard job. However these categories are not water-tight.

It would be important to know how many people were employed in these different categories, but as yet no reliable measures have been devised. The various proxies that are used in a household survey, for example, may be misleading.

From a policy perspective it is important to differentiate between employment, on the one hand, and work that cannot be construed as employment, because there is no identifiable employer, on the other. This is because where there is an identifiable

employer there is someone who may be accountable for the conditions under which a worker works.

In this booklet, therefore, unless the context indicates otherwise, employment refers to employment in an employment relationship, as distinct from work where there is no employment relationship.

Employment equity

Equity is a very broad concept, implying fairness and even-handedness. In the context of employment, it inevitably raises the question of inequality in the workplace.

The objectives of the EEA are “to achieve equity in the workplace” but the measures by which it proposes to do so imply a very limited concept of equity. These concern:

- the elimination of unfair discrimination; and
- affirmative action measures to redress the disadvantages in employment experienced by what are referred to as “designated groups”.³²

However affirmative action measures are primarily relevant to applicants for jobs, where education or skills are a requirement. They are of little relevance to persons lacking education and skills, where the primary problem is a lack of jobs.

For persons lacking education and skills, the only job opportunities may be in the services sector, or the informal economy. In the services sector, this may mean working in the workplace of a core business for a fraction of the wages earned by employees of that business, doing equivalent work.

The only provision of the EEA that addresses the issue of inequality is a requirement that “designated employers” progressively reduce “disproportionate income differentials.”³³ However the really disproportionate differentials are between workers employed by different employers working in the same physical workplace. Although the EEA does not define the workplace, it is understood the same definition as in the LRA applies (see **workplace**).

Policy question:

Can the EEA as currently framed be utilised to address inequalities in wages and conditions of employment in the physical workplace?

References:

Jain et al (2005); Theron (2009); Budlender (2010).

Employment relationship

This is not a term that is used in South African legislation. It is however common nowadays to distinguish between workers in an employment relationship and those who are not. It is therefore necessary to be clear what this distinction implies.

Some people understand workers in an employment relationship to mean employees as defined in labour legislation, and employment relationship to have more or less the same meaning as contract of employment.³⁴

However, it serves little purpose to use the term “employment relationship” if it is given the same meaning as contract of employment. The proponents of the term clearly intended it to have a broader meaning, encompassing both the workers with a contract of employment and those who would not be regarded as employees, applying a contractual test.³⁵

The concept of an employment relationship also represents an acknowledgment that the employment contract is incomplete and that in the course of an on-going employment relationship, additional undertakings and obligations, often unstated and implicit, arise.

The ILO uses the term employment relationship in a broad sense, in the Employment Relationship Recommendation³⁶. This recommendation was introduced to address, amongst others, the following situations:

- “where the respective rights and obligations of the parties concerned are not clear, or 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.”³⁷
- “where contractual arrangements ..have the effect of depriving workers of the protection they are due.”

The employment relationship is universally understood to be a relationship between two parties, an employer, who is economically the dominant party, and an employee, who is the subordinate party. One rationale for labour regulation is to redress the inequality of power between the two parties.

The traditional employment relationship is thus a bilateral relationship, in which the parties to the relationship also have reciprocal rights and obligations. As well as rights and obligations imposed by labour legislation, there are those developed by the courts in terms of the so-called common law.³⁸

Where externalisation takes the form of a core business engaging a contractor to provide workers who in turn provide it with goods and services, there is no longer a traditional, bilateral relationship (see **externalisation, triangular employment relationship**).

The reference in the Recommendation to situations “where the respective rights and obligations of the parties concerned are not clear” probably refers to the emergence

of this non-traditional form of employment. However it does not sufficiently acknowledge how radically this form of externalisation undermines the existing notion of an employment relationship.

The Recommendation also offers no explicit guidance as to what kind of measures can be adopted to address situations in which there are three or more parties to the employment relationship. However in the case of private employment agencies the ILO has proposed that there could be an allocation of rights and responsibilities as between the core business (which it refers to as the user enterprise) and agency concerned. This proposal is criticised elsewhere in this booklet (see **labour broking**).

References:

Brassey (1998); Deakin & Morris (2001); Theron (2011).

Empowerment

Empowerment is one of the buzz-words of the current era. The sense in which it is used nowadays dates back to the civil rights movement in the United States, which was regarded as a struggle for political empowerment. It was thereafter adopted by the women's movement, which was also seeking the empowerment of women ³⁹

Since it is always expedient to promise people control over their destiny, the term is now used in many different contexts. In South Africa, however, it is especially used in the economic context, to address economic disadvantage.

In the 1990s business initiated various schemes that could be or were styled as "economic empowerment", including schemes whereby persons who had been employed in managerial or supervisory positions were in effect converted into entrepreneurs, and drivers were converted into owner-drivers.

As government policy post 1994, economic empowerment was soon qualified to become "black economic empowerment (BEE)". Since it very quickly became clear that BEE had primarily become a vehicle for the enrichment of a few individuals, it then became "broad-based black economic empowerment (BBBEE)."

The BBBEE Act has now been adopted to give effect to government's policy. It provides for codes of good practice to be introduced, in order to promote empowerment in different sectors. These codes introduce a system whereby businesses can be rated, in order to determine the extent to which they are transformed. The rating in turn becomes the basis on which government procures from businesses.

References:

Benjamin (2009).

Entrepreneur / Social entrepreneur

An entrepreneur is someone who establishes a business, having perceived that there is a need or opportunity that the business can meet, and who assumes the risk of the business failing. It is supposedly the prospect of profit should the business succeed that motivates the individual entrepreneur.

A social entrepreneur is not motivated by profit. He or she utilises entrepreneurial principles for a social purpose, such as the establishment of a not-for-profit organization or enterprise (also called a social enterprise), or NPO (see **social economy**).

Social entrepreneurship should not be confused with philanthropy, where someone donates money for a social or charitable purpose.

Externalisation

Deregulation and privatisation are policies that have vigorously pursued in the neo-liberal era, particularly in the 1980s and 1990s. The primary means by which deregulation has been effected in South Africa (and probably elsewhere) is by a process of industrial restructuring which includes, and is at the same time broader than, what is conventionally understood to be outsourcing.

One writer has suggested this process be called vertical disintegration, which he contrasts with what he regards as having been the dominant trend in industrial organization, vertical integration.⁴⁰ He describes this as the arrangement of aspects of production “through subcontracting, franchising, concessions and outsourcing.”

However in our view the term “vertical disintegration” does not throw much light on the object and outcome of this process. The overriding object is that the business driving the process, which we refer to as the core business, avoid accountability for the workers who work for it, so far as is legally possible to do so. This must be understood as a response to labour regulation and trade union organization.

One way for the core business to avoid accountability in terms of labour regulation is to engage workers as contractors. This may be a viable solution in certain limited circumstances, where for example a service can as well be rendered on a contractual basis as in an employment relationship.

The drawback of this option, from the point of view of the core business, is that it is still in a bilateral relationship. It may be held accountable by worker(s) claiming they are in fact in an employment relationship, or that the relationship is one of disguised employment. The safer option, therefore, is for some other person to assume the responsibilities of an employer, and to engage that person to provide the goods or services the core business requires.

In either event, employment is externalised. However the former option, in which there is still a bilateral relationship, represents the weak form of externalisation, whereas the latter is the strong form of externalisation. This is specifically because in

the latter instance the employees are physically or legally excluded from the workplace of the core business. The reason this is important is that the workplace is where employees exercise key labour rights (see **workplace**).

Externalisation can therefore be defined as a process in terms of which the conditions of employment of workers are regulated or governed by a commercial contract, rather than by a contract of employment, which occurs in one of two ways:

- When a core business engages a worker as a contractor rather than an employee, to provide goods or services (the weak form).
- Where a core business engages a contractor to provide workers who will provide goods and services for it. Such a contractor may also be regarded as a service provider or intermediary (the strong form).

The weak form gives rise to the question whether in fact the relationship is one of employment, or whether the core business is in fact an employer seeking to disguise the true nature of the relationship.

The strong form gives rise to a relationship in which there are at least three parties involved: the worker, the contractor who is the legal employer and the core business. However where the contractor concerned in turn engages someone else to provide some or all the workers working for a core business, there will be more than three parties to the relationship (see **triangular employment relationship**).

This in turn gives rise to the question whether, having regard to substance rather than form, the contractor is really the employer of the workers concerned, or whether the true employer is the core business for whom the worker actually works.

The strong form of externalisation is far more significant, both in terms of the numbers employed and in terms of its effects. It can also take different forms, including the following:

- Homework or outwork
- The utilisation of labour brokers
- The utilisation of service providers such as cleaning, security, transport
- Subcontracting
- Franchising
- Privatisation in the context of the public sector.

Some of its important effects are as follows:

- To minimise the number of workers that are in an employment relationship with the core business, specifically unskilled workers, and to maximise the number whose employment is governed by a commercial contract.

- To fragment the workforce within the same physical workplace, into at least two tiers, each having its own employer: a tier that is employed by the core business and a tier that is employed by contractors (see **workplace**).
- To encourage competition amongst contractors providing goods and services, thereby driving down wages (resulting in so-called second generation outsourcing).

The benefits of this form of externalisation for the owners of a core business are numerous. Although there are also disadvantages, organization is needed to create greater awareness of these. The benefits include the following:

- There is a direct cost saving, in that the contractor is able to employ workers at a minimum wage that is far lower than the core business would be required to pay its own employees, doing equivalent work.
- There are no contingent costs associated with employment (or fewer contingent costs), such as if unfair dismissal proceedings are instituted, or if workers join trade unions.
- Engaging contractors creates opportunities for empowering individuals, and thereby broadening the class base of the owners of the core business.
- A fragmented workforce is easy to control.
- Since workers employed by contractors are highly vulnerable, the core business is able to use them flexibly. In other words, labour becomes a variable cost rather than a fixed cost to the core business.

Amongst the reasons why workers employed by contractors are highly vulnerable are the following:

- Their job security depends on the core business, which may terminate the contract of the contractor, or instruct the contractor to remove workers from the premises, or simply deny workers access to the premises. In any of these events, the worker has no recourse against the core business.
- The place where the worker employed by a contractor works is actually the workplace of the core business, but the workers are not able to exercise organizational rights in this workplace.
- Although the workers are able to bargain collectively with the contractor that employs them, this is not a meaningful process because what the contractor can afford to pay is pre-determined by the core business.

References:

Theron (2000); Theron (2001); Theron (2007); Theron and Godfrey (2000).

Flexibility

The need for greater flexibility, both within firms and in the labour market, is a common justification for certain of the phenomena that are dealt with in this booklet, such as casualisation, externalisation and informalisation. Flexibility is counter-posed to labour market rigidity.

Two reasons are often advanced as to why greater flexibility is needed. First, international competition and other pressures on firms have created a more uncertain business environment. Second, collective bargaining and measures to protect job security are perceived as introducing rigidities that impede the ability of firms to adapt to this new environment.

Decentralising wage bargaining, weakening trade unions, dismantling minimum wages, reducing employment protection and labour market regulations, widening wage differentials, cutting non-wage labour costs, taxes and social security contributions, and the use of non-standard forms of employment have all been regarded as means of introducing greater flexibility in the labour market.

Within the firm or workplace, different categories of flexibility have been identified. One influential categorisation draws a distinction between numerical, functional and wage flexibility⁴¹. Numerical flexibility is the ability of firms to adjust the number of workers, or the level of worked hours, in line with changes in the level of demand for labour.

Functional flexibility is the ability of firms to organise jobs so that a worker can deploy his or her skills across a broad range of tasks. Wage flexibility refers to wages that reflect the state of demand and supply in the external labour market, and to pay flexibility in the firm.

For workers and trade unions, flexibility generally has negative connotations. However it is also possible that certain forms of flexibility can be benefit workers, or a section of the workforce. Part-time work, for example, represents a form of numerical flexibility that may enable workers with child-care responsibilities or students to obtain employment, which they otherwise might not be able to.

References:

Atkinson (1985); Delsen (1995); Bezuidenhout & Kenny (1998).

Franchising

Franchising occurs where a business (called the franchisor) enters into an agreement with another person, in terms of which that person (called the franchisee) is licensed to operate a business under the franchisor's trademark or brand. The franchisee, in turn, agrees to pay the franchisor a fee.

The franchisor can be expected to retain control over what it regards as key elements of its business strategy in such agreements. These are the elements that

have contributed to establishing its brand, or reputation. The franchisee is clearly economically dependent on the franchisor.

The Consumer Protection Act now regulates certain aspects of franchise agreements.⁴² Such agreements must for example be in writing, and contain certain information, as prescribed in terms of this Act. A franchisee is permitted to cancel such agreement within ten business days of signing it, without cost or penalty.

Aside from these provisions, franchise agreements can take different forms, depending on the nature of the business and the franchisor's business strategy. While it is therefore difficult to generalise about these agreements, it appears the fee commonly includes a payment calculated on the basis of the turnover of the franchisee's business. There are also commonly stipulations about where the franchisee sources inputs, and pricing strategy.

It is not known whether these agreements also have stipulations regarding the employment of staff and labour relations. This is, however, a matter that is often relevant to the business strategy of the franchisor, and there are reports of franchisors sometimes telling franchisees what kind of workers to employ, and under what conditions. However this may be portrayed as a form of "mentoring" rather than a requirement of the agreement.

Even if the agreement between franchisor and franchisee does not contain express stipulations regarding the employment of staff, the agreement will nevertheless determine the margins the franchisee is able to realize, which will serve to govern the conditions under which workers of the franchisee are employed.

Accordingly, franchising gives rise to a triangular employment relationship, and represents a form of externalisation. However, although the franchisor is in a comparable position to that of a core business, the relationship between the workers of the franchisee and the core business is more indirect than other forms of externalisation, such as labour broking and the provision of certain services. The job security of the employees also does not depend on the franchisor to the same extent as in other forms of externalisation, because the franchisor does not control access to the place where employees work.

At the same time it is difficult to see how there could be meaningful collective bargaining between an individual franchisee and his or her employees. If there were to be meaningful collective bargaining, it would have to be conducted jointly with a number of franchisees of the same franchisor (even if it poses organisational difficulties to do so). This would inevitably raise the question of their relationship to the franchisor.

This would imply that, in order to exercise organizational rights, the workplace would have to be regarded as all the places where the employees of the franchisees of the franchisor in question work. In other words the workplace in the case of franchising is fragmented.

(See **externalisation, triangular employment relationship, workplace**).

Fixed term employment

See temporary employment.

Globalization

The reality that the term “globalization” seeks to address is that as a result of a process of global integration, social and economic activity increasingly takes place across, rather than within, national borders.

Although most would agree that this is not a new process, it has greatly intensified since the 1970s. The factors that have intensified this process include, amongst others:

- Change in technology, particularly information and communication technology;
- The increasing ease with which large amounts of funds can be transferred from one country to another, partly as a result of the changes of technology;
- Trade liberalization, meaning a lowering of the barriers to trade between countries;
- The growing power of trans-national corporations (TNCs);
- The global dispersion of production, as a result of all the above.

However there is no agreed definition of globalization, and there are also different perspectives on this process of integration. There are also those who are critical of the term. Some prefer to regard the process as trans-national. The term trans-national would appear more apt for South African based businesses expanding into the Southern Africa region.

The concepts of global value chains (GVCs) and global production networks (GPNs) represent an attempt to understand the dynamics of production that is dispersed across national borders (see **value chains**).

References:

Sklair (2002: 29-58); Standing (1999: 62-73).

Global value chain / global production networks

See value chains.

Governance

The term governance refers to the function of governing, or the manner in which that function is exercised, hence the phrase “good governance.” Governance is an old

term. It has, however, become fashionable because of the more limited role the state is conceived as having nowadays.

Thus, whereas formerly governance was seen as the responsibility of governments, there is a trend nowadays for governments to devolve some of their powers on relatively autonomous state institutions, or onto private institutions. This trend dovetails to some extent with neoliberal policies (see **neoliberalism**).

At the same time non-state bodies and institutions such as companies are regarded as “governing” in terms of a constitution or their founding statute. Although the manner in which they do so may be regulated by the state, there has been a tendency for governments to withdraw from the role of regulator, and to assume the role of facilitator instead.

The term is also used in an even broader sense. As one definition has it, governance means “organised efforts to manage the course of events in a social system.” This would encompass efforts by non-state bodies to influence external events. Governance is used in this sense to refer to the manner in which a lead firm seeks to manage events in a value chain, for example (see **value chains**).

There is a close relationship and potential overlap between governance and regulation, although some commentators draw a sharp distinction between these concepts.⁴³

References:

Burris, Kempa and Shearing (2008).
Lobel, O (2004)

Homework / Home-based work

Homework, in the context of this booklet, is not the work learners do after school. It is also not any work done in the home. It is necessary to distinguish between homework and home-based work in this regard.

Home-based work is a term that is sometimes used to describe all forms of work performed in a home. This may be the worker’s own home or the home of someone else, and it includes both work that worker undertakes on her or his own account, and homework.

Homework is work undertaken for someone else for remuneration, whether in the worker’s own home or the home of another, other than the home of the employer. It can therefore be distinguish from care work, which is not necessarily remunerated, and domestic work, which is remunerated, but takes place at the home of the employer (see **care work, domestic work**.)

This corresponds with the sense in which the ILO uses the term. As defined by the ILO, homework results in a product or service specified by an employer, who is someone who either directly or through an intermediary gives out home work in pursuance of her or his business activity.⁴⁴

Homework can thus be regarded as a form of sub-contracting, or outworking. It is prevalent in industries such as clothing, which utilise women workers. In the case of clothing, intermediaries typically supply materials and instructions to workers, who make the product and are usually paid per piece produced.

References:

Theron (1996); Chen et al (2002); Clarke, Godfrey & Theron (2003).

Independent contractor

This is the legally recognised term for a contractor (see **contractor**). As in the case of the contract of employment, the contract between an independent contractor and person for whose benefit the work is done is regarded as a kind of lease. In this instance it is a lease (or letting and hiring) of work.

The LRA refers to an independent contractor in the definition of an employee. This term is not defined, but it is clear that the LRA presupposes that all contractors are “independent”. It is also implicit that the independent contractor is an individual.

It is presumably because these contractors are independent that it has not been considered necessary to protect them to the same extent as employees, and that they are excluded from the definition of employees (see **employee**).

The examples of jobs that are often cited to illustrate who is an independent contractor are those of plumbers and electricians. That is because these are well-established (and well- remunerated) occupations, which are commonly performed by self-employed individuals or small firms.

However plumbers and electricians may also be employees. There are also occupations that are not as well-established, which could equally be performed by an employee or a contractor, or in which the “independence” of a contractor is questionable. The use of independent contractors has become very visible in information technology (IT) and other knowledge-based occupations.

As a consequence of externalisation, there are a growing numbers of workers who are in the situation in which it is not clear, on the face of it, whether a person is an employee or not. The LRA has been amended to address this development by creating a “presumption as to who is an employee” (see **employee**).

It can, however, be argued that the distinction between employee and independent contractor no longer corresponds with social reality, given the increasing number of persons who are in a relationship of economic dependence to another, but who are not employees as defined. It is therefore necessary to recognise the existence of an intermediate category of worker, the dependent contractor, and to seek to extend certain labour rights to such workers. In some countries legislation has been adopted regarding dependent contractors (see **dependent contractor**).

References:

Ang & Slaughter (2001) (regarding the use of independent contractors in IT).

Informalisation

In this booklet we define informal employment as employment that is unregulated. Informalisation refers to the process by which work is increasingly unregulated, and increasing number of workers are in unregulated employment (see **informal economy**).

Informal economy (informal sector)

“Formal” and “informal” are adjectives that are commonly used to describe different kinds of enterprises and different kinds of employment. The distinction is supposedly between enterprises that are regulated by the state and those that are not, and employment that is regulated by the state and employment that is not. Employment in this context refers to all forms of employment ie work.

Whether or not economic activity or work is regulated is an important question for the state. It enables the state to determine what its tax base is. For this reason, amongst others, the statistical agencies of the state are concerned with measuring formality and informality.

However there is no simple way to measure whether or not economic activity is regulated. It is, for example, perfectly possible for a firm to be registered for the purposes of taxation, but not to be registered as an employer in terms of the UIA and COIDA.

If, moreover, one were to focus only on labour regulation, a firm may be registered in terms of the UIA and COIDA but not comply with key provisions of the BCEA or a relevant bargaining council agreement. It is unclear in these circumstances whether it is meaningful to categorise a firm as formal or informal.

A more useful approach would be to look at formality and informality as representing a spectrum, with complete formality at one end and complete informality at the other. Firms and their employees would be located along this spectrum according to the extent of the compliance with relevant regulations.

“Formal” and “informal” are therefore not precise concepts, and remain contested. This is even more so the case when one is confronted with the different forms informal work may take, which may include self-employment, unpaid work by family members, and homework.

Domestic workers are generally regarded as being informal, although it is questionable whether a domestic worker whose employer has registered him or her in terms of the UIA and is complying with all aspects of the relevant sectoral determination should be classified as such.

There is little doubt that there has been an increase of informal economic activity and employment since the 1970s. The term “informal sector” was coined at about this time, to refer to the different ways poor people try to generate income for themselves, without registering to pay tax, or complying with laws regulating economic activity, including labour legislation.

Initially, the tendency was to see these activities as distinct from and not related to the formal sector, and this also seems to have been the view of President Mbeki, when he introduced the notion of the “first economy” and “second economy”.⁴⁵

However this view ignores the extent to which the formal and informal activities are intertwined. Enterprises that can be regarded as informal depend on formal enterprises in various ways, and formal enterprises in turn depend on informal enterprises. Indeed formal enterprises are actively involved in establishing and promoting informal firms, pursuant to the process of externalisation (see **externalisation**).

Because there is consensus that informal economic activity does not constitute a discrete sector, amongst others reasons, the term “informal sector” has now fallen out of favour internationally. The term “informal economy” is now preferred. Although it is not intended to suggest there is a cleavage between the formal and informal economies, it is nevertheless open to this interpretation.

The informal economy was defined by the ILO in 2002 as referring to “all economic activities by workers and economic units that are- in law or practice- not covered or insufficiently covered by formal arrangements.”⁴⁶ It is thus a definition that concerns both the status of the enterprise (or economic unit) and the status of workers.

The International Conference of Labour Statisticians (ICLS) followed a similar approach in 2003. Whereas formerly it defined the informal economy with reference to enterprises that are not legally regulated, it now also includes employment relationships that are not legally regulated or protected.

Statistics SA still collects data regarding the “informal sector”. However the way in which it defines “informal sector” has changed several times, and its current definition corresponds with the approach of the ICLS. It defines informal sector as having two components

- “Employees who are not registered for income tax and who work in establishments that employ less than five persons”; and
- “Employers, own account workers and persons helping unpaid in their household business who are not registered either for income tax or value added tax.”⁴⁷

This is arguably quite a restrictive definition, which would exclude a lot of enterprises that many would regard as informal. To confuse matters further, Statistics SA has also introduced a measure of “informal employment”, which has a far broader meaning than employees in the informal sector, as defined above.

Informal employment, as defined by Statistics SA, is intended to cover “precarious employment situations”. These include “all persons helping unpaid in their family business. It also includes employees in the formal sector and private households who are NOT entitled to basic benefits from their employer such as pension or medical aid and who also do not have a written contract of employment.”⁴⁸

This definition is problematic. Few would regard membership of a pension fund or medical aid in the context of South Africa as a “basic benefit”, whilst the existence of written contract of employment does not tell us much of significance about the formality of employment (see **contract of employment**).

References:

Portes (1994); Chen et al (2004); Chen (2007).

Informal sector

See informal economy.

Intermediary

An intermediary is a go-between, or middleman (intermediaries are often men). In product markets, an intermediary sources goods or services for the retail sector or for manufacturers. This function often facilitates the decentralisation of production and outsourcing of work. In the context of the labour market, an intermediary facilitates the employment of workers, or the provision of work.

In some countries this is seen primarily as the function of government. Since the adoption neoliberal policies, however, the role of government as labour market intermediary has much diminished. Corresponding with the diminished role of the state as labour market intermediary, there has been increased reliance on private agencies to fulfil this function.

In South Africa the Department of Labour used to play a significant role in placing workers in jobs. There are plans to revive this function in the form of the proposed Employment Services Bill of 2010.⁴⁹

There are two ways in which private employment agencies can function on a for-profit basis: placement agencies, which place workers in jobs for the payment of a once-off fee, payable by the client with whom they place the workers; and agencies which become the employer of the workers, and are in effect labour brokers (see **labour brokers**).

There are also various ways in which the provision of employment, or placement of workers, can take place on a non-profit basis. These are as follows:

- Through NGOs providing employment or placement services
- Through union “hiring halls”. In the United States in certain sectors such as construction and entertainment workers are hired via their trade union, through so-called hiring halls.⁵⁰
- Through establishing cooperatives that provide employment services to their members, by placing them in jobs, or which provide employment to their members, as worker cooperatives.

International Labour Standards

See labour standards

Job

Although people (especially politicians) speak of “job”, especially in the context of the need for jobs, and “job creation”, it is often not clear whether they mean a job in the sense of someone in an employment relationship, or work.

In this booklet, the term job means the work a person does for a living, whether in an employment relationship or not.

Job security

If job is understood to include any kind of work that a person does for a living, then job security has a broader meaning than employment security.

Employment security concerns the protection of the security of workers in an employment relationship. The LRA provides that such workers have a right not to be unfairly dismissed, and that they may have resort to the CCMA in the event that they are.

Job security also concerns the protection of workers that are not in an employment relationship. There are different kinds of measures that could be taken to address job security, including labour market interventions to assist people get work and move relatively easily to other jobs (see **social protection**).

Provisions that address job security include the following:

- The stipulation of a minimum period of notice for the termination of any kind of contract,
- Provisions that seek to provide the worker with greater income security.
- Provisions preventing workers being shifted, or relocated, or having the content of their job changed.

Job security is a key issue, in that without job security it will be difficult to organise workers, or for workers to exercise any of their rights. The concept of decent work could be used to secure more protection. It could also be argued that the right to fair labour practices provided in the Constitution, and which applies to “everyone”, should be regarded as including provisions protecting job security.

Labour / work

In the English language, labour and work do not mean quite the same thing.

Labour is generally understood to mean to work for someone else voluntarily, in which case there is an expectation of payment. It therefore corresponds with work in an employment relationship, as outlined above.

Forced labour is where someone is compelled to work under threat of some sanction, and is prohibited in terms of ILO Conventions, the Constitution and the BCEA.⁵¹

If one is speaking of labour in a context other than working for someone else, it usually has a negative meaning, as in “hard labour.” Work, however, has no such connotation.

Work has a broader meaning than labour. It can mean working for someone else or working for yourself, and may refer to paid work or unpaid work. It is the only concept which extends beyond the employment relationship “without encompassing life in its entirety...it is distinguished from activity in that it results from an obligation, whether voluntarily undertaken or compulsorily imposed. ”⁵²

References:

Standing (1999); Supiot (2001); Le Roux (2009).

Labour rights / worker rights

Corresponding with the distinction drawn between labour and work, it is also necessary to distinguish between labour rights and worker rights.

“Everyone has the right to work,” according to the Universal Declaration of Human Rights, and “to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”⁵³

However few countries have attempted to recognise a right to work in their national constitutions or legislation, and it is regarded as controversial how to give effect to this right, or whether it is possible to do so.

The Constitution does not include a right to work. This does not mean it is not legitimate to argue such a right exists. The reason this argument cannot easily be dismissed is that, under present day conditions, the prospects of paid work are diminishing, and there is chronic unemployment. This is the case globally as well as domestically.

One of the reasons the right to work is controversial is because, in terms of neoliberal ideology, labour rights are viewed as a constraint on the capacity of the market to generate employment (see **neoliberalism**). If a right to work existed, it would apply to everyone of working age. Labour rights, however, apply only to persons who are already working for someone else.

The view that labour rights, and labour regulation, are a constraint on employment has found legislative expression in certain states of the United States, which are known as “right to work” states. In these states certain trade union rights are prohibited or limited.

There is, therefore, a potential tension between labour rights and the right to work, depending on how labour rights are interpreted. On a narrow interpretation, labour rights apply to employees. On a broader interpretation, labour rights would apply to workers in an employment relationship who are not employees, or workers in a relationship akin to employment.

If the term “worker rights” were used instead of “labour rights”, it would be clearer that the intention were to include all persons who work. There is clearly a need to extend rights to workers who are not employees, and that are not currently protected by labour regulation, or not adequately protected.

In terms of the Constitution, rights that are relevant to workers include the prohibition against “slavery, servitude and forced labour”, “freedom of association”, rights related to “assembly, demonstration, picket and petition”, “freedom of trade, occupation and profession” and a cluster of rights dealt with under the heading “labour relations.”⁵⁴

The labour relations rights provided in the Constitution include a “right to fair labour practices” which applies to everyone, certain rights that apply to workers, certain rights that apply to employers, and certain rights that apply to trade unions and employer organizations.

The rights that apply to workers are the right to form and join a trade union, and to participate in its activities, and the right to strike.⁵⁵ Of these rights, however, the right which has the greatest potential to be developed in order to address the situation of workers who are currently not protected by labour legislation, or not adequately protected, seems to be the right to fair labour practices.

References:

Standing (1999: 11-19).

Labour broker

This is the term that is commonly used in South Africa to describe a person who procures or provides workers to work for a client (which we refer to here as the core business). The term dates back to a 1983 amendment to the LRA of 1956, which for the first time introduced provisions to regulate the activities of labour broker.

Importantly, the 1983 amendment also introduced the notion that the labour broker would be the employer of the workers provided to the core business. Supposedly this was done to protect the workers concerned, but a more likely explanation is that it was done at the behest of multi-national corporations engaged in this kind of business, that were in the process of establishing themselves in South Africa at the time.

Accordingly, there are three parties involved in labour broking: the worker(s), the labour broker, who is the legal employer, and the core business, for whom the worker(s) work. More obviously than any other forms of externalisation, it results in a triangular employment relationship, in which the conditions of employment of the workers are governed by the contractual terms agreed between the labour broker

and the core business. In terms of the analysis outlined above, it represents the strong form of externalisation (see **externalisation, triangular employment relationship**).

The activity of labour broking goes under various names in other parts of the world. In Namibia, for example, it is called “labour hire.” However in most countries the name emphasizes that the workers are provided on a temporary basis. In North America, for example, it is common to refer to “temporary help agencies”, or simply “temp agencies”; in Europe the generally accepted term is temporary agency work.

The term “labour broker” is still used in the OHSA, COIDA and certain bargaining council agreements. However the LRA and the BCEA use the term “temporary employment service”(TES). The continued use of the term labour broker, despite the fact that the LRA has adopted a different label, may be attributed to the fact that the older term had already taken root. It can also be justified on the following grounds:

- It conveys more accurately what the role of the “employer” really is, which is more that of broker or intermediary than that of a service or, for that matter, than that of an employer.
- The term temporary employment service is problematic, amongst other reasons because there is nothing in the LRA that defines what temporary employment means, or limits the period for which a worker placed by a labour broker may be temporarily employed.

The fact that the LRA does not limit the period for which a worker placed by a labour broker may be employed gives rise to the anomalous situation that a worker may be indefinitely employed, working for the same core business. The fact that workers may be indefinitely employed even though ostensibly temporary is probably the cause of the most serious abuses associated with the practice.

It also makes it practically difficult to differentiate labour broking from other forms of externalisation, such as cleaning services or labour only subcontracting (see **contract cleaning, labour only subcontracting**). The difficulty of differentiating labour broking from other services was one of the reasons why a bid to ban labour broking in Namibia failed.

Both with respect to the period for which a worker may be placed with a core business, and insofar as labour regulation may or may not regard the labour broker as an employer, labour broking is a product of labour regulation. Internationally, this is evident from the fact that different countries have taken different approaches in this regard.

Some countries (now a minority) do not recognise the labour broker as the employer, or labour broking as a legitimate activity at all. In some countries, it depends on the circumstances of each case whether the labour broker is an employer or not. In other countries (now a majority, sometimes as a result of a vigorous lobbying and litigation by employers, as in the case of the United States during the 1950s and 1960s) it has been established that the labour broker is the employer.

In 1997 the ILO adopted the Private Employment Agencies (PEAS) Convention.⁵⁶The definition of a private employment agency in this Convention is

broader than labour broking, and includes a placement agency, ie an agency that provides workers to a business without becoming their employer. However it also recognises agencies that provide “services consisting of employing workers with a view to making them available to a third party...[and] which assigns their tasks and supervises the execution of these tasks.”⁵⁷ This is generally seen as legitimating labour broking.

In order to deal with the anomalies that arise as a result of a situation where the person for whom workers work is not their employer, the ILO has proposed that member states “determine and allocate...the respective responsibilities” of agencies and the core businesses (which it refers to as user enterprises) in respect of a list of topics.

These topics are:

- collective bargaining;
- minimum wages;
- working time and other working conditions;
- statutory social security benefits;
- access to training;
- protection in the field of occupational health and safety;
- compensation in the case occupational accidents or diseases;
- compensation in cases of insolvency and protection of workers claims; and
- maternity protection.⁵⁸

However in all instances it will be the core business that determines whether, and under what conditions, workers are able to exercise any of the rights to which they are entitled, in respect of the topics mentioned. This can be illustrated with reference to collective bargaining.

Workers may have the ostensible right to bargain with the labour broker, but in fact what the broker can pay is determined by the price for which it has been agreed the workers will be provided. Since the broker’s remuneration is often determined as a percentage of the wage, the commercial contract between the broker and core business will often specify the wage that workers will be paid.

There are also two important omissions from the topics in the Convention listed above: these are job security and organizational rights. Without job security a worker will find it difficult to exercise any other rights. Without organizational rights it is generally accepted that collective bargaining is not feasible. Again, although workers employed by a labour broker ostensibly have these rights, they can only exercise them vis-à-vis their employer ie the broker.

The greatest threat to the job security of such workers is not the broker, but the core business. That is because the core business is able to terminate their employment arbitrarily, either by instructing the labour broker to remove them from the premises, or to deny them access. In this event the worker has no recourse against the core business.

By the same token, the place where workers would want to exercise organizational rights is at the workplace of the core business, over which the labour broker has no say (see **workplace**).

It is for these reasons, amongst others, that labour broking has become contentious. However workers employed by labour brokers are not the only category of workers who ostensibly have rights, but are not able to exercise them. The same is true of other forms of externalised employment.

For the same reason it is also incorrect to suppose, as some writers do, that it is only the workers of labour brokers who are in a triangular employment relationship. As indicated above, externalisation can take various forms in which there are three or more parties to the relationship.

The same factors that have encouraged businesses to externalise employment therefore apply to labour broking as well. However it appears that labour broking has played a particularly important role in promoting externalisation, in that it provides a mechanism to enable a core business to reduce its workforce to the minimum, and utilise labour brokers to supplement its labour requirements from time to time. As such, the number of workers employed in the labour market at any time belies its importance.

References

Gonos (1997); Peck & Theodore (1998); Peck & Theodore (2007); Theron (2005b); Theron, Godfrey and Lewis (2005); Vosko (1997); Vosko (2008).

Labour market

If labour is understood to mean working for someone else, the labour market is the notional place where workers offer their services to potential employers, and the “going rate” for their labour is determined.

The ILO has stated “labour is not a commodity.”⁵⁹ Perhaps a more realistic statement would be that labour is not a commodity like any other. If it were not a commodity there would not be a market.

The concept of an “internal labour market” refers to the workforce employed by a firm, and questions such as whether there is the potential for upward mobility within the firm.

Labour regulation / Labour legislation

Regulation is generally understood to have a broader meaning than legislation (see **regulation**). In the sphere of labour, it could be understood to include rules that are established in practice in the workplace, but that are not legislative. It could also be understood to refer to rules and policies that apply to workers who are not employees.

On the other hand labour legislation in South Africa refers specifically to the suite of legislation administered by the Department of Labour, including the LRA, BCEA, EEA, COIDA, OHS Act and UIA. By and large this legislation applies to workers who are employees, and not to workers who are not employees.

Trade union organisation and collective bargaining have played an important role in developing rules that are established in practice in the workplace. This has been characterised as “regulation from below.” An understanding of regulation from below is helpful in understanding the provisions of labour legislation, as well as its shortcomings.

The provisions of the pre-1994 labour legislation was informed by struggles in mining and manufacturing, between employers and a trade union movement representing predominantly skilled workers. Many of these provisions have been retained in the current legislation. Post-1994 legislation was informed by struggles between employers and non-racial unions in the 1980s. However employment had not been externalised during the 1980s and standard employment was still regarded as the norm amongst trade unions and others (see **standard employment**).

The policy objectives of labour legislation in South Africa have never been spelled out. However, a tacit objective of labour legislation may be said to be to limit the scope of the commercial contract in the sphere of employment. The justification for doing so is that the relationship between an employer and an employee is inherently an unequal one.

Given the extent to which employment has been externalised and employment is now governed by commercial contract, it would seem necessary to review its policy objectives. If, moreover, if the policy objectives were to be widened to include workers who are not employees, it would be necessary to consider whether it would possible to do so through labour legislation as currently conceived or other forms of labour regulation.

References:

Shearing, C (1993); Benjamin, P (2009). Theron,J (2011)

Labour-only subcontracting

This is a term used primarily in the construction sector in South Africa, to describe contractors who supply workers having no specialist skills, as opposed to contractors fulfilling a specialised function.

However it is practically difficult to differentiate such a contractor from a labour broker or temporary employment service, and in some other jurisdictions the term is used to describe agencies providing unskilled workers.

Labour standards

The term “labour standards” can either be used to refer to

- domestic standards, meaning the standards set by labour legislation within a country; or
- international labour standards, which refers to the standards set by the ILO.

The international labour standards are to be found in two kinds of legal instrument: the convention and the recommendation. They cover a wide range of topics and situations, including situations in which workers are commonly not employed in standard jobs.

A convention is an instrument that becomes binding on a country if ratified by its Parliament. A recommendation is not intended to be binding on a country, and may either be adopted to supplement the provisions of a convention, or adopted instead of a convention (where, for example, there is insufficient consensus to adopt a convention).

However even though a country has not ratified a convention, it may be requested to report on matters dealt with in that convention, or on matters dealt with in a recommendation, in terms of the ILO constitution.⁶⁰

Up until 1998 the focus of the ILO was on establishing labour standards. However fewer and fewer countries were ratifying these standards, and they were also standards applicable in the main to workers in the formal economy, whereas in developing countries especially the vast majority of workers are in the informal economy. While the ILO still establishes labour standards, its focus since 1998 has been on getting as many countries as possible to ratify what it regards as the “fundamental conventions”, and on decent work (see **decent work**).⁶¹

The topics covered by the fundamental conventions include:

- Freedom of association and the protection of rights to organize
- The right to collective bargaining
- Prohibitions against forced labour

However these are not necessarily the most relevant conventions, from the point of view of organised labour. For example the convention dealing with collective bargaining that is regarded as “fundamental” is convention 98 of 1949 (Right to Organise and Collective Bargaining Convention). Convention 154 of 1981 (Collective Bargaining Convention), which deals with collective bargaining in more detail, is not regarded as fundamental.

Neoliberalism

Neoliberalism is a label for a set of economic and social policies that were adopted from the late 1970s onwards, in the developed countries and elsewhere. It is also an apt description of a political era.

Probably the most authoritative statement of neoliberal principles was a list ten policy proposals representing what became known as the “Washington consensus”,

because it had apparently been endorsed by the Washington-based International Monetary Fund (IMF) and World Bank. These included:

- Privatization of state enterprises and the promotion of the idea that public goods and services are best provided by private enterprise.
- Deregulation, meaning the abolition of regulations that are perceived to be onerous on business.

Neoliberalism is also a label for a set of ideas, or ideology. The following are amongst the ideas or beliefs that are emphasized in neoliberal thinking:

- A belief in the rights of the individual as opposed to the rights of the collective, coupled with a mistrust of organizations based on principles of human solidarity, such as trade unions and cooperatives.
- A belief in the capacity of the market to regulate itself, without interference from the state (hence the need for deregulation).
- A belief that role of the state is limited to functions such as safeguarding property rights and ensuring that the market functions without interference, and that it is necessary to reduce the state bureaucracy (hence the need for privatisation).
- An emphasis on a version of the rule of law that emphasizes property rights and the freedom of contract.

These ideas have to be understood in the context of the post World War 2 period, during which there had been unprecedented economic growth in the developed countries (and also in a country like South Africa). Organized labour had achieved unprecedented economic and social gains, and had significant political clout. Political parties espousing some form of socialism were relatively strong.

Neoliberalism had the more or less explicit objective of reversing these trends, and restoring class power. It has been relatively successful in this regard. This is in large part due to the global dispersion of production, and particularly the relocation of mass manufacturing to low-wage countries. Neoliberalism has actively encouraged this and other aspects of globalisation. Consequently it is closely associated with this particular phase of capitalist development (see **globalisation**).

The clearest indication of the success of neoliberalism in restoring class power has been the growth of inequality, both at a global level and at a national level, as is the case in South Africa. The rich in most countries are becoming richer, both relative to the poor and in absolute terms. The poor are becoming poorer, relative to the rich and sometimes in absolute terms as well.

This has been described as a process of class polarization, although there is no longer a coherent working class at the bottom; instead, it is a mix of groups that make up the poor and working poor.

At the start of 2007, the Financial Times in the United Kingdom pronounced as follows: “Rarely has the world had it so good. If most of the economic forecasts are correct, global growth will exceed four percent for the fifth year running...Such a sustained run of good news has not been seen since the early 1970s.”⁶²

Most economic forecasts had not predicted the global economic crisis, which happened in 2008. This was in part attributable to a failure of regulation. In order to revive the global economy, it was necessary to abandon certain neoliberal policy positions. It is too soon to tell whether this crisis might mark the end of neoliberalism.

Even if it does mark the end of neoliberalism, it is likely the legacy of neoliberalism will be with us for some time. Three reasons for this state of affairs suggest themselves:

- Those that have benefited from neoliberalism will not easily relinquish a position of relative privilege.
- The institutions of the state and of civil society have been transformed to conform with neoliberal policies. The notion of the neoliberal state reflects the extent to which these policies are now embedded.
- There is little effective organization of those who have been most detrimentally affected by the pursuit of neoliberal policies. Class polarization has been an important factor in this regard. It has contributed to the fragmentation of what previously might have been regarded as the working class into different strata.

This is not to suggest that it is not possible to undo some of the consequences of neoliberalism. However the way in which individuals and organizations seek to do so will have to take account of how the institutions of state have been transformed during the neoliberal era. One of the institutions whose role has greatly expanded is the courts. Corresponding to this development is the importance attached to “rights” in present day political discourse.

References:

Sklair (2002); Harvey (2005: 64-65); Glyn (2006).

Non-standard employment

Non-standard employment, as the term implies, is defined by what it is not. It is not standard employment. However standard employment is a social construct with no generally accepted meaning (see **standard employment relationship**). It is therefore not surprising that there is no generally accepted definition of non-standard employment. There is however agreement that it takes various forms. These are discussed below.

There are various other terms that have more or less the same meaning as non-standard employment. These include terms such as “atypical” or “non-regular” that seek to define it with reference to essentially the same norm, and terms that seek

describe the nature of this employment, such as contingent, precarious, and casual (or casualised) employment.

The different terms used to some extent reflect different conceptions of the issues the different forms of non-standard employment give rise to. This is discussed further below. However even the descriptive terms that are used tend to define the different forms of employment with reference to a norm of standard employment. For instance, one writer had this to say about what he terms contingent employment:

“It would be tedious and confusing to discuss the protean forms of contingent employment one by one. It is more useful and manageable to discuss these forms of employment from the viewpoint of their deviation from, or denial of, the three basic characteristics of the dominant model of the employment relation.”⁶³

In the literature on non-standard employment, it is sometimes said that non-standard employment is not a new phenomenon. This is true to the extent that standard employment was established as a norm during a specific period of capitalist development, and primarily in the developed countries (see **globalisation**).

It was never the norm in developing countries, or countries with primarily agricultural economies. In South Africa, a number of sectors depended heavily on a particular form of non-standard employment, namely the contract labour system, from the discovery of diamonds and gold at the end of the nineteenth century until the 1980s (see **contract labour**).

Non-standard employment is generally seen to have grown exponentially in developed countries from the late 1970s onwards. It is tempting, therefore, to see the growth of non-standard employment as simply representing a return to forms of employment that prevailed prior to the heyday of standard employment.

Certain forms of employment do of course recur. The contract labour system in South Africa utilised the fixed-term contract, and therefore represents a form of temporary employment. It would however clearly be misleading to portray the contract labour system merely as a form of temporary employment, apart from the policies of the apartheid state that underpinned it.

By the same token the use of temporary employment nowadays, by labour brokers and the like, needs to be understood in the context of the process of globalisation that has taken place since the 1970s, and the policies of neoliberalism that were adopted, which strengthened this process (see **globalisation, neoliberalism**).

There is therefore no need to discuss the factors contributing to the growth of non-standard employment here. Below, we first consider the different conceptions of non-standard employment in more detail, and thereafter consider the different forms it takes.

Different conceptions

Given that non-standard employment takes different forms, the first question that arises is whether it is useful to lump these different forms together, as one category. This question needs to be considered from a policy perspective. What, in other words, is the policy objective of grouping together different forms of employment?

Related to this question is the question whether workers that are not in an employment relationship should be lumped with those who are employees.

Some writers refer to “non-standard work” rather than “employment”. This makes it clear that the potential scope of the phenomenon described includes self-employment, where there is no employer who is accountable for the conditions under which a worker is employed. However the term “non-standard work” is nonsensical, in that there is not and never was such a thing as “standard work”. It is only an employment relationship that can be said to be standard. It makes more sense, in this context, to talk about “contingent” or “precarious work”.

Both the terms contingent and precarious emphasize the insecurity of the employment or work arrangement. The policy approach this suggests is measures that will enhance or protect job security. There are measures that could apply to all citizens that would enhance job security (for example a basic income grant). However, it appears self-evident that any measures targeted at workers will need to differentiate between the self employed, on the one hand, and workers in an employment relationship on the other. Different measures are also required to cater for different forms of employment.

In the case of temporary employment for example, the period for which a workers is employed is an important determinant of security, and employment may vary from the extremely insecure to employment that is so secure that it to all intents and purposes resembles standard employment. This lends a subjective character to terms such as precarious and contingent.

In the light of the above it seems preferable that the term non-standard employment is used to refer to workers in an employment relationship, and that a different term is used to refer to workers who are not in an employment relationship and are in need of protection. This is not to minimise their need for protection, but to ensure that the measures proposed are tailored to their needs.

Different forms of non-standard employment

From a legal perspective the different forms that non-standard employment may take are not nearly as various and difficult to describe as some writers seem to suppose.

Although various permutations are possible, all forms of non-standard employment can be grouped into two broad categories, and thereafter into different subcategories.

The two broad categories are as follows

- Workers in a traditional (or bilateral) employment relationship, which in turn can be divided into two sub-categories:
 1. Workers who are (directly) employed on a temporary basis (see **temporary employment**); or
 2. Workers who are (directly) employed on part-time basis, (see **part-time employment**).

- Workers in an externalised employment relationship, which in turn comprises two subcategories:
 1. Workers who are dependent contractors (see **dependent contractors**); or
 2. Workers whose employment is governed by a commercial contract between a core business and their employer, or between a core business and another contractor, which contractor has in turn engaged their employer to provide goods or services.

It is this second subcategory that gives rise to indirect or triangular employment. This is the most complex and poorly understood of the different forms of non-standard employment.

This is partly because, as discussed below, that it is not in the interests of either the core business or contractor in this scenario to acknowledge the existence any kind of employment relationship between the workers concerned and a core business. The notion of triangular employment is thus highly contested, as evidenced also by the historic defeat of the proposed ILO convention on contract labour (see **contract labour, triangular employment relationship**).

At the same time there is no consistency as to how the different kinds of contractors are categorised, or how their relationship with the core business should be described. In this regard, it is useful to differentiate between contractors providing goods and those providing services.

A contractor providing goods is often categorised as a sub-contractor, whether or not it does so in terms of an agreement brokered by an intermediary. In the case of homework or outwork, goods are procured through an intermediary.

There are a variety of contractors that define themselves as services, including cleaning services, security services and transport services (see **services**). In South Africa labour broking or temporary employment agencies categorise themselves as a service, although it is debatable whether they should be regarded as such.

All workers employed by such agencies or services can be regarded as temporary in that their continued employment depends on the subsistence of the contract between the employer and the client (or core business). Notwithstanding the temporary nature of their employment such workers are sometimes told they are “permanent” or regarded as being in standard employment.

Policy issue:

The reason it is important to clearly identify the different forms of non-standard employment is to develop measures to lessen the vulnerability of these workers. Labour regulation does not become comprehensive in its coverage merely by seeking to encompass all forms of employment within one definition. On the contrary, it can be argued that the likely consequence of failing to differentiate between standard and non-standard employees, and different forms of non-standard employment, is that ever more non-standard employees fall between the cracks of a floor of rights that ostensibly protects them.

References:

Befort (2002); Delsen (1995); Cappelli (1999); Cappelli et al (1997); Fudge and Owens (2006); Gallagher & Sverke (2005:182); Kalleberg (2000); Lee (1996); Polivka & Nardone (1989); Stanford & Vosko (2004); Summers (1997); Vosko (2006:3-4).

Organisational rights

The LRA provides a set of organizational rights to employees. These rights are intended to enable trade unions to organize effectively, and underpin a trade union's ability to bargain collectively.⁶⁴ The rights provided are as follows:

- A right of access by the trade union to the workplace
- A right to have trade union subscriptions deducted from members' wages
- A right to elect trade union representatives
- A right to reasonable leave for office-bearers of trade unions to attend to their functions
- A right to information relevant to the exercise of the function of a trade union representative, or for the purposes of consultation or collective bargaining.

However these rights have not in fact been of much assistance to trade unions. In the case of trade unions that were established at the time the LRA was adopted, these rights went no further (and in most cases not as far) as the rights trade unions had already established in practice.

In the case of new-comer unions, or trade unions seeking to establish rights in unorganised sectors, the definition of the workplace has proved an insuperable obstacle. This is because to qualify to exercise these rights a trade union has to be "sufficiently representative" of employees in the workplace. For reasons discussed below, the workplace as defined no longer corresponds with how the workplace is nowadays constituted (see **workplace**).

The right of greatest relevance to trade unions wishing to address the situation of workers whose employment has been externalised is perhaps the right to information. Trade unions could try and utilise this right to seek disclosure of the terms of the commercial contract between a core business and its satellites. It is certain, however, that both the core business and any satellite business with which it had contracted would resist any attempt to disclose the terms of its commercial contracts. The objection to doing so would in all probability be that such contracts are not relevant for the purposes for which a trade union may request the disclosure of information, and are in any event confidential.⁶⁵

The rights provided by the LRA do not apply to workers who are not employees, but they provide a template for the kind of rights such workers, or organizations representing such workers, might wish to establish.

As in the case of employees belonging to a trade union, the starting point for the exercise of such rights must be recognition of the workplace where they actually work. In the case of workers who are not in an employment relationship, this may

involve winning recognition from someone that is not an employer, such as a local authority.

All workers, or organizations representing workers, are entitled to information that is held by another person that is required for the exercise or protection of any rights in terms of the Promotion of Access to Information Act, and the constitution.⁶⁶ This law could also be utilised to try and compel core businesses and others to disclose the terms of contracts affecting such workers.

As regards the organisational rights of workers who are not protected by the LRA, the right to assemble and the right of freedom of association are obviously relevant.⁶⁷ The right to freedom of association, as established by ILO convention, includes the right of workers to join organisations of their own choosing, and to draw up constitutions and rules, and elect representatives.⁶⁸

ILO conventions also apply to worker representatives, “who shall enjoy effective protection against any act prejudicial to them, including dismissal “, the protection of rural workers, and collective bargaining.⁶⁹ Amongst other things these require member states to take “measures adapted to national conditions.... to promote collective bargaining” which should be “made possible for all employers and all groups of workers...”⁷⁰

Outwork

Outwork refers to a situation in which an employer or core business puts out work, which is to be done off the premises of the workplace. Typically the work that is put out is a component or part of a product that is manufactured at the workplace, that a worker or workers take home to complete, or have completed. It could therefore be regarded as a form of subcontracting.

In terms of the BCEA, an employer is required to provide an employee with written particulars of the place of work. Where the employee is required to work at various places, this must be indicated.⁷¹ Clearly if not indicated, it would be unlawful. In some industries outwork is expressly outlawed.

Outsourcing

Outsourcing is the obtaining of goods and services by contract from an outside source, although the term is associated more with services than goods. As one writer puts it, outsourcing is “simply the farming out of services to a third party.”⁷²

It is clear, therefore, that outsourcing concerns a business decision, taken by the manager or owner. The rationale normally advanced for doing so is to focus on the “core business”. However, what is core or non-core is not objectively determinable and often services are outsourced precisely because of their strategic importance to the business, rather than that they are not core.

By the same token, businesses in South Africa have in many instances been actively engaged in establishing services, often under the mantle of empowerment. The

suggestion that outsourcing is a process of “farming out” belies the extent to which businesses are actively promoting this process.

As outlined above, the term “outsourcing” is not equivalent to what we refer to as externalisation in this booklet, but is incorporated by it (see **externalisation**). However it is sometimes used in a less precise sense. It is also difficult to disentangle it from the business management discourse in which it is sometimes clothed.

Own-account worker

Own account worker can be used in the same sense as self-employed person. However it seems sensible to use it to refer only to vulnerable forms of self employment, as argued below (see **self-employment**).

Statistics SA appears to have adopted the term as a synonym for self-employment.⁷³

Part-time employment

The ILO has defined a part-time worker as “an employed person whose normal hours of work are less than those of comparable full-time workers.”⁷⁴ However labour legislation does not recognise part-time employment as a separate and distinct category of employment. Consequently there is no clear dividing line in law between full-time and part-time employment.

It is important to distinguish part-time employment from temporary employment. As noted elsewhere, a temporary worker works for a specified period. When that period expires employment terminates automatically, and there is therefore no dismissal (see **temporary employment**).

Because part-time employment is ongoing, by contrast, the employer can only terminate the relationship by dismissing the worker. As a general proposition, therefore, part-time work is a more secure form of employment than temporary employment, although the validity of any comparison between the two does depend on the period of temporary employment, and the number of hours of part-time work that are guaranteed.

Where part-time and temporary employment is often confused is in the case of the so-called “casual worker.” As already noted, most chapters of the BCEA, including the chapter regulating hours of work, do not apply to employees who work less than 24 hours a month for an employer (see **casual employee**). A worker employed for less than 24 hours a month could thus be employed on a part-time basis (a char working 5.5 hours a week, for example) or on a temporary basis (a day labourer, who is employed for three days).

The BCEA only lays down the maximum number of ordinary hours an employee must work. The maximum number of weekly is 45 hours. This is arrived at on the basis that a worker is not permitted to work 9 hour day for 5 days a week, or 8 hours a day in the case of an employee working more than five days a week.⁷⁵

On the assumption that it would not make operational sense, in a firm working a five day week, to employ workers on a part time basis for more than four days a week or 36 hours, part-time work should not in practice exceed 36 hours a week. However it is more likely to make operational sense for a firm to utilise part-time workers for the equivalent of three days, or 27 hours a week.

In a country with chronic high unemployment it makes sense, from a policy perspective, to encourage part-time employment as opposed to temporary employment. This was done with some success in certain countries in Europe during the 1970s, to meet the demand of business for flexibility. However, it appears that during the 1980s there was a shift from part-time to temporary employment.⁷⁶

Some have argued that the BCEA of 1997 extended protection to part-time workers. This is debatable, and illustrates the need for a policy regarding labour regulation. As argued elsewhere, labour regulation does not become comprehensive in its coverage by failing to differentiate specific forms of non-standard employees, and part-time workers are worse off for not having specific provisions that address particular problems associated with this form of employment.

One of the particular problems part-time workers have concerns their entitlement to leave and other benefits. As workers employed on an ongoing basis, part-time workers should be entitled to the same quantum of leave as full-time workers, at the same rate of remuneration they would ordinarily receive. However the BCEA does not state as much, and there is confusion as to how their entitlement should be calculated.

This confusion may have been compounded by the following statement in a leading commentary on the BCEA: “part-time workers [who]are entitled to all rights in terms of the Act, where appropriate on a proportional basis”.⁷⁷ It is not clear what “on a proportional basis means” in this context. It is also not clear when it will be “appropriate”.

The same phrase (where appropriate on a proportional basis) is used in the sectoral determination for the retail sector, Sectoral Determination 9, in respect of the leave entitlement of part-time workers⁷⁸. However it is no clearer in terms of this determination how the phrase should be interpreted.

The retail sector employs more workers than any other sector in South Africa, and is also a sector in which significant numbers of part-time workers are employed. Large employers, especially, rely on part-time workers in order to be able to staff their stores for the extended hours they are open.

Sectoral Determination 9 does not refer to part-time workers as such, but it provides for two categories of employees who are in effect part-time workers. Different conditions of employment apply to each category. These categories are as follows:

- Employees working 27 hours a week or less per week.
- Employees working 40 hours or less ordinary hours of work per week including a Sunday.

However 40 hours a week is too high a threshold for differentiating part-time from full-time work, as already indicated. Moreover the latter category obviously overlaps with the former category, in that a worker working 27 hours or less also works less than 40 hours. It is therefore not clear which conditions of work are intended to apply to which workers. However the conditions of work applicable to the latter category are more favourable, from an employer's perspective, than the former.

There are a number of other serious problems with Sectoral Determination 9. These include the fact that the conditions of work it proposes apply to part-time workers are substantially less favourable than are applicable to employees in terms of the BCEA. It is not clear whether the Minister of Labour acted within the powers conferred upon him in terms of the BCEA, in publishing a sectoral determination in these terms.

For example certain part-time workers:

- are entitled only to two weeks' paid annual leave (and, on request by the employee, a further one week's unpaid leave)
- forego the right to paid sick-leave and compassionate leave;
- forego a premium for Sunday work
- forego an allowance for performing night work⁷⁹

Instead of creating greater certainty regarding part-time work, it seems the Sectoral Determination has created new uncertainty. An important source of uncertainty for part-time workers concerns the variation of their hours of work. The BCEA permits an employer to vary hours, from one week or month to the next, by averaging: in other words, provided that on average the minimum number of hours is worked. However this can only take place in terms of the BCEA by collective agreement, whereas the Sectoral Determination allows averaging by agreement with the individual employee.⁸⁰

Part-time work is regulated internationally by Convention 175. This provides that "measures shall be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers" in respect of certain labour rights, and "to ensure that part-time workers do not, solely because they work part-time, receive a basic wage which.... is lower than the basic wage of comparable full-time workers"⁸¹.

References:

Delsen (1995); Sparrow (1998); Thompson and Benjamin (2003); Visser & Theron (2010).

Privatisation

Privatisation refers to the transfer of assets or enterprises belonging to the state to private ownership, or the transfer of functions performed by the state to private service providers.

As indicated above, privatisation is one of the policies advocated by neoliberalism (see **neoliberalism**), and also results in the externalisation of employment.

The establishment of public entities such as Eskom and Telkom operating along similar lines as companies in the private sector can be seen as a concession towards pressure from business to privatise.

A related process, which may also be understood to represent privatisation, is the demutualization of a mutual organization, or the conversion of a cooperative. An example of this in South Africa was the conversion of the insurance mutuals Old Mutual and Sanlam, as well as certain cooperatives, into listed companies (see **cooperatives, solidarity economy**).

Regulation

There is a distinction between regulation and legislation. Regulation is generally understood to have a broader meaning than legislation. The benefit of referring to regulation would therefore be to consider a broader range of instruments or interventions than might be considered if the focus was only on legislation.

There is, however, no consensus as to how broadly regulation should be defined. There are two issues to bear in mind in this regard. First, whether regulation only comprises rules, or whether it also comprises other mechanisms or measures utilised to achieve a policy objective. Second, whether regulation refers only to the state, or whether private actors also regulate.

Examples of mechanisms or measures utilised by the state to achieve a policy objective would be the adoption of a formal policy, or incentives provided by the state in terms of a formal or informal policy. Some might categorise this as governance, rather than regulation. There is no clear boundary between these concepts (see **governance**).

Even if regulation were regarded as only comprising rules, it would be necessary to understand how such rules are applied and enforced in practice. It would also be necessary to understand the relationship between different kinds of rules. Certain legal concepts or rules constitute the space within which other regulations are understood or applied or enforced. For example, rules protecting property rights and rights of contract tend to be regarded as constituting the space within which other rights are exercised.

As discussed elsewhere in this booklet, the legal concept of the workplace constitutes the space within which organizational rights and rights to collective bargaining are exercised, and on which the concept of a sector are founded. The property rights of a core business in respect of that workplace are only limited in respect of workers directly employed by it. They are not limited in respect of other workers working at their workplace. (See **labour regulation, workplace**)

References:

Shearing, C (1993); Benjamin, P (2009). Theron, J (2011)

Seasonal worker

A seasonal worker is a worker employed for the duration of a particular season, in an industry in which production is seasonal. Industries or sectors that are seasonal include agriculture, agro-processing, and fishing.

It follows that seasonal work is a species of temporary work, with the period being the duration of a particular season (see **temporary work**). Since the duration of a season depends on the vicissitudes of the weather, this is an inherently insecure form of employment.

Measures that would lessen the insecurity of seasonal workers include some form of provision for an income during the off-season, and measures to establish a right of workers to be re-employed during the following season.

Sector

A sector in the context of this booklet refers to a distinct category of the economy, consisting of economic activities or industries of the same kind. The term tends therefore to be used in a broader sense than “industry”, and is defined in the LRA as meaning “an industry or service”.⁸²

One way an economy can be categorized by sector is according to ownership or control, by differentiating between a public and private sector. The public sector refers to activities or industries controlled or owned by the state. The private sector refers to activities or industries that are controlled or owned by individuals. The distinction between public and private has been blurred by privatisation (see **privatisation**).

The concept of the social economy is based on the notion that there is third sector of the economy, comprising economic activities that do not belong in either the private or public sector (see **social economy/solidarity economy**).

Another way an economy can be categorized by sector is by the nature of the activity or industry, based on the understanding that the economy of a country can be divided into three broad sectors:

- The primary sectors, referring to activities or industries engaged in the production or extraction of raw materials, such as agriculture, fishing, forestry and mining.
- The secondary sector, referring to activities or industries engaged in the processing of raw materials.
- The tertiary sector, also referred to as the services sector, which comprises a disparate set of activities which does not fall in either of the above categories, and is discussed separately (see **services**).

By international agreement, the different economic activities or industries that make up these sectors are in turn divided into sectors, or sub-sectors, according to a system known as the International Standard Industrial Classification of all Economic Activities (ISIC).

The object of this classification is to facilitate comparisons between countries. Employment data in South Africa, for example, is provided for ten different sectors. These ten sectors are listed below. The first two are in the primary sector, the third one corresponds with the secondary sector, and the others fall in the tertiary category:

- Agriculture, hunting, forestry and fishing
- Mining and quarrying
- Manufacturing
- Electricity, gas and water supply
- Construction
- Wholesale and retail trade
- Transport, storage and communication
- Financial intermediation, insurances, real estate and business services (business services includes labour broking, cleaning and security)
- Community, social and personal services (this includes the public service)
- Private households

As noted above, collective bargaining may take place at a sectoral level. In terms of the LRA, this is the preferred level at which collective bargaining should take place (see **collective bargaining**).⁸³ However the LRA does not in any way prescribe the sectors in which collective bargaining should take place. This is left up to the parties to define.

This means that in practice how a sector is defined, or demarcated, for the purposes of collective bargaining depends on how trade unions are organised in the workplace, and how many workplaces they are organised in. This in turn depends on how the workplace is defined (see **workplace**).

The approach of the LRA in this regard contrasts with the approach of the SDA, as regards the provision of education and training by Sectoral Education and Training Authorities (SETAs). In terms of the SDA, the responsible Minister demarcates the sectors in respect of which the SETA has jurisdiction.

Amongst the factors which the Minister takes into consideration when demarcating sectors in terms of the SDA are “the materials, processes and technologies” utilised, and the products made and services rendered.⁸⁴ The same or similar factors might be considered relevant in demarcating sectors for the purposes of collective bargaining.

Where a bargaining council is established, the LRA requires NEDLAC to consider, amongst other things, the appropriateness of the sector in which it is to be established, and to demarcate the sector.⁸⁵ NEDLAC must also be consulted in the event that any dispute regarding the demarcation of a bargaining council is referred to arbitration.⁸⁶

NEDLAC has apparently established a standing committee to consider demarcation matters but has thus far not succeeded in establishing coherent principles or guidelines for demarcating sectors. It is probably not realistic to expect it to do so for various reasons, but primarily because corresponding with the process of externalisation there has been a proliferation of new services, and it contested whether these services are properly regarded as ancillary to the core business (and therefore part of the same sector) or are separate from it (and therefore constitute a sector in their own right).

Self Employment

The term is self explanatory. Someone who is self-employed works for his or her own account. There is therefore no employer, and without an employer there can be no employment relationship.

There is a very broad range of occupations which self employed people are engaged in. It ranges from occupations requiring little education or training, such as a street trader, to occupations requiring high levels of education or training. An example of the latter is persons in professional occupations, such as doctors and lawyers.

A self employed person may become an employer, and a street trader is as likely to employ a worker to assist her or him as a professional person. Most people would probably still regard someone that employs one or two workers as self employed. However at some point the number of workers a person employs becomes a basis for differentiating a small business from self-employment (see **small business**).

Clearly some self employed persons, but not all, are vulnerable. Using the term worker, or own account worker, is one way to distinguish between those that are vulnerable and those that are not.

One of the ways self-employed workers can try and reduce their vulnerability is by working in partnership. In a partnership, the profits are shared, and each of the partners is liable for the debts of the partnership

Another way self-employed workers try and reduce their vulnerability is to organize themselves. The most basic form of organization is the association (see **association**). Sometimes self employed workers form an association called a union, with the object of negotiating with the local authorities in much the same way as a trade union does. The other form of association which self-employed workers may form is a cooperative, which may also negotiate on behalf of its members (see **trade unions, cooperatives**).

Services

Services, as indicated, is a term that can be used to describe the tertiary sector. It can also be use to describe what are properly described as services within the tertiary sector, as opposed to activities such as the operation of an electricity utility or construction that arguably have more in common with manufacturing.

It is said that the proportion of people employed in services is growing, and that this is a good thing. Indeed, children in schools are taught that the growth of employment in services is an indication that an economy is relatively developed.

This idea dates back to the idea that societies advance from an economy based on agriculture, to an economy based on manufacture, to an economy based on commerce and services.⁸⁷ However developed economies in Europe and North America have become increasingly reliant on a supply of cheap product from elsewhere and it remains to be seen what will happen if this supply is interrupted.

It is also necessary to examine claims that there has been a growth of jobs in services carefully, for the following reasons, amongst others:

- This is the sector in which the bulk of the workers in informal employment, and self-employed workers, are located.
- Construction, which is a significant employer at times, is cyclical in nature
- Workers whose employment has been externalised are now located in services. Business services is the subsector which has show the most dramatic growth in employment in recent years, and the reason must be that this is where labour broking, security and cleaning services are located.

One part of the services sector that has increased enormously in significance is information technology (IT). Its significance is of course not only by virtue of the numbers it employs but also its impact on the economy as a whole, and the process of globalisation (see **globalisation**).

Such is the significance of IT that some believe it should constitute a fourth sector, called the quaternary sector.

Short-time

Short-time refers to a temporary reduction in the number of ordinary hours of work owing to vagaries of the weather, a slackness of trade, a shortage of materials, a breakdown of plant or machinery or a breakdown or threatened breakdown of structures, or any other circumstances beyond the control of the employer necessitating a temporary reduction in the number of ordinary hours of work.

Social dialogue

The promotion of social dialogue is one of the objectives of the ILO's concept of decent work (see **decent work**). As defined by the ILO, social dialogue includes all types of negotiation, consultation or information sharing either between representatives of government, employers and organized labour (at a tripartite level) or between employers and organized labour (at a bipartite level).

Social dialogue can take place at a national level (NEDLAC would be an example), or a sectoral level, or at the workplace. It can be formal or informal.

Social protection

This is a broad concept intended to encompass a variety of measures aimed to reduce vulnerability and economic insecurity. The promotion of social protection is one of the objectives of the ILO's concept of decent work (see **decent work**). These measures are regarded as including:

- Labour market interventions to promote employment and protect workers
- Social insurance, to mitigate risks. UIF and compensation as provided by the UIA and COIDA would fall in this category. So too would employment-based forms of insurance such as medical schemes, and self-help schemes such as savings and credit cooperatives and stokvels.
- Social assistance, in the form of the transfer of resources to vulnerable individuals or households. The child-support grant or other social grants fall in this category.

Social economy (Solidarity economy)

Social economy refers to those economic activities and industries that are social in character, and that are not owned or controlled by either the private sector or the state. The term is better known in European countries and Latin America than in countries influenced by Anglo-American traditions.⁸⁸

These activities take various forms in different countries. One way of categorizing them is as not-for-profit organizations, and non-profit organizations.

Not-for-profit organizations are enterprises operating for the benefit of their members, who finance them. Although they aim to generate a surplus, they do not seek to maximize profits. In countries influenced by Anglo-American traditions, these are sometimes referred to as "social enterprises".

Mutual associations and cooperatives are examples of such enterprises. In the case of South Africa, both Old Mutual and Sanlam were mutual associations before they converted to listed companies. Enterprises nowadays providing financial services to their members include savings and credit cooperatives (SACCOs) and cooperative banks.

A NPO, on the other hand, is not funded by its members, and often has a charitable or educational or like objective. In countries influenced by Anglo-American traditions, "voluntary sector" is sometimes used to collectively describe these organizations.

Clearly the social economy assumes increasing significance in a context in which direct employment in both the private and public sector is diminishing. Solidarity economy is a more overtly political term for the same phenomenon.

References:

Standard Employment / Standard Employment Relationship

The term standard employment, or the standard employment relationship (SER), describes employment in what is commonly called a “permanent” job, or indefinite employment, or “typical” employment. It is sometimes described as representing a norm or model to which employment should conform.

However none of the above terms feature in labour legislation, and there is also no agreement as to how standard employment should be defined. It seems there are only two criteria about which there is no room for disagreement. These are as follows:

- It is employment for an indefinite period;
- It is full-time, although definitions of full-time will vary;

Most writers would add a further criterion, that the employee has only one employer. This can be understood as being the corollary of being employed full time. (A part-time worker, by way of contrast, may have more than one employer.) It can also be understood to refer to the distinction between a bilateral (or bilateral) rather than a triangular employment relationship.

In our opinion the existence of a bilateral employment relationship must certainly be regarded as a criterion for distinguishing standard from non-standard employment. The problem is that the notion of a triangular employment relationship is poorly understood, and its scope is contested.

Some writers argue that standard employment should be regarded as taking place at the workplace of the employer. However what is or should be regarded as the workplace is also contested, in the case of workers in a bilateral employment relationship in services such as transport or security, and in the case of workers in a triangular employment relationship (see **workplace**).

It is usually only workers in standard employment that enjoy benefits such as pension and medical aid schemes, and whose job security is protected. Some writers argue that it is the provision of benefits, and job security that differentiates standard from non-standard employment.

However this introduces a subjective element into the equation, since there is necessarily considerable variation in the benefits provided, or the degree of job security workers enjoy. It may also be debatable whether workers should be expected to contribute to certain kinds of benefits.

It is therefore not likely that there will be agreement regarding what constitutes standard employment, so any attempt to measure standard employment must be regarded as unreliable.

The significance of standard employment, however, is that the kind of labour regulation we have in South Africa and other countries is informed in large part by a model of standard employment. In other words, the assumptions on which labour regulation is premised are valid for workers in standard employment, but not necessarily for non-standard workers.

This needs to be understood in a historical context. The hey-day of standard employment is generally regarded as being in the period following World War 2 until about the mid-1970s, which is the period of the post-war economic boom. In South Africa, this period also coincided with the hey-day of apartheid. The only section of the employed workforce that enjoyed the benefits associated with standard employment at the time was a predominantly skilled section of the workforce, which was also racially defined.

This same section of the workforce was unionised. As was the case elsewhere in the world, and as is the case in many other countries that were industrialised, or were in the process of becoming industrialised at this point, much of South Africa's present day labour legislation, and key labour relations institutions such as bargaining councils (formerly known as industrial councils), date back to struggles between trade unions and employers during this period.

The labour legislation adopted post 1994 introduced a number of far-reaching changes to the pre 1994 legislation. These were changes largely informed by struggles between the emergent, non-racial trade unions and employers in the 1980s. It was during this brief period, after the phasing out of the migrant labour system, that standard employment seemed a realisable goal. Accordingly this legislation is also premised on assumptions that apply to standard employment (see **labour legislation**).

However during the 1990s neoliberal policies were adopted and employment was increasingly externalised. The situation in South Africa today is one in which standard employment is declining. This has been the case globally since about the late 1970s, for reasons discussed elsewhere (see **globalisation, neoliberalism**). There is no realistic prospect of this trend being reversed.

Sub-contracting

This term refers to the situation in which one firm (a contractor) engages another firm (the sub-contractor) to provide good or services. The traditional rationale for subcontracting is that sub-contractor has the specialised skills that the firm itself does not have. However increasingly nowadays firms sub-contract for the same reasons that core businesses externalise.

Sub-contracting is therefore a species of externalisation. It is not, however, a term that is generally applied to services provided on the premises of the core business. The outcome of subcontracting is thus a fragmented workplace (see **workplace**).

In the proposed convention concerning contract labour debated by the ILO's Conference in 1998, a person providing workers to the user enterprise (ie core business or client) is regarded as either being a 'subcontractor' or 'intermediary'. However, the convention was never adopted.

Temporary employment

Employment that is temporary is employment for a specified term, also called a fixed term. The important difference between employment that is temporary and employment that is part-time, as indicated above, is that part-time employment is ongoing, whereas temporary employment ends when the term expires. The worker is therefore not dismissed at the end of the term.

The only circumstance in which a worker may be regarded as dismissed upon the expiry of the term is where there was a reasonable expectation that the contract would be renewed. However the onus is on the worker to prove there was such an expectation.⁸⁹

There are two ways in which the term of a temporary contract may be defined:

- A term that is defined by a task to be completed.
- A term that is defined in terms of a specified number of hours, days, weeks, months or years.

So important is the distinction between these two forms that it is appropriate that they are given different names. The term “task contract” has been used elsewhere to describe the first form. It is not yet recognized in South Africa.⁹⁰ We suggest it should be.

There should be no objection to the use of task contracts when the task in question is concrete and ascertainable, and it is objectively determinable when it is complete (the painting of a house, for example).

However it creates great uncertainty when the task in question is in effect determined by an employer or core business (where the worker is in a triangular employment relationship) or where it is the employer or core business that determines when the task is complete.

Labour brokers and service providers such as cleaning services generally enter into written contracts of employment with workers they place with a core business, which are task contracts. In terms of these contracts, the task is defined by the client, and the client has the right to terminate the assignment with or without notice. In this event, the employment contract terminates automatically, and the worker is without a job.

It is for this reason that it is a misconception to suppose that workers with written contracts of employment are better protected than workers without such contracts, or that a written contract is a basis to differentiate formal from informal employment (see **informal economy**).

Sometimes contracts specify a task, and in the alternative, a period computed in hours, days, weeks, months or years. If the contract terminates upon the completion of the task, or upon the expiry of the period of hours or days etc., whichever is the

later, the worker has at least a guarantee of that number of hours or days, as the case may be.

We suggest that “fixed-term” should only be used to designate a contract whose term is computed in hours, days, weeks, months or years. It is obvious that employment in this kind of contract constitutes a spectrum, and one cannot generalize about fixed-term contracts as a whole.

At the most vulnerable end of the spectrum is the casual worker, or “day labourer”, who is generally employed in terms of an oral contract. As noted above, unless such a worker is employed for 24 hours a month or more, his or her hours of work are not regulated by BCEA. At the secure end of the spectrum is the worker employed for a period of years.

Seasonal work is a category of temporary work that warrants special mention (see **seasonal work**).

Temporary employment service

This is the term used in the LRA and BCEA for a labour broker (see **labour broker**).

Trans-national corporations / Multi-national corporations

The terms transnational corporation (TNC) and multi-national corporation are often used interchangeably. It appears to be accepted that the distinction between them is not clear-cut, but is based on the following:

- MNCs are national corporations that have their headquarters in one country, but have subsidiaries in other countries as well
- TNCs operate in a number of countries with a relative degree of autonomy from their headquarters.

The largest TNCs today have assets and sales far exceeding the gross national product of most countries of the world.

Triangular employment relationship

It is possible to distinguish three distinct senses in which this term can be used:

- In the narrowest sense, in respect of the labour broking relationship, where the labour broker is the employer, but the worker works for someone else.
- To encompass all forms of employment generated by externalisation (which is the sense in which the term is used in this booklet), including franchising and production under license.

- To describe all employment relationships in the services sector, in which the client is the customer, and satisfying the customer is increasingly the measure of performance.

In whichever sense the term is used, the object is to draw attention to the extent to which the conditions of employment of workers are determined by someone who is not their employer, namely the core business or client.

However the core business or client determines the conditions of employment of workers more directly in the case of labour broking and cleaning, for example, than the franchisor in the case of franchising. In the case of the customer in services, it is the job security of workers that is most likely to be affected.

There are a few instances in which labour legislation in South Africa holds the core business or client liable, and which represent implicit recognition of the triangular employment relationship. However any attempt to widen the scope of the concept is likely to be contested.

In one of its reports, the ILO defined a triangular employment relationship as occurring when “employees of an enterprise (‘the provider’) perform work for a third party (the ‘user enterprise’) to whom their employer provides labour or services.”⁹¹

However this definition is problematic. It assumes that the workers of the provider are its employees, rather than the employees of the client. This is precisely what is at issue, insofar as the client determines the terms on which services are provided. At the same time, it characterises the client as a third party. This characterisation is at odds with economic reality, since the client is necessarily the economically dominant party.

The term is also open to misinterpretation, in that it may be understood to imply there are necessarily only three parties to the relationship, whereas in the case of sub-contracting or homework, for example, there may be a series of intermediaries between the worker making a product and the core business (eg a retail chain) which has commissioned its making.

“Trilateral employment” is an alternative term for triangular employment, describing the same phenomenon.

Trade Union

A trade union is an association that represents employees. In some countries associations of self-employed workers call themselves “unions” because they see themselves as workers, and because they regard “unions” as organizations of workers.

There is nothing to prevent a group in South Africa from calling itself a “union” for this reason. However “union” is generally understood to be a short form of “trade union” and in South Africa a trade union, as defined by law, is an association whose members are employees. An association of workers who are not employees cannot register as a trade union.

To register, a trade union must adopt a constitution and be a trade union in compliance with the LRA. A registered trade union has certain rights in terms of the LRA, such as organizational rights in terms of which it has access to the workplace of the employer.⁹²

User enterprise

This is a term used by the ILO in various conventions, to denote a business that uses the services provided by another. In common speech, it is a client. In this booklet it is referred to as a core business.

Value chain

The concept of a sector, as indicated, is focused on different firms who are engaged in the same or similar kinds of activities. This enables comparisons to be made between the economies and labour markets of different countries. The concept of a value chain focuses instead on the production of a product and the internal organization of the firm, and its relations with other firms, including firms located in other sectors, in order to produce the product.

Since many branches of production are now dispersed globally, the notion of a value chain cuts across national borders. Accordingly the concept of a global value chain (GVC) has been developed. One of the advantages of this conception is to identify who is the dominant party (or parties) in the chain, referred to as the lead firm, and the point at which surpluses accrue.⁹³

The concept of governance is used to understand how the lead firm controls other parties in the chain (see **governance**). It has been suggested two kinds of GVC are important⁹⁴, namely:

- Producer driven chains are usually found in industries in which TNCs control the system of production eg in automobiles and computers (see **transnational corporations**). Control is usually exercised by the headquarters of the TNC.
- Buyer-driven chains refer to industries in which large retailers and the owners of famous brands have set up decentralised production networks in other countries, typically low wage countries in the East. eg in garments, footwear and toys. Often these large retailers do not own any production facilities, but design and/or market the products.

The owners of brands exercise control by virtue of their intellectual property rights to the brand. One reason why the distinction between buyer-driven and producer-driven GVCs is important concerns where control is exercised. In the case of the former it is still at the point of production. In the case of the latter it is at the point of consumption.

Global Production Networks (GPNs) is an alternative to the GVC concept. This is understood as a network of firms clustered around one commodity or product.⁹⁵ The

GPN concept emphasizes that there is not always a lead firm operating in the linear manner the GVC concept envisages, and that there are social processes involved in producing goods and services. It thus acknowledges the role of the state, trade unions and NGOs in influencing the functioning of production networks.

References:

Gereffi (1994 a and b); Gereffi, Korzeniewicz and Korzeniewicz (1994).

Vertical integration / disintegration

A firm that is vertically integrated is one that incorporates its suppliers (those that supply it with raw materials, for instance, or services) or its distributors, or both. The suppliers are sometimes described as being “upstream” (or backward) of the firm they supply, as opposed to the distributors, who are described as “downstream” (or forward).

Vertical disintegration describes an opposing trend, whereby firms cease to incorporate suppliers or distributors (see **externalisation**).

Work

See **labour / work**.

Worker

The literal meaning of “worker” is someone who works, and corresponding with the distinction between work and labour, would therefore include both work in an employment relationship and self-employment (see **labour /work**).

However not all who work regard themselves as workers. In other words it is a term that also has to do with identity. In the 1980s, for example, “worker” was commonly used to distinguish between workers in production (also called “blue-collar workers”) and employees in managerial and administrative positions.

Nowadays a more appropriate distinction would appear to be between workers in a relationship of economic dependence, whether it be an employment relationship or not, on the one hand, and self-employed professionals and entrepreneurs on the other.

A similar distinction has been drawn between workers who earn an income by selling their labour in some kind of a market – either directly on a wage-labour market, or indirectly through some form of product market- and others.⁹⁶

Workplace

The workplace means “any premises or place where a person performs work in the course of his (sic) employment”. This is the definition in OHSA.⁹⁷ This means that in the case of workers whose employment has been externalised, and who work on the premises of the core business, the workplace would be the premises of the core business. Workplace has the same meaning in terms of the BCEA.⁹⁸

This is not how the LRA defines the workplace. In terms of the LRA, the workplace is the “place or places where the employee of an employer works...”⁹⁹ For workers whose employment has been externalised, the premises of the core business where they actually work is therefore **not** regarded as their workplace.

The problem is that it is not clear what the workplace of such workers is. In the case of a labour broker or service provider, for example, it may be that the only premises it has are the offices where its management and administration are based (if it has offices at all). This is not the place where the workers work. It is also often the case that the workers have no contact with such offices or only very limited contact.

Moreover, if these offices were deemed to be the workplace of such workers, it would mean that this was the workplace of all the other workers placed by that labour broker or service provider. Some of these firms operate nationally.

To be sufficiently representative in such a firm, a trade union would have to have organized nationally, in the different places where it has placed workers. These places are shifting all the time, as it loses one contract with a core business and gains another.

To explain the practical effects of these definitions in more detail, it is first of all necessary to consider why the workplace matters: not only for workers in externalised employment, but more generally, and also for informal workers whose employment is not regulated by labour legislation.

Why the workplace matters

The reason the workplace is important for workers is that it is first and foremost the place where they learn to know one another, and are able to associate. It is also where they have power as a collective.

It is also in respect of the workplace that a trade union must establish that it is sufficiently representative to exercise organizational rights. The right of access to which trade unions are entitled in terms of the LRA concerns access to the workplace. The representatives which trade unions are entitled to elect are elected in terms of the workplace.¹⁰⁰

Collective bargaining often takes place at the workplace. Where collective bargaining takes place at a higher level, it is on the basis that the trade union concerned has organized sufficient workplaces. Without effective workplace organization, effective collective bargaining is not possible.

In the same way that the workplace is important to workers in the formal economy, it is important to workers in the informal economy. Everyone who works has a workplace. If workers in the informal economy are to be organised, whether as associations, or trade unions or cooperatives, the place to begin is where they work.

It is therefore necessary to identify such a place. Places where large numbers of informal workers are aggregated also hold the best potential for organisation. It may also be necessary to secure recognition for the rights of workers in such informal workplaces, whether from a local authority or private landowners.

The transformation of the workplace

As argued above, South Africa's pre-1994 labour legislation was informed by struggles between employers and trade unions representing predominantly skilled workers in mining and manufacture. South Africa's post-1994 labour legislation was informed by struggles during the 1980s, between employers and non-racial unions, based primarily in the manufacturing sector (see **labour legislation**).

Throughout this period and until the start of the 1990s there would have been no objection to defining the workplace as the place where the employees of an employer work. However the workplace, as it was understood then, is a very different place from the workplace as it is today. In the 1980s it was, in the main, a place where the employees of a single employer worked. In other words, a single workforce worked there.

Today, there are multiple workforces on the premises of core businesses, in manufacturing, mining and other sectors in the formal economy. On the one hand there is the workforce of the core business. On the other there are different workforces engaged in the different functions that have been externalised, which can be described as satellite workforces.

The effect of the LRA's current definition of a workplace, in this context, is to deprive workers in the satellite workforces of their organizational rights in the workplace in which they actually work. It is also to frustrate the possibility of the different workforces establishing a joint forum where they can address collective issues. By the same token, it permits gross inequities between the different workforces in the actual workplace to be ignored (see **employment equity**).

At the same time the LRA's current definition creates insuperable obstacles for any union wishing to organise not only workers in externalised employment, as already explained, but other categories of workers as well.

This is because where an employer an employer conducts two or more operations, the LRA requires that a trade union be sufficiently representative of all its operations. So in the case of a national retail chain, for example, a trade union must be sufficiently representative of its entire national operation for workers to qualify for organizational rights.¹⁰¹

A proposed typology of workplaces

We suggest that in the light of the above a different approach to the workplace is needed. First and foremost, it is necessary to restore (or reaffirm) that the workplace

is a space (or spaces) where workers actually work, and regardless of who their employer may be.

It is therefore necessary to distinguish between the workplace as defined by the LRA (there is, at present, no proposal to amend the current definition) and the actual or physical workplace. The object in doing so is not to disturb any collective bargaining arrangement at a company or sectoral level.

However the effect of externalisation has been to fragment organisation at the workplace, and collective bargaining cannot be effective at a higher level if there is not effective organisation at the workplace. The object of this typology is to understand how the workplace has been fragmented, in order to devise ways of addressing it.

Having regard to the actual workplace, it is necessary to differentiate between different types of workplace. Since we are not only concerned with workers in the informal economy, it is firstly necessary to differentiate between formal and informal workplaces, as follows:

- A formal workplace is located in the formal economy, in a formally designated space such as an industrial site. It is typically owned or controlled by a core business. The core business defines the economic activity or activities that are conducted there, and controls access to the premises. It is host to one or more satellite workforces.
- An informal workplace, where people are working in spaces that are formally designated for informal trading, such as a market, or on public or vacant land which they have occupied, often in the proximity of transport or retail hubs.

Secondly, it is necessary to differentiate between an integrated and a fragmented workplace. A fragmented workplace would be where a core business locates a component of its activity in a physically separate place(s).

Such activity could be located in the formal or informal economy. For example:

- Where a core business enters into a subcontracting or franchising arrangement, or production is taken place under licence, the activity would be located in the formal economy.
- In the situation of outworking or homework, the activity would be located in the informal economy.

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End notes

¹ Williams, 1988; Boonzaaier and Sharp, 1988.

² Act 17 of 2000. Associations may in addition register with SARS as a Public Benefit Organization (PBO), in order to qualify for certain tax benefits.

³ In terms of section 21, Act 61 of 1975, and Schedule 1 of Act 71 of 2008.

⁴ Section 1(a) of Act 3 of 1983.

⁵ Sections 6(1), 19(1) and 28(1) of Act 75 of 1997.

⁶ For example chapters 2, 3 and 4 of Act 75 of 1997.

⁷ Section 27(2), Constitution.

⁸ In terms of section 48(9) of the LRA (Act 28 of 1956) an agreement entered into at a conciliation board could be extended in the same as an industrial council agreement.

⁹ Section 29(2), BCEA.

¹⁰ Section 185(1), LRA.

¹¹ Section 199, LRA.

¹² Article 1, Proposed Convention concerning contract labour, Report V (2B), International Labour Conference, June 1998.

¹³ The writers are not aware of any proper analysis of the reasons for the ILO's failure to adopt the proposed convention. The views expressed are based on J. Theron's personal contact with an official of the ILO responsible for drafting the proposed convention.

¹⁴ Labour Relations Amendment Bill, 2010. Government Gazette No 33873 of 17 December 2010.

¹⁵ Section 43, Act 14 of 2005. How members contribute to the capital of a cooperative is something that needs to be specified in its constitution. In terms of the Cooperatives Act, there are various options. The member may pay an entrance fee, on joining. In addition the member may either take out shares in the cooperative or pay a subscription. Members can also contribute by way of loans.

¹⁶ Act 14 of 2005.

¹⁷ Section 1, Act 14 of 2005. A separate schedule of the Act applies to workers' cooperatives, to prevent the abuse of this kind of cooperative. See Part 2, Schedule 1 of Act 14 of 2005.

¹⁸ The first express mention of the term decent work appears to have been in the ILO Director General's Report to the International Labour Conference in 1999, which bears that title, and contains an initial definition. However decent work is not an international labour standard (see Labour Standards), and the definition and the objectives (or pillars) have been through different formulations.

¹⁹ <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

²⁰ See section 3, read with the definition of employee in section 1, and section 55(1)(k), BCEA.

²¹ Article 4(b), ILO Recommendation 198, 2006.

²² The grounds on which an employee may be dismissed are set out in section 186 (a) to (f), LRA.

²³ However that the UIA applies only to domestic workers that work for 24 hours or more per month for a particular employer.

²⁴ As discussed above, there is an apparent conflict between the provisions of section 1 of the BCEA, which defines employees to exclude independent contractors, and section 55(1)(k), which empowers the Minister to make a

determination specifying minimum conditions of work “for persons other than employees.”

²⁵ Section 1, OHSA, defines an employee as “any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.”

²⁶ Labour Relations Amendment Bill, 2010 published in Government Gazette No 33873, 17 December 2010.

²⁷ Sections 83A of the BCEA and 200A of the LRA.

²⁸ This is also the case in the EEA and SDA.

²⁹ Section 1,(a) to (c), COIDA. The definition also includes a person to whom an employee is seconded.

³⁰ Section 1, OHSA.

³¹ Preamble, Labour Relations Amendment Bill, 2010. See note 26 above.

³² Section 2, EEA. “Designated groups” is defined to include all those not classified as white under apartheid, women and people with disabilities.

³³ Section 27, EEA.

³⁴ See for example Grogan (2007: 50): “An employment relationship commences only when parties conclude a contract of service...”

³⁵ Hepple (1986)

³⁶ ILO Recommendation 198 of 2006.

³⁷ Preamble, ILO Recommendation 198 of 2006.

³⁸ For a full exposition of respective rights and obligations of employers and employees, see Brassey (1998).

³⁹ www.thefreedictionary.com/empowerment

⁴⁰ Collins (1990).

⁴¹ See Atkinson (1985).

⁴² Act 68 of 2008.

⁴³ The US, for example, is regarded as having shifted away from the model of a “regulatory state” that was introduced in the New Deal era. See Lobel, O. 2004.

⁴⁴ The ILO’s definition also does not require work to be carried out in the person’s home, provided it is carried out in premises of her or his choice, other than the workplace of the employer. Article 1, ILO Convention 177 of 1996 (Homework convention).

⁴⁵ February 2003, State of the Nation address. The first economy was “modern and relatively well developed”, he said. The second economy, he suggested, “is characterised by under-development and an entrenched crisis of poverty”, and is structurally disconnected from the first economy.

⁴⁶ See ILO, 2002. Resolution concerning decent work and the informal economy, adopted by the General Conference at its 90th Session, 2002.

⁴⁷ Quarterly Labour Force Survey, August 2008 (Report nr 02.11.01), page 16. See www.statssa.gov.za/publications

⁴⁸ Quarterly Labour Force Survey, note 31 above, page 18.

⁴⁹ The Bill was published with certain other Bills to amend labour legislation at the end of 2010. See note 26 above.

⁵⁰ This is underpinned by a pre-entry closed shop, whereby only trade union members are hired, and has not been attempted in South Africa.

⁵¹ ILO Conventions 29 and 105; Section 13, Constitution; and section 48 of the BCEA. There are certain forms of forced labour that are not prohibited, eg military conscription.

⁵² Supiot (2001: 54, cited in Le Roux, 2009)

⁵³ Article 23, Paragraph 1, United Nations Universal Declaration of Human Rights, 1948.

⁵⁴ Sections 13,17,18, 22 and 23 of the Constitution, respectively.

⁵⁵ Section 23(2), Constitution.

⁵⁶ This was the same year that the ILO first presented the proposed convention on contract labour. See **contract labour**.

⁵⁷ Article 1(1)(b), Convention 181 of 1997.

⁵⁸ Article 12, Convention 181 of 1997.

⁵⁹ Philadelphia Declaration of 1944.

⁶⁰ Article 19(5e), ILO Constitution.

⁶¹ The ILO Declaration on Fundamental Principles and Rights at Work, and its focus on 'core labour standards', has been criticised as representing a reliance on principles de-linked from standards, which are thus effectively undefined. See Alston, 2004.

⁶² Cited in Glyn (2006:184)

⁶³ Summers (1997).

⁶⁴ Chapter 3, Part A, LRA.

⁶⁵ See sections 16(2), (3) and (5) of the LRA.

⁶⁶ The Promotion of Access to Information Act (No 2 of 2000) gives effect to the constitutional right of access to information held by any person that is required for the exercise or protection of any rights. However a request for information must be refused, inter alia, if disclosure contains "trade secrets of a third party" or if the disclosure "would be likely to cause harm to the commercial or financial interests" of a third party or "put that third party at a disadvantage in contractual or other negotiations." See section 64, Act 2 of 2000.

⁶⁷ Section 17 and 18, Constitution.

⁶⁸ Article 2 and 3, Convention 87 of 1948. See also article 1, Convention 98 of 1949.

⁶⁹ Convention 141 of 1975 (Rural Workers' Organisations Convention).

⁷⁰ Article 5, Convention 154 of 1981 (Collective Bargaining Convention).

⁷¹ Section 29 (1)(c), BCEA.

⁷² S.Overby (2007). 'ABC: An introduction to outsourcing'. See www.cio.com/article/40380.

⁷³ See Government Notice 235 in Government Gazette 4131 of 1 October 2008.

⁷⁴ Article 1 (a), Convention 175 (the Part-time Work Convention). There is a corresponding definition of "comparable full-time worker. "

⁷⁵ Section 9, BCEA.

⁷⁶ Delsen (1995: 8)

⁷⁷ Thompson and Benjamin (2003: BB1-5)

⁷⁸ Section 11(2), Sectoral Determination 9.

⁷⁹ Section 11(1)(a) –(f), Sectoral Determination 9.

⁸⁰ Visser & Theron (2010)

⁸¹ Article 4 and 5, Convention 175 of 1994.

⁸² Section 213.

⁸³ In terms of section 1(d)(ii) of the LRA, one of the purposes of the LRA is to promote collective bargaining at sectoral level.

⁸⁴ Section 9(2), SDA.

⁸⁵ Section 29(8), LRA.

⁸⁶ Section 62(9), LRA. However it is not clear how this process of consultation is supposed to be effected or what regard, if any, an arbitrator must pay to the views of NEDLAC.

⁸⁷ The theory is generally credited to Colin Clarke. See Clarke (1940).

⁸⁸ Spain has recently adopted a law regulating the social economy.

⁸⁹ Section 186(b), LRA.

⁹⁰ Thus whereas section 29(1)(d) of the BCEA requires an employer to specify “the date when employment is to terminate”, this date would be the date the task is completed in terms of a task contract.

⁹¹ ILO Report, 2003, note 1, 37-40.

⁹² In terms of the LRA, a trade union that is sufficiently representative of employees in the workplace is entitled to certain organizational rights, and (whether or not it is sufficiently representative) may refer disputes to the Commission for Conciliation Mediation and Arbitration (CCMA).

⁹³ The dominant party is the party who determines the overall character of the chain and/or coordinates the activities of the firms in the chain.

⁹⁴ Gereffi is the originator of the concepts of producer and buyer driven chains. See Gereffi (1994).

⁹⁵ According to Gereffi et al (1994), this network links households, enterprises, and states to one another within the world-economy.

⁹⁶ Heinz (2006 cited in Webster et al, 2008)

⁹⁷ Section 1, OHSA.

⁹⁸ Section 1 of the BCEA defines a workplace as “any place where employees work.”

⁹⁹ Section 213, LRA.

¹⁰⁰ Chapter 3, Part A, LRA.

¹⁰¹ Section 213 creates an exception where “an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organization.” In this event, each independent operation would constitute the workplace. However it is difficult to see in what circumstances an enterprise would qualify as independent on this basis.