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The Impact of Triangular Employment Relationship on Workers' Rights in Ethiopia

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DECLARATION

I declare that the thesis is my original work and has not been presented for a degree in any other University and that all sources of materials used in the thesis have been duly acknowledged.

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ACRONYMS AND ABBREVIATIONS

Art.	Article
AABOLSA	Addis Ababa Bureau of Labour and Social Affairs
BPO	Business Process Outsourcing
CBE	Commercial Bank of Ethiopia
CETU	Confederation of Ethiopian Trade Unions
CN	Commercial Nominees
FDRE	Federal Democratic Republic of Ethiopia
HRM	Human Resource Management
ILO	International Labour Organization
ITO	Information Technology Outsourcing
LRB	Labour Relations Board
MOLSA	Ministry of Labour and Social Affairs
NGO	Non-Governmental Organizations
Proc.	Proclamation
PLC	Private Limited Company
Sec.	Section
TEA	Temporary Employment Agency
User	Service User Enterprise

Abstract

This thesis attempts to assess the impact triangular employment relationship may have on workers. Due to the involvement of two persons with certain attributes of employer the question "who should be considered the employer" in triangular employment relationships is one of the issues. Among the alternative approaches to this question the joint employer approach adopted by Ethiopian employment exchange proclamation is identified as the best to protect workers. The issue of workers' rights and protection is also another issue considered at stake in this relationship. There are arguments in support of the position that triangular employment relationship is inherently problematic and dangerous to workers. On the other hand there is also argument which is of the position that there is no inherent problem that harms workers in this relationship if it is regulated properly. This thesis tries to assess the validity of each argument having a deep in sight at both the law and the practice and arrive at a conclusion. Though there are some gaps in the law that make workers vulnerable like absence of legal mechanism to determine workers' wage in this arrangement and employment security, there are no inherent or unavoidable problems unique to this work arrangement. Failure of the regulatory organ to enforce the law and lack of awareness about the work arrangement and legal protection on workers' side create the impression that this work arrangement is inherently problematic.

Key words

Provider, user enterprise, joint employers, outsourcing, workers' right

Chapter one

1 Introduction

1.1 Background of the study

Employment as traditionally known is a contractual relationship in which two parties, the employee and the employer, enter into agreement where the former undertakes to provide service and the later pays wage in return for the service it receives. Such employment relation is characterized by the direct and personal provision of service by the employee, under the supervision, guidance, schedule of the employer which also takes place in the premises of the employer.[1] The worker has only one employer at a time instead of working simultaneously for different employers, works full time on the employer's premises and the employment relation in principle is expected to continue for an indefinite period of time.[2] These are the main features of what is called the typical/ standard employment relation.[3] These typical patterns of employment first took shape with the emergence of large scale industries and eventually become the standards in business and industry.[4] Labour law, collective bargaining and social security systems were also developed within this framework.[5]

Currently, however, there is a trend of shifting towards nonstandard employment both in developing and developed countries.[6] Atypical/ nonstandard employment appears as a departure from the employment patterns known for a long period of time. It differs in form from the traditionally known typical employment relation, falls outside the scope of regulatory and

[1] Leah Vosko, 'Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards, from a Comparative Perspective' (1997), 19 Comparative labour law and Policy journal 43

[2] Ibid

[3] Arnel Kalleberg, 'Changing employment relations in the United States' 1999, (The Society for the Advancement of Socio economics, Madison, Wisconsin, 1999) available at https://www.annualreviews.org/doi/pdf/10.1146/annurev.soc.26.1.341, last accessed on 3-4-19

[4] Aychiluhem Yesuneh, 'The regulation of atypical/ non-Standard employment relation in Ethiopia' (2010) 3 Jimma University journal of law 14

[5] Ibid

[6] Susan Houseman, 'Why employers use flexible staffing arrangements: evidence from an establishment survey' (2001) 55 Industrial and Labor Relations Review 149

protective provisions which labour laws and trade union action have established.[7] Some of such new arrangements are part time work, temporary work, contract work, subcontracted work, outsourced jobs and other forms of non-standard jobs.[8] These work arrangements are also known as flexible staffing arrangements. Currently they are getting wider acceptance and significant number of work force is engaged in such atypical relations though there is difference in the extent to which it is being utilized in different countries. What makes them different is the absence of one or more of the features characterizing the standard employment relations.

Triangular employment relation is one of such atypical employment relations that came to the picture as a result of globalization and technological advancement among other things.[9] Unlike the standard employment relation where only two parties, the employer and the employee are parties and the employee undertakes to directly provide personal service to the employer without a third party intermediary,[10] in the triangular employment relation, there is the involvement of a third party at different levels. The involvement of third party intermediaries/ agencies may take place at the level of recruitment in which a third party may recruit employees based on the need of the employer and provides service of matching offers. The agencies in this case act as intermediaries to connect employers and those who seek work without being party to the employment contract. Once the employee and employer concludes contract of employment, the employment agency will go out of the picture. There might be three persons, the employer, the employee and the employment agency at the beginning/ until contract of employment is concluded/ but the ultimate parties to the contract will be the employer and the employee.

The other is atypical employment relation which involves three parties and hence triangular in the strict sense of the term. The employment agency in this case concludes contract of employment with the employees but is not the direct beneficiary of the labour. Rather, it enters into another contractual relation with organizations that seek workers or certain services and

[7] Ibid

[8] Ibid

[9] Jan Theron, 'The shift to services and triangular employment: Implications for labour market reform' (2008) 29 Industrial law journal 1

[10] Of course a third party intermediary may exist at stages before the conclusion of employment contract but not party to the contract.

provide the employees under it to the same.[11] The agency renders a service of making workers available, locally or internationally, to third parties known as clients or user enterprises by concluding a contract of employment with the workers.[12] In this type of employment relation the employees conclude contract with the employment agency but provides the service not for the agency directly rather to another person that does not have any contractual relation with them. Technically speaking the employee is interacting with two interlocutors, each of whom assumes certain functions of employer in the bilateral labour relationship.[13] The employee, the provider/ agency and the user enterprise are involved as opposed to the standard employment relation where the employer and the employee are considered the only parties. Timothy J. Barktiw has explained this relation as "functions traditionally performed by a single employer are distributed among a user firm and a service provider".[14]

The focus of this thesis is the triangular employment relation in which the employment agencies conclude contract of employment with workers because it is this kind of arrangement that introduces new concept of having two different persons with the status of employer and deviates from the standard employment relation where the agencies serve only matching offers of application.

Enterprises may for different reasons externalize some of the functions mainly not constituting their core/major activities. One of the main reasons is in order to focus more on their core business activities.[15] In Ethiopia as well this kind of employment arrangement is getting acceptance and being used by different organizations engaged in commercial and other activities. The Ethiopian Commercial Bank, Zemen Bank, Dashen Bank, some of the public universities are examples of institutions using the agency employment to get services like security, janitor and other activities which are considered to be ancillary.[16] However, as discussed above, due to

[11] Timothy Bartkiw, 'Regulatory differentials and triangular employment growth in the U.S. and Canada' (2015) 19 Employment rights & employment Policy journal 1

[12] Ibid

[13] 'The employment relationship' (International Labour Conference, 95th Session, 2006)

[14] Timothy (n.11)

[15] Susan (n.6)

[16] Betelhem Mekuria, 'Challenges and prospects of outsourcing Practice in Commercial Bank of Ethiopia' (MA thesis, AAU school of commerce, 2017) 2&18

its unique features this arrangement needs special attention. Assessing the existing legal regime and the practice with regard to the roles and responsibilities of the parties involved, legal protection provided specially for the employees and other matters is an important step to fill the gaps that may be created as a result of the unique features of the triangular employment relations which may not be addressed under the laws governing the standard employment relations. This thesis is devoted to assess the legal and practical aspects of the triangular employment relations in Ethiopia, whether the issues involved are properly addressed under the existing legal framework and how it is exercised in practice, trying to identify the gaps if any and come up with possible recommendations.

1.2 Statement of the problem and research questions

In triangular employment relation the employee has a contractual relation with the employment agency which gives the agency the status of an employer and this is so because user enterprises want to avoid directly employing workers for different reasons.[17] But the agency itself does not provide work for the employees i.e. it does not place the workers to its own work place. Rather it makes them available to another entity with which it enters into contract to provide workers or service. In other words the workers are not directly employed by the user enterprise but they are supplied to it through outsourcing, subcontracting or temporary employment agencies.[18] The entity to which the workers or service is provided uses the labour of the workers with which it does not have any contractual employment relation. This is where most of the issues in relation to this kind of arrangement arise. Dealing with two persons with certain attributes of employer has its own implications on workers' rights. The main problem related to triangular employment relations is determining "who is going to be considered the employer?"

As mentioned above employees are dealing with at least two different persons each with some attributes of employer. As a result of this, determining who actually is the employer in this type of relations could have a significant impact for all legal and practical reasons. Against which of these persons are the workers going to claim their rights in case of violation and the issue of enforcement of the same is a question that needs to be addressed seriously. There are number of obligations imposed by laws like the FDRE constitution, the Labour Proclamation no. 377/2003,

[17] The employment relationship (n.13)

[18] Aychluhem (n.4)

International Instruments like the ILO Conventions on those who assume the position of employers and in case these obligations are not met, employees can directly institute legal action against such employers in case of standard/ typical employment relations. But due to existence of two different persons with certain attribute of employer in atypical relation this may create some confusion on workers and may even lead them to be without legal remedy unless it is regulated properly. Is there sharing of responsibilities between these persons or any other mechanism of keeping the user enterprises responsible for the workers together with the agency is an issue worthy of attention.

Some argue that the true intention of the user enterprises in contracting with employment agencies instead of directly employing workers is contracting out the responsibilities attached to the status of being 'employer'.[19] They further argue that such arrangement enable employers to easily avoid the labour law obligations through contractual arrangement whereby they only contract out the payment of service charge for employment agencies and maintain some of the supervision and control aspect of the relationship.[20] Can a user enterprise which is the direct beneficiary of the labour force contract out all the responsibilities of an employer is another issue that needs serious discussion. In this kind of relation the user enterprise is the one in complete control of the work place and who decides on important aspects of the work.[21] The work is most of the time performed under the premises of the user enterprise and obligations like making the work environment safe and healthy seems under the direct control of the user enterprise than the employment agency. Can these and other obligations which have direct relation with and look more of the obligation of the user enterprise be contracted out and the enterprise be free of any obligation? Does the mere fact of outsourcing employment affairs to employment agency relieve the user enterprise of any legal obligations towards the workers is the other concern of this thesis. There is also the issue of an attempt to shift obligations in both cases i.e. when the agency is requested to do something expected of an employer, it replies "since the user enterprise is the one you are serving and it is the ultimate beneficiary of the work you are performing, you have

[19] Arne Kalleberg, Barbara Reskin and Ken Hudson, 'Bad jobs in America: Standard and nonstandard employment relations and job quality in the United States' (2000) 65 American sociological review 256-278 , available at https://www.jstor.org/stable/2657440 last accessed: 18-02-2019 09:34 UTC

[20] Ibid

[21] Harry Braverman, labour and monopoly capital, Monthly review press, 1998

to go and ask the same."[22] On the other when workers come with the same request to the user enterprise, the reply is "since there is no contractual relation between you and me, you are not entitled to bring any claim against me. You should rather go to the agency who is your employer based on the contract and the law."[23]

Others regard the triangular employment relation like the other forms of atypical employment relations as a threat to the survival of the principles that have shaped labour law.[24] It is also blamed for allowing high level of flexibility and cut costs while exposing workers to less stable and unsecure employment and worse working conditions.[25] According to these persons the triangular employment arrangement has negative impact on working conditions and security. There is also the issue of getting a reduced wage by agency employees because the agencies are "taking commissions" from the payment collected. Are the agencies really charging commission against the workers wage and if this is the case, is it legal for the employment agencies to charge commission against salary of employees is another problem in relation to the triangular employment relation.

This being the case, Proclamation No. 632/2009 under Art. 22 provides that the private employment agency and the third party shall jointly and severally be liable for violation of the contract of employment between workers and agency. The third party mentioned under this provision is the user enterprise. Part of this Proclamation dealing with agency making workers available locally remains effective because it is excluded from being repealed by Proc. No. 923/16 by virtue of Art. 78/4. The law has made it clear that there is joint and several liability on the employment agency and the user but to what extent is this provision being implemented is another concern of this thesis. To what extent are agency workers aware of this joint and several liability scheme in enforcing their rights also needs to be assessed. Generally the thesis is intended to address the following research questions.

[22] Focus group discussion with Ato Yonas Hailu, Ato Abebe Arega, Ato Jemal Abdela, Ato Haile Berhanu, W/ro Sisay Bekele and Kebebush Adane who are all workers at a private employment agency (Addis Ababa, Ethiopia, 10 March 2019)

[23] Ibid

[24] Kalleberg (n.3)

[25] Ibid

The central question of this study is "does triangular employment relationship has inherently adverse effects on workers which is unique to it?" In order to address this central question the following specific questions will be addressed.

1. Does the joint and several liability provided by the law amounts to joint employer status?
2. Does triangular employment relation makes the employment relation less secure as compared to the standard employment relations? How?
3. Does triangular employment relationship negatively affect the minimum working conditions as compared to the standard labour relationship?
4. Are the parties involved in triangular employment relation aware of the joint and several liability scheme?
5. Is there charging of commission against the wage of workers in triangular employment relationship?

1.3 Objectives

1.3.1 General objective

The general objective of this study is trying to assess the impact of triangular employment relationship on workers in Ethiopia with a focus on workers.

1.3.2 Specific objectives

- Identifying who the employer is in triangular employment relation in Ethiopia.
- Assessing whether the triangular employment relation makes the employment relation less secure as compared to the standard relation.
- Assessing whether the triangular employment relationship negatively affects the minimum working conditions as compared to the bilateral labour relationship.
- Assessing whether the parties involved in this type of employment relation are aware of the joint and several liability scheme.
- Assessing whether agencies are charging commission against workers' wage.

1.4 Research method and methodology

1.4.1 Type of data and Method of collection

This study is a mixed approach legal research in which both doctrinal and empirical approaches are used. It is doctrinal in the sense that the existing labour laws of Ethiopia are assessed and analyzed with a view to understanding how triangular employment relation is recognized and protected under the laws. The study has also an empirical aspect in the sense that the practical aspect of this employment relation is assessed and existing challenges are identified. Both qualitative and quantitative methods are used in the study and hence it is mixed in this regard as well. The study is qualitative in that it is devoted on the reasons, justifications and logical arguments on legal provisions. It is quantitative because the study depends on data and information collected from employment agencies, agency workers, MOLSA, AABOLSA, CETU and the likes.

With regard to the type of data used for the doctrinal aspect of the research, relevant laws in labour law particularly the FDRE Constitution, Labour Proclamation. No. 377/2003, Proclamation. No. 632/2009 and International Instruments like the ILO Private Employment Agencies Convention No. 181 are assessed. Employment agencies, employees working under employment agencies and user enterprises that are operating in Addis Ababa are also used as primary sources in data collection process by way of interview, questionnaire, personal observation and group discussion. Secondary sources of data like books, journal articles, working papers, archives and other internet sources that deal with labour law in general and triangular employment relations in particular are reviewed with a view to having a comprehensive understanding of the subject matter.

1.4.2 Tools and techniques of data collection

Interview with different persons has been conducted. The target groups of population for the interview are employment agencies, agency workers, MOLSA, AABOLSA, CETU. Managers and other responsible persons of selected employment agencies, user companies, agency employees and focal persons for triangular employment relation under the Ministry of Labour and Social Affairs and Bureau of Labour and Social Affairs of Addis Ababa. With regard to the employment agencies five leading employment agencies operating in Addis Ababa and other parts of the country are selected. The selection is made based on purposive sampling technique

and this is done since there are more than 105 employment agencies registered under AABOLSA[26] it would be impossible to make all of them part of the study due to time and finance constraints. As a result of this the leading employment agencies in terms of the number of workers they have and their experience in the business are selected. Managers and directors of the selected agencies were interviewed and the total number of persons interviewed from agencies is eight.

Questionnaire was sent to agency workers in order to collect data. A total number of one hundred fifty workers are made to participate in the study using questionnaire. The selection is made based on random sampling technique since there are thousands of workers under agencies and it is impossible to make them participate in the study due to the constraints mentioned above. Focus group discussion with agency workers is also used for data collection purpose.

Directors and team leaders from the responsible departments at AABOLSA and MOLSA are also interviewed. A total number of five persons are used as source of data. Selection was made on the basis of purposive sampling method.

1.5 Scope and limitation of the study

In terms of scope the thesis is limited to triangular employment relation which is based on assessing the relevant legislations on the area including Proclamation No. 377/2003, Proclamation No. 632/2009 and the ILO private employment agencies convention. Triangular employment relationship may take place in the forms of outsourcing, subcontracting and use of temporary help agencies. This thesis mainly focuses on the outsourcing aspect of the relationship because it is this arrangement that is widely practiced in Ethiopia. With regard to the practical aspect of the study it is confined to the leading employment agencies operating in Addis Ababa city administration and their workers. workers engaged in cleaning, security, gardening and messenger service are made parts of the study because these are works predominantly done in triangular employment relationship and the workers are more vulnerable due to their lower bargaining power as compared to skilled workers.

[26] Interview with Ato Seyoum Lemma, team leader of Industrial relations at AABOLSA, ((Addis Ababa, Ethiopia, 18 April 2019)

With regard to limitation, since triangular employment relation is a new phenomenon to this country, getting sufficient published materials was difficult. There is one published material the researcher have come across written by Aycheluhm Yesuneh which focus on regulation of atypical employment relationships in Ethiopia with comparative reference to South African labour law and a thesis by Kenna Tariku on labour rights of security guards in private security industry in Addis Ababa.

1.6 Significance of the Study

The research focuses on analysis of laws and the problems in the practice. With this it identifies and gives a clear image of the legal framework governing triangular employment relation. It will also identify gaps and challenges. The laws are assessed and analyzed with a view to shed light on whether they sufficiently protect the parties in this relationship. The research will be helpful for the law making organ in identifying the legal gaps if any. The practical aspect of the relationship is assessed with a view to understand the problems frequently raised in relation to this type of employment relation. This would enable all the parties involved in this relation i.e. the employment agencies, the user enterprises and the agency employees understand their respective rights and obligations while engaging in such relation. This may in turn help reduce the controversies surrounding such relation. Looking at the existing laws as well, it will address whether this relation is sufficiently regulated, the workers are properly protected by the law, identify gaps if any and give recommendation which may contribute for the betterment of the relation in general. So it is believed that this thesis will be of importance for all the parties involved and the legislative.

1.7 Organization of the paper

This paper is designed to be divided into five chapters. The first chapter is on introductory matters which cover background of the study, the research problem and questions, the objectives, the methodology, scope and limitation and significance of the study. The second chapter deals with a general overview of non-standard employment relations. The third chapter will be on development of triangular employment relations in Ethiopia and the legal framework. Chapter four will focus on the impact of triangular employment relations on workers right. The last chapter, chapter five is devoted for conclusion and recommendation.

Chapter two

2 General overview of Nonstandard Labour Relationship

2.1. Meaning and conceptual underpinning of non-standard labour relationship

The Proliferation of non-standard forms of employment is one of the features characterizing the modern world of work. A data from the 1995 Population Survey in the United States has revealed that among workers who are 18 years old and over, 31 percent are in some type of nonstandard employment.[27] Though the degree might be different, this is not very far from the reality in many countries. In an attempt to discuss the non-standard employment relations, however, it is better to see what the standard employment relationship looks like so that the deviations can be clearly understood. The term nonstandard employment relationship presupposes the existence of standard employment relationship.[28] Black's law dictionary has defined the term "standard" as "a criterion for measuring acceptability, quality or accuracy." In employment relation we have some criteria based on which a certain employment relationship is to be classified as standard/typical or non-standard/atypical. Stability of the work relationship, length of working time, the degree of entitlement of an employee to social rights according to the working regime[29] etc. can be taken as some of these criteria.

Although there is no consensus on what exactly constitutes standard employment relation, in most of the labour law regimes it is characterized by a full time, permanent employment contract, an employee working for a single employer at a time, on the employer's premises/ place of business and expected (or was expected) to continue doing so for an undetermined period of time.[30] In other words an employment relationship is considered to be standard/ typical when

[27] Susan (n.6)

[28] Kalleberg, Barbara and Hudson, (n.18)

[29] Hanzelova, 'Non-standard employment in Slovak Republic' (2007) Institute for Labour and Family Research 51

[30] Mihaela-Emila Maria, 'Non-standard employment relationship and the gender dimension' (2013) Juridical tribune 168, Efren Cordova, 'From full-time wage employment to atypical employment: A major shift in the evolution of Labour Relations' (1986) 125 International labor review 641

there is an exchange of labour in return for wage on a full time basis according to a known schedule; employee works continuously for one employer with one contract instead of series of contracts; and work at a place provided, according to a schedule determined and direction given by the employer.[31]

The relationship is a full time engagement as the worker puts himself at the disposal of the employer every working day, the whole regular/ normal working hours so long as the employment relationship continues. There is an expectation of continued employment on both the employer's and employee's side.[32] The existence of only one employment contract is indicative of the fact that the worker is engaged only with a single employer contractually and provides service only for this employer. Workers are required to attend the working place based on the work schedule set by the employer. It is the same person that hires workers and makes them work under his/ her authority.[33] It is also the same person that pay wage for the workers. Where these conditions are met and employment is protected by the law, the worker enjoys statutory entitlement to a whole series of guarantees and benefits while at the same time the law imposed a number of contributions and obligations on the employer and the state.[34] As discussed above, Labour laws, collective bargaining and social security systems were developed within the framework of this standard labour arrangement.

"Non-standard" is something that deviates from what is accepted as standard or norm. Accordingly employment relationship is considered non-standard when it has some departure from the standards in employment relationship. The absence of one or more of the features in the standard employment relationship may reduce the status of a labour relationship into a non-standard one. As discussed above the standard in many labour law regimes with regard to the duration of employment relation is indefinite period of time. Based on this fact on labour law regimes, employment contracts made for a fixed period of time would fall in the non-standard category. Likewise, full time work is the standard with regard to the length of working hours and this makes part time works to be categorized as non-standard. There is direct relationship

[31] Aychiluhem (n.14)

[32] Leah (n.1)

[33] This can be seen form definition of employer provided under the Labour law Proclamation No. 377/2003.

[34] Kalleberg (n.3)

between the worker and the employer without the involvement of a third party (once a contract is signed) in the standard relationship. The employer is the one who directly concludes contract with the worker and at the same time the one who receives the labour service. But in the non-standard arrangement the worker may conclude contract with a person and provides service to another person. Bilateral labour relationship is the standard while tripartite/ triangular employment relationship is nonstandard.

One of the features of standard relation as discussed above is the workers working on the premise of the employer. In non-standard arrangement however, the worker is not necessarily confined to the employer's premises.[35] Workers may provide the work from somewhere else (different from the employer's premises) like the home work arrangement.[36]

2.2. Some frequent non-standard labour relations

Nonstandard/ atypical employment relationship is used as a "catch all" term to refer employment relations that somehow deviate from the standard relationship. Some of the frequently used non-standard labour relations with their distinguishing features are briefly discussed in this section.

2.2.1. Fixed-term contracts

Generally it can be stated that employment contracts are either fixed term or for indefinite period of time. Of course employment contracts have typically been for indefinite duration. A fixed term contract is a contract of employment that is to expire at the end of a given period of time which is specified in the contract.[37] In making the contract the employer and employee reaches at an agreement that the contract will remain valid for a certain determined period of time. This may be related with the nature of the work i.e. the work may be one which may be completed within the period fixed in the contract or the contract may be concluded for the performance of a certain piece of work upon the end of which the contract may come to an end. When the contract is made for a piece work, the term for which the contract remains valid is not fixed in terms of time. Rather it is the time which is needed to complete the work, whatever time the work may

[35] 'Industrial Home Work' 58 International labour review (1948) 735, Gisela Schneider, 'Home Work: a case for social protection' (1990) 129 International labour review 423

[36] Ibid

[37] Tamara Cohen, 'When common law and labour law collide -some problems arising out of the termination of fixed-term contracts' (2007), 19 South African mercantile law journal 26

take, that brings the contract to an end.[38] In many jurisdictions there is the presumption of employment contracts for indefinite duration.[39] Situations in which a contract may be concluded for a fixed period of time are provided as exceptions.[40]

It is undeniable that there are circumstances that necessitates employment contracts for a fixed term because there are works which may obviously last only within a certain fixed term (for instance seasonal works). In these cases the employment contract would be terminated upon the expiration of this term or the occurrence of a condition subsequent which is the completion of the work piece.[41] Such contracts are, therefore, exceptions to the rule according to which employment contracts are primarily concluded for an open ended period and this character makes them atypical contracts. When the nature of the work is only temporary; the worker is employed to replace another employee for a certain period and when the employee is hired following vocational training or study in order to facilitate his/her entry into subsequent employment the nature of the work justifies the fixed duration of the contract.[42] Somehow similar grounds for fixed term contract are listed under Art. 10 of Labour Proclamation No. 377/2003 in Ethiopia.

Some of the problems raised in relation to fixed term contracts are lesser treatment the workers receive as compared to permanent workers, a higher degree of job insecurity and abuse of successive fixed term contracts.[43] Usually fixed term workers are not entitled to the same benefit packages with permanent workers of the same employer. There is a differential treatment among

[38] Fasil Wondwossen, 'An overview of Federal supreme court cassation bench decisions on stay of employment contract on project works' (2013) 2 Haramaya law review. 137 (translation mine)

[39] Ibid, N. Smit, 'Everything fixed about fixed-term contracts of employment: or not' (2005) Journal of South African law 2

[40] This is true under Ethiopian Labour law regime as well. Under Art. 9 of the Labour Proclamation no. 377 it is made clear that the presumption of the law is indefinite period and exceptional circumstances upon which a contract may be made for a fixed or definite period are listed under Art. 10.

[41] Schneider (n.10)

[42] Sebastian Nielen and Alexander Schiersch, 'Productivity in German manufacturing firms: Does fixed-term employment matter' (2016) 155 International labour review 538

[43] Arne Kalleberg, 'Nonstandard employment relations: Part-time, temporary and contract Work' (2000) Anne review of Sociology 355 https://www.researchgate.net/publication/228584753, (last accesses on 02-03-19)

workers performing the same or substantially the same work or work of an equal value on the ground of the type of employment contract.[44]

Can employers treat their workers differently based on duration of contract of employment? Is a question that should be seen seriously. Under Ethiopian labour law regime, there are certain grounds based on which the employer cannot discriminate among workers.[45] In this list the duration of contract of employment is not among the expressly prohibited grounds. However, the list is an open ended one and it may be interpreted to include all unjustified grounds based on which employer may discriminate among workers. Can we consider fixed term contract as a valid ground for treating workers of the same employer differently? The Federal Supreme court cassation bench decided positively on Ethiopian Electric Power Corporation V Taju Abagaro et al case.[46] The court ruled on this case that the law does not prohibit employers from treating permanent and project/ fixed term workers differently as far as benefits are concerned.

A higher degree of job insecurity is another threat for workers under this arrangement. In the absence of express or tacit term or legitimate expectation to the contrary, a fixed term contract automatically expires when the period contracted for comes to an end.[47] This shows employees with fixed term contract enjoy very little job security. Employers hire workers for a specific project work and terminate the contract upon end of the project. They do so despite the existence of other project works in different sites by the same employer. Are employers entitled to terminate the contract automatically upon the end of the specific project? Should not they be required to show the employment relationship cannot continue for justified reasons in addition to the end of the project?

There are two lines of arguments in this regard. The first argument is the one held by the cassation division of the Federal Supreme court. The cassation has decided that once the specific project on which the worker is employed comes to an end; the employer is entitled to

[44] Beata Nasca, 'Fixed-term contracts in law on paper and in practice: Remarks to the flexicurity debate' (2008) 49 Annales university of science Budapestinensis Rolando Eotvos Nominatae 351

[45] Art. 14(1)(f) of Proclamation no 377/2003 prohibits discrimination based on nationality, sex, religion, political outlook or any other conditions

[46] Federal Supreme court Cassation division, file no. 44218

[47] Beata (n.17)

automatically terminate the contract despite the fact that the employer has other projects.[48] The employer is not even expected to show the reasons for which the labour relation cannot continue for instance the reason for which the employer cannot transfer the workers to other project sites.[49]

The other argument is a contract for project work shall not automatically be terminated upon the end of the project unless the employer proves the employment relation cannot continue for some justified reasons other than completion of the project.[50] This may be proved, for instance, by showing there are no other projects under the control of the employer to which it can assign workers, there is no vacant position which fits the worker in the other projects etc.[51] So the employer is not/ should not automatically be entitled to terminate the contract for the mere reason that the project is completed. According to Fasil, allowing employers to automatically terminate the contract upon conclusion of project is against the presumption of the law which is in favor of contract for indefinite period.[52]

In a contract of employment that is clearly made for a specific work piece or project, terminating the employment contract automatically upon the end of the project is in line with both the law of general contract and labour law. Even if there are other works or projects under the control of the employer since these works are not parts of the contract, there is no legal basis for the employee to claim placement at other projects as of right. There is no reason to reject the decision of the cassation.

Employers abuse the fixed term contract arrangement by offering successive fixed term contracts for the same workers for the same work.[53] This is a deliberate act by the employers to avoid a contract for an indefinite period because the fixed term contract gives them a higher degree of flexibility. As discussed elsewhere the expiry of the period fixed in the contract usually would bring the contract to an end and this enable employers successfully avoid the onerous, time-

[48] Sunshine Con. V Fekadu et al (file no. 35621), Adventist V Gebeyew (File no. 57337)

[49] Ibid

[50] Fasil (n.11)

[51] Ibid

[52] Ibid

[53] Helen J. Desmond, 'Fixed-term contracts – regulating atypical working' (2000) 15 Denning law journal 49

consuming and even costly procedures that are required by the law when dismissing employees had it been a contract for indefinite period.[54] In this regard Proclamation No. 377/2003 provides a fixed term contract may not be concluded for more than 45 days where the worker is hired for "the temporary placement of a worker who has suddenly and permanently vacated from a post and/or the temporary placement of a worker to fill a vacant position in the period between the study of the organizational structure and its implementation.[55] In these two cases, the law provides, fixed term contract shall be made only once.[56] Does that mean having successive fixed term contracts in the other conditions (listed under Art. 10(1) (a-g)) is possible under the law? Since there is no indication as to existence of clear qualifications on the conditions, it seems this is possible. So usually employers tend to use this type of contract out of the context it is devised under the law.

With the influence of social globalization and more flexible employment relations, the number of concluded fixed term employment contracts has considerably increased, even in countries which have traditionally set strict legislative frameworks for their use.[57]

2.2.2. Part-time workers

Thurman and Trah defined part time work as "a regular wage employment in which the hours of work are less than normal." Under this work arrangement there would be some agreement between the worker and the employer that the former would provide service on some what a regular basis but for shorter hours than the regular weekly working hours.[58] The worker is not supposed to work for all the working hours in a day or a week. Rather the work is performed for certain hours which are necessarily less than the regular working hours in a standard employment relation. Development of part time work is the result of a process of mutual adjustment between

[54] Ibid

[55] Labour proclamation, Article 10(2)

[56] These conditions are:- if the worker is hired in temporary placement of a worker who has suddenly and permanently vacated from a post having a contract of an indefinite period and to fill a vacant position in the period between the study of the organizational structure and its implementation

[57] Kalleberg, 'Nonstandard…' (n.16) 343

[58] Ibid

the employers' needs and employees' willingness in response to demographic, social and economic changes.[59]

Different countries have their own standards based on which they classify a worker as full timer or part time worker. In the United States for instance a worker providing service for less than 35 hours in a week is considered as part time worker.[60] In Canada and the UK the threshold for part time work is 30 hours a week.[61] If a worker provides service for an employer for less than 30 hours in a week this worker is categorized as part time worker.[62] In France it has been at least 20% below the legally stipulated normal working hours and in Germany it is less than 36 hours a week.[63] Japan uses a different approach from the one classifying works as full/part time based on working hours. Part time work in japan is related with status in the firm attached to workers not with working hours.[64] Workers providing service for the same working hours with the full time workers may be considered part timers due to the status attached to them.

In Ethiopia, even if the practice of part time work is a well-known and frequently used arrangement, there is no clear indication as to the criterion we use to classify workers as full timer/ part timer. Normally we may take the normal hours of work which shall not exceed eight hours a day or fourty eight hours a week[65] (in the labour law regime) as the standard for full time work and work provided for less than these hours may be classified as part time work. The civil servants proclamation has adopted lesser working hours than the labour law regime which is 39 hours a week.[66]

Part timers may be classified in to two. The first class consists of workers who are engaged with an employer on a full time basis and provide part time work for another employer. These

[59] Randi Kjeldstad and Erik H. Nymoen, 'Part-time work and gender: worker versus job explanations' (2012) 151 International labour review 85

[60] Chris de Neuborg, 'Part-time work: an international quantitative comparison' (1985) 124 International labour review 559

[61] Ibid

[62] Kalleberg, (n.16)

[63] Chris (n.56)

[64] Ibid

[65] Labour proclamation No. 377/2003, Article 61

[66] Federal civil servants proclamation No. 1064/2017, Article 33

workers use the part time work as additional work basically to maximize their income.[67] The other class consists of those who are not providing a full time work anywhere but prefer a part time work due to different reasons. National labour force sample surveys in most industrial countries show many women prefer part time work even if they are not full time workers anywhere.[68] In terms of age, older workers are more engaged in part time work than the younger ones even if they are not full time employees in another enterprise and in terms of marital status as well more married women are part timers as compared to unmarried ones.[69]

We may also have a voluntary/ involuntary part timers divide. Workers may be part timers as a result of their choice which makes them voluntary part timers.[70] These workers may not be ready to take full time work even if the employer is ready to hire them on a full time basis. From the beginning they prefer part time arrangement because it best fits their situation. For instance the part time work creates compatibility of family responsibility and work for women.[71] Students may wish to use their spare time to help pay for their personal or educational expenses. Workers entering or re-entering the labour market may prefer to work shorter hours at first and older workers may wish to leave working life gradually or to supplement their retirement income.[72] Workers who are full timers in another enterprise may also be considered voluntary part timers when they are hired on a part time basis for another employer. Involuntary part timers on the other hand are workers who want a full time work but are working part time not because they are interested on it but it appears to be the only option.[73] These workers choose this type of work when they consider it preferable to the alternative of unemployment.[74]

On-call work is a variety of part time work which is generally understood to involve periods of time in which a worker is required to be available at the workplace (or elsewhere required by the

[67] Chris (n,56)560

[68] Ibid

[69] Ibid

[70] Maximilian Fuchs, 'Part-time work: the German experience' (2001) 22 Industrial law journal 2146

[71] Ibid

[72] Joseph Thurman and Gabriele Trah, 'Part-time work in international perspective' (1990), 129 International labour review 25

[73] Megan Dunn, 'who chooses part-time Work and Why' (2018) 141 Monthly labour review 1

[74] Chris (n.31)

employer) and can be called on to work as and when required.[75] It has conventionally been used by employers to respond to unexpected and emergency circumstances that arise outside of normal working hours, including permit essential repair work, provide sickness cover and respond to public health and safety emergencies, particularly in the health services and road transport sectors.[76]

Employers prefer the part time work arrangement in order to secure greater flexibility in planning and hiring, to reduce total labour cost by paying lower hourly wages for part timers and no or lower social security contributions.[77] Part time workers do not enjoy the same conditions of employment with their full timer counterparts. They are often not eligible for different benefit packages like various wage components, for example overtime rates, paid time off, merit and seniority payments and incentive payments.[78] Part-time workers have been less likely than full-time workers to be covered by collective agreements, left unrewarded for productivity increases (like bonus), training and promotion may also be not be available.[79] Some part time workers receive substantially lower hourly pay than full time workers in the same occupation or sector.[80]

It may be against the very purpose of the work arrangement to expect the employer provide equal conditions and benefits to part timers and full timers. The legal protections for workers under the labour law are provided considering standard/ full time work. It would be against the purpose and spirit of the law to make part time workers equally beneficiaries of these conditions. For instance, annual leave is provided by the law so that workers will have rest with pay. The purpose is in order to enable workers rest and come to work with a fresh labour and mind since these workers spend most of their time (48 hours a week) at work. When this working hour is calculated in a year, workers provide service for 2496 hours. However, when it comes to part timers the hours they provide service to the employer is much less compared to full timers. There are also part timers working for 2 or 3 employers at the same time. Which employer is giving

[75] Susan (n.6)

[76] Ibid

[77] Erika Szyszczak, 'Differences in pay for part-time Work' (1981), 44 Modern law review 672

[78] Ibid

[79] Rosemary Hunter, 'Part-time work and indirect discrimination' (1996) 21 Alternative law journal. 220

[80] Thurman(n.68)

them annual leave among these employers and on what basis? So it is difficult to treat part timers similarly with full timers. It is also difficult to provide equal payment for full time and part time workers.

In most of cases the service the employer obtain from the part time workers is less than that of the full time workers both in terms of time and magnitude. So it may not be economical for the employer to provide equal terms and conditions for these workers. However, except for such objective grounds justifying differential treatment, employers should not be allowed to discriminate between workers like in cases of employment injury. An employer should cover medical expenses for a worker who sustained employment injury while working for the same employer.

2.2.3. Triangular employment

Triangular employment relation is a relationship in which employees find themselves interacting with two persons, each of whom assumes certain functions of an employer in standard employment relation.[81] Under the standard employment relationship the employee enters into contract with a certain person and provides the labour service for the same person (who is the employer and the user of the labour service at the same time.) In triangular employment relationship however, this is not the case. The worker enters into an employment contract with a certain person assuming the position of employer (the employment agency) while the actual service is rendered to another person who is not part of the contract (the user enterprise).

The relationship between the employment agency, the client and the worker is the most common form of what is known as "triangular" or "tripartite" employment relationships.[82] A basic problem raised in such relationships is who should be considered the legal "employer" of the worker in question. As discussed above, there is no contract directly signed between the user enterprise and the worker. However, there is reason to place some employer responsibilities with the user firm, since the characteristics of employment that put workers in need of protection can

[81] Timothy J. Bartkiw, 'labour law and triangular employment growth'(International Labour Conference, Report V(1): 95th Session, 2006) 13

[82] Guy Davidov, 'Joint employers status in triangular employment relationships' (2002) 52 University of Toronto law journal 14

be found, to some extent, in both of the worker's relationships i.e. worker-agency and worker-user relationships.[83] So, the responsibility of employer is shared between the two parties i.e. the user enterprise and the employment agency.[84] The manner how this responsibility is shared will be discussed in detail in the next chapter.

This arrangement which is the result of an attempt to externalize employment relationships by the user enterprises may take place in the forms of outsourcing, subcontracting or use of temporary employment agency service.[85] Outsourcing, as a modality of externalizing work, is an arrangement whereby an activity or service performed by employees within an employer's business (usually a 'non-core' or 'ancillary' service) is 'contracted out' to be performed by an outside party.[86] The outsourcer will take over the complete function of a particular department, rather than the user enterprise employing full-time personnel.[87] Outsourcing in relation to labour may take place in different forms. An enterprise may outsource the task of recruitment and placement of workers who are engaged in activities which most of the time do not constitute the core business. In such case the entity to which this task is outsourced will perform the work without having any further relation with the workers recruited and placed at the outsourcing enterprise. There is nothing that looks triangular relation here. The types of labour relation that have triangular nature will be discussed in detail in the next chapter.

2.3. Why non-standard labour relations

A survey by Susan N. Houseman has revealed some of the reasons invoked by employers for using non-standard labour relations. The most common reasons related to specific staffing or scheduling the employers raised in the survey includes:[88]

[83] Ibid, the relationships are worker-agency and worker-user enterprise

[84] Ibid

[85] V. P. Kokhan, 'Non-standard employment in Ukraine: challenges of time' (2013) Law & Innovative Society 170

[86] Bragg S. M. (2011), 'Outsourcing: a guide to selection the correct business unit New York': Cited by Bethelehem Mekuria, on 'Challenges and Prospects of Outsourcing Practice In Commercial Bank of Ethiopia'(2017)

[87] Marcus Moran, 'Joint-employer classification: NLRB polarization in the administration of contingent employee labour rights' (2017) Pro Quest LLC 13

[88] Susan (n.6)

- To fill vacancy until regular employee is hired
- To fill in for absent regular employee who is sick, on vacation, or on family medical leave
- Seasonal needs/ due to the seasonal nature of some of their works
- To provide needed assistance during peak-time hours of the day or week
- To provide needed assistance at times of unexpected increases in business
- When they are engaged in special projects which last in a certain period for which they do not have regular workers
- To provide needed assistance during hours not covered by full-time shifts
- To do away with the procedure and complexities in screening job candidates for regular jobs
- To save on wage and/or benefit costs
- To provide needed assistance during company restructuring or merger
- To fill positions with temporary agency workers for more than one year
- To save on training costs
- Special expertise possessed by this type of worker
- Accommodate employees' wishes for part-time hours
- When they are unable to find qualified full-time worker

Others argue that employers prefer such work arrangements to bypass statutory obligations and justify differential treatment of atypical employees since it gives them much flexibility.[89] As discussed elsewhere in this paper the reason on employees' side for engaging in the atypical labour relationships are of two types. Some employees prefer this arrangement due to their particular situations (like family and other responsibilities) which do not allow them work in the standard arrangement. Others join works under these arrangements because they do not have other alternatives.

Generally, despite the change in the world of work which is witnessing proliferation of atypical employment relation at a higher rate, the focus of labour laws in most countries is the standard labour relations. This is attributable to the very inception of labour laws which mainly consider the full time, permanent work arrangements and did not sufficiently cover atypical work

[89] Ibid

arrangements. The relatively younger age of some of the atypical works has also partly contributed to this. However, due to the unique features involved in the relationships, workers in the non-standard employment relation might be subjected to abuse unless these works are regulated properly.

Chapter Three

3. Triangular Employment Relationship in Ethiopia

3.1. Emergence and development of triangular employment relationship in Ethiopia

Employment relationship of a triangular nature is a relatively recent phenomenon to the world of work. It came to the picture as a result of externalization of certain works of enterprises which formerly were performed by the enterprises themselves. The practice of outsourcing, one of the major ways of job externalization, dates back to the latter half of the nineteenth century.[90] New models of outsourcing, however, came about in the late 1980s and 1990s with the profound development in internet technology and software.[91] The 1990s marked the focusing on cost-saving measures and outsourcing those functions necessary to run a company but not related specifically to their core business.[92] Managers entered into contracts with provider companies to deliver accounting, human resources, data processing, internal mail distribution, security, plant maintenance, and the like as a matter of "good housekeeping".[93] Labour outsourcing which includes outsourcing tasks of workers recruitment, human resource management/ personnel work and providing an overall service or performance of certain works developed in the 1950s and 1960s.[94]

Outsourcing could be broadly classified as Information Technology Outsourcing (ITO) and Business Process Outsourcing (BPO).[95] ITO is a company's outsourcing of computer or Internet related work while BPO is the outsourcing of the work that does not require much of technical

[90] Andrae Gonzales and David Dorwin, 'Outsourcing: past, present and future' (2000) Journal of It & public policy 1

[91] Ibid

[92] Sova Pal Bera, 'The concept of outsourcing' (2017) Journal of computer engineering 37

[93] Selamawit Shitaye, 'outsourcing in commercial bank of Ethiopia: Opportunities and challenges' (unpublished, 2016, AAU Faculty of Business and Economics library) 9

[94] Leah (n.1)

[95] Pal Bera (n 88)

skills.[96] The most common ITO services are application development and maintenance, infrastructure management, data center management, managed security and cloud computing etc. BPO services include payroll, human resources management (HRM) etc.[97] Outsourcing of human resource management/ personnel and provision of services not related with computer like cleaning, security, messenger service etc. can be categorized as BPO based on this classification.

Labour outsourcing itself may take place in different forms. Sub-contracting, employee leasing, and the use of temporary agencies and service companies are some of these forms.[98] The common element in all these forms of outsourcing is the difference between the entity that directly receives the service of workers and the one that concludes employment contract with the workers. In all these forms the entity to which the work is performed/ service is provided does not enter into employment relationship based on contractual arrangement. This separation of the roles of employer as known in the traditional bilateral labour relationship would create a room for confusion as to the true identity of the employer and may have adverse impact on workers unless regulated properly.

In Ethiopia outsourcing in general and labour outsourcing in particular are recent phenomena.[99] Like the case in many countries, in Ethiopia also the bilateral labour relationship was the dominant labour relationship. Triangular employment relationship has a history of less than three decades in Ethiopia.[100] Some of the first private security and cleaning service providers were established in the beginning of the 1990s. Sebhatu and Sons property administration and security service PLC was for instance established in 1992[101]. Commercial Nominees was established in

[96] Ibid

[97] Ibid

[98] Yuval Feldman, 'Ex-ante vs. ex-post: optimizing state intervention in exploitive triangular employment relationships' (2009) Comparative labour law & policy journal 752

[99] Even if there is no accurate data showing the exact time in which outsourcing was started, the establishment of service provider entities is witnessed starting from the 1990s according to the data obtained from AABOLSA.

[100] Interview with Ato Abebe Haile, Director of man power research and employment promotion directorate, Ministry of Labour and Social Affairs (Addis Ababa, Ethiopia, 17 April 2019)

[101] Interview with Ato Endalkachew Sebhatu, Manager of Sebhat and sons security service PLC (Addis Ababa, Ethiopia, 20 April 2019)

1958 but it started to provide security, cleaning, messenger and related services by way of outsourcing recently.[102] Addis private security agency was established in 1996.[103]

It is at the end of 2009 that CBE, one of the biggest users of outsourcing throughout the country, started using outsourcing service as its management option.[104] CBE mainly outsources its non-clerical services.[105] Outsourcing of works of ancillary nature is currently becoming a trend in many enterprises and institutions which consists of private companies (both domestic and foreign), public institutions including public enterprises, foreign countries' embassies, public universities, banks, hospitals, international NGOs etc. Institutions are preferring outsourcing due to the comparative advantage it provides them. Currently, Commercial Nominees is the leading outsourcing service provider in terms of number of workers employed with an estimated number of 22,000 workers mainly engaged in security and cleaning.[106] Though it has a history of around 50 years' service, CN started to involve in triangular employment relationship since 2013.[107] Workers are employed by CN and they are placed to work under different user enterprises most of which are banks. Most of the workers of CN are placed at the commercial bank of Ethiopia which is also a majority shareholder of CN.[108]

Unlike service providers that conclude service contract with the user enterprises, there are employment agencies that are limited to only supplying the labour force and human resource management service to the user enterprises. What is outsourced in this case is service like recruitment of workers and human resource management. These agencies are not delivering the work or service which is to be done by the workers they supply. Rather they employ workers and supply these workers to the users. They also engage in controlling them. What these agencies

[102] Interview with colonel Sheleme Terefe, Manager of all security division at CN (Addis Ababa, Ethiopia, 13 March 2019)

[103] Kenna Tariku, 'labour rights of security guards in the Ethiopian private security industry: case study in Addis Ababa' (unpublished, AAU law library, 2017) 12

[104] Interview with Ato Yeshitla Tefera, Marketing and business development manager at commercial nominees (Addis Ababa, Ethiopia, 15 March 2019)

[105] Ibid

[106] Ibid

[107] CN take over the security and janitorial service of the CBE in the year 2013

[108] Interview with colonel Sheleme (n. 98)

basically do is providing workers to user enterprises, paying their wage, administer other matters related with the workers like the different legally recognized paid leaves, enter into insurance contract with insurers for their workers, take disciplinary measures etc.

The major distinction between agencies providing the workers and providing the service is the former does not deliver the service/work to be performed by the workers as an organization. For instance if the agency is providing workers that are going to be placed on security department of a user enterprise, the agency is required only to send workers (the number of which may be as stipulated in the contract between the user enterprise and the provider) to the user enterprise. Once the workers are provided to it, it is the user that manages the process of the work. The role of overall work performing/ service providing agencies on the other hand is not limited to making the workers available to the user but they are the ones that direct and supervise the workers thereto.

In Ethiopia, though there is no sufficient data on when they started operation and their number, there are employment agencies that make workers available to user enterprises with human resource management services only and those who provide overall service in certain fields. Most of the agencies provide workers in security, cleaning, messenger and similar fields which need less skilled workers. There are, however, agencies that provide professionals as well. But most of the agencies are engaged in providing a full scale service on specific fields like security, cleaning, messenger, etc. There are around 119 registered agencies only in Addis Ababa.[109] This number covers those providing service of matching of offers, human resource management service and provision of other services.[110] Some of them provide all the three services while others take part in one or two of them.

Most of the employment agencies start to engage in providing workers to other enterprises very recently.[111] Even if there are some agencies that provide professional and skilled manpower to user enterprises, most of the workers supplied by agencies are from the labour force that engage in works of a relatively lower status like cleaning, security, messenger, etc as discussed above.

[109] Interview with Ato Kassa Seyoum, Employment exchange service directorate director at AABOLSA (Addis Ababa, Ethiopia, 20 March 2019)

[110] Ibid

[111] Interview with Ato Kassa (n.109)

There are service provider organizations in many fields including accounting; auditing, data operation and some other works which need skilled man power. However that is not the concern of this research. The focus of this study is on works performed by workers like cleaning, security, gardening and messengers. Workers who perform works of this nature are less skilled and have lower bargaining power as compared to somehow skilled workers. The lower status of these workers would make them more vulnerable. Furthermore provider enterprises are mainly providing the labour of these workers whether they deliver service/ perform a certain work using their own labour force and equipment or provide the labour and management service only.

When the provider contracts with the user for performance of a certain work, cleaning for instance, the main asset the provider utilize is the labour of its workers. These workers are the ones to be placed at the user enterprises' work place and actually perform the work that is agreed. In contracts between providers and users for provision of human resource management service as well, the main point of the contract is making workers employed by the provider available at the disposal of the user enterprise.

3.2. Types of triangular employment relationships

The term triangular relationship may be used to refer to relations of any kind involving three parties. In labour law there are different relations in which three parties are engaged. One of such relationships is a triangular relation that involves workers, employers and government.[112] However the relationship between the agency, the client and the worker is the most common form of what is known as triangular or tripartite relationship in labour law according to Davidov. This relationship may also be classified as making workers available to a client domestically and abroad. The focus of this study is on agencies that provide service of making workers available to a third party domestically. There are three different forms in this service as well. An overview of these three forms of triangular employment relationship is made below.

[112] Government is involved in labour relationships as a regulator of the labour market. In civil service regime the government itself is part of employment contracts as employer.

3.2.1. Worker, agency and client relationship without the agency being party to employment contract/ service of matching of offers

This is the simplest of all the labour relationships involving three parties. There is a contractual relationship between the agency and the client for the former would recruit and provide workers for the latter. In doing so the agency is guided by the interest and specifications of the client. It can be said that the client has outsourced the tasks like announcing vacancy, registering applicants and it may also include examining and recruiting potential candidates for the work.[113] Matching of offers is the task of the agency. In return for this service the client will pay the agency the sum agreed in the contract. The involvement of agencies improves the speed and quality of the match between available jobs and jobseekers.[114]

Once it provides the service of matching offers, the agency will go out of the picture. The agency will not conclude contract with the workers. It is also strictly forbidden for the agency to receive any payment from the worker before or after the conclusion of employment contract between the worker and the client. This is provided under Art. 34(3) of the Employment Exchange Service Proclamation. It is only the client that pays commission to the agency. It can be said that this relationship begins with three parties but ends up with creating the ultimate relationship between the two i.e. the worker and the employer. There is no a such complex relation here and does not need further discussion.

3.2.2. Worker, Agency and Client relationship where Human resource management/ personnel service is outsourced

In this relationship of a triangular nature, the agency concludes employment contract with workers. However, the agency concludes contract of employment not because it is the direct consumer of the service of the workers. Rather it does so to make them available to a "third party" with which it has a contractual relationship.[115] In this relationship, what the agency basically provides is the labour or the workers themselves together with some management activities.[116] The workers perform their work within the third party's labour process who is

[113] Interview with Ato Yeshitla (n.104)
[114] Jacqueline Mazza 'Labour intermediation service, a review for Caribbean and Latin American countries' (2003) Labour Markets Policy Briefs Series 5
[115] Leah (n.1)
[116] Timothy (n.77)

known as the user enterprise i.e. they work under the direct control and supervision of the user.[117] However there are also tasks undertaken by the agency in addition to making the workers available to the user. The mere provision of workers only or payroll service by agencies while other roles of employer are handled by user enterprises would not make the relationship a triangular.[118] The discussion here is about relations in which the agency assumes responsibilities more than just providing workers and a simple payroll service.

There are two contracts in this relationship. The first one is the contract between the employment agency and the user/client and the other is the contract between the agency and workers. The contract between the agency and user enterprise is a commercial contract in which the agency undertakes to hire workers and provide the same to the client[119]. This contract is subject to regulations under contract law.[120] Once the workers are made available to the client/ user enterprise, it is the user enterprise that assigns tasks on the workers and supervises them.[121] The labour process is under the direct control and supervision of not the agency, but the client/ user enterprise.[122] It is the commercial contract which is also known as a "hiring out contract" which serve as a basis through which the user enterprise gets the right to direct and supervise workers employed by the agency. However the role of the agency is, as discussed above, not limited to making the workers available to the client. Rather it is extended to taking over some of the burdens of employer. This includes dealing with the tasks of hiring and firing, pay roll, withholding income tax and paying the tax authority, collecting pension contributions of the workers and paying to social security agency, administering the legally recognized paid leaves, entering into insurance contract for the workers and other related tasks.[123]

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[117] Ibid

[118] Timoty barktiw, 'Regulatory differentials and triangular employment growth in the U.S. and Canada' (2015) 19 Employment rights and employment Policy journal 3

[119] Korczynski, M. 'Back-office service work: bureaucracy challenged?' (2004) 18 Work, Employment & Society journal. 97

[120] Timothy (n.115)

[121] Ibid

[122] Ibid

[123] Jan theron, 'Intermediary or employer - labour brokers and the triangular employment relationship', (2005) 26 Industrial law journal 618

In the standard labour relationship where there is no agency that have contract of employment, all these were the responsibilities of the employer. The person who would have been the only employer in bilateral labour relationship and handle all responsibilities unilaterally is the one who enter into employment contract. In triangular relationship however, the agencies are assuming part of the employer's responsibilities together with users.[124] The role of the agency can be summarized as hiring the worker, making available to the user and administering the same. The user enterprise would make payment to the agency for the service the latter rendered. This includes fees associated with the recruitment, placement, and administration costs the agency incurs in addition to the payment the agency gets for the service.[125] The payment is called service charge and it is different from workers' wage. Generally in this relationship, responsibilities of an employer in the standard labour relation are shared between the agency and the user enterprise.

The main issue in this relationship is addressing the questions "what makes a person or an entity employer?" and "who is the employer?" Under the Labour Proclamation No. 377/2003 employer is defined as "a person or an undertaking who employs one or more persons…." The provision dealing with elements of employment contract provides "A contract of employment shall be deemed formed where a person agrees directly or indirectly to perform work for and under the authority of an employer…." The Employment exchange Proclamation no. 632/2009 also makes a cross reference to Proclamation No. 377/2003 for definition of employer. From the cumulative reading of these provisions, being an employer consists of employing/ entering into employment contract with one or more persons and making them work for and under one's authority. Having this in mind, "should an employment agency which employs workers without making them work for and under its authority be considered employer?" "Are the acts of administering affairs of workers discussed above sufficient to give the agency the status of employer?" and generally who is considered the employer of the workers in this type of relationship are questions we should focus on.

[124] Leah (n.1)

[125] Dominik Arnold, 'Temporary agency workers in the UK: who is the employer and can uncertainty be avoided' (2013) 9 Business law review 14

One line of argument in this regard is agencies shall not be considered employers for they lack an important attribute of being employer.[126] The law provides "you should employ, control and direct workers as to how they work in your authority and supervision so that you will be considered employer".[127] The agencies as repeatedly said do not make the workers work for them and under their authority or labour process. It is the user that determines what labour or services it requires. If the client does not want the labour or services the agency provides, there is no employment, as far as the specific client's workplace is concerned.[128] The one that have a day to day interaction with the workers and controls the work place is the user enterprise. Most of the workers under this arrangement recognize only the user enterprise as their employer and some of them are not even aware of the employment relationship they have with the agency.[129] These persons believe the agency is doing only matching of offers.[130] Others who have clear understanding of the employment relationship they are engaged in are not interested with the presence of the agencies in the relationship permanently and even they do not believe the agency is doing something valuable.[131] What they want is the agency should not be part of the employment contract as they are serving the user enterprise and no need of intermediary.

According to this argument, agencies might be the ones paying wage to workers but it is the user enterprise that is paying the workers through the agency.[132] The control agencies exercise over workers is not directly related with the work. The tasks performed by the agency are mere supportive acts to the user enterprises and do not substitute the missing element of employment relationship which is exercising control as to how the work is to be performed. The main

[126] Paul Benjamin, 'Restructuring triangular employment: the interpretation of Section 198A of the labour relations act' (2016) 28 Industrial law journal 34

[127] Ibid

[128] Ibid

[129] Focus group discussion with Ato Yonas Hailu, Ato Abebe Arega, Ato Jemal Abdela, Ato Haile Berhanu, W/ro Sisay Bekele and Kebebush Adane who are all workers at a private employment agency (Addis Ababa, Ethiopia, 10 March 2019)

[130] More than half of the workers who participate in the study believe the agency will no more remain part of the relationship once it connects workers with users.

[131] Workers who replied they know the agency is acting as their employer but they believe this should not be the case constitutes 30% among who took part in the study.

[132] Timothy (n.77)

attributes of employers are still with the user enterprises and they are the ones that should be considered employers for all legal and practical reasons is the conclusion in this argument.[133]

The contract of service is not, as some argue, an instrument of contracting out all employers' responsibilities. Rather these contracts suggest that user enterprises retain the major responsibility attached with being an employer. It is this contract that evidences the user agrees to share some of the roles of employer. This can be evidenced from the terms of the service contract which provides that the agency make workers available to the user while the later would place them to work and exercise control and supervision as to how the work should be done.[134]. This approach used to identify the employer in such relations is called "the right to control test" as it signifies on who exercises fundamental control on the worker in relation to the work. The short coming of this argument is it totally disregards the tasks and functions of the agencies.

The counter argument for the above is the only responsibility of employers left with users is giving direction and supervision to workers as to how they should work. Except this, all the traditional responsibilities of employers starting from recruiting workers, placing them to work, administering all the affairs of workers including payment of wage are handled by the agencies.[135] The very contract of employment is also concluded between the agency and workers. The benefit the user gets from this relationship is being able to control the terms on which labour is employed through the commercial contract it enters with this third party as the user has contracted out the responsibilities associated with being employer.[136] It is also the agency that has the power to terminate the contract. If the user is not interested on performance of a worker it may only inform the agency. The user enterprise has no contract with the worker and a contract that did not exist from the beginning cannot be terminated. The facts that there is no contractual relationship between the user and the workers together with absence of some administrative powers by the user cannot enable us conclude the user is the employer. Even if it is said the user is the one that exercises control as to how the work is to be done, the user gets

[133] Feldmann (n.94)

[134] Interview with Ato Yesuf Raja, Director of Ethio jobs (Addis Ababa, Ethiopia, 9 March 2019)

[135] Jan Theron, 'Intermediary or employer- labour Brokers and the Triangular Employment Relationship' (2005) 26 Industrial law journal 618

[136] Ibid

this power not directly from a contract of employment it has with workers but indirectly through the service contract. There is the hidden hand of the agency in the process of the worker working under control and supervision of the user. So the agency's power is very significant in this relationship and it should be considered the employer.

Users, from the very beginning prefer to utilize the agencies and find workers indirectly through the intermediacy of agencies in order to avoid the risks associated with being employer.[137] The most common of such risks is in relation to termination of workers especially the consequences following unlawful termination.[138] The handling of the administration of most of the workers' affairs by agencies is generally the incentive for user enterprises to hire agencies.[139] If this is the case, considering the user as employer would defeat the purpose of using agencies on the part of the user enterprises. Had it not been for the said benefits they get from this relationship, users would not enter into such arrangement. This can be easily understood looking at the relationship the user has with workers it directly hires and those provided to it through agency. All the powers of employer are exclusively vested with the user in the first case but these powers/ roles are basically exercised by the agency in the second case. Considering the user as employer for both workers i.e. workers it hired directly and agency workers would not be proper. So user enterprises should not be considered employers rather only the agencies should be taken as employers according to this approach.

A third approach is conferring joint employer status on both the agency and the user enterprise. This approach bases its argument on the shared responsibilities of employers between the user enterprises and the agencies. Both the agency and user determine matters governing the essential terms and conditions of employment relationship.[140] In order to be considered an employer "one must meaningfully affect matters related with employment relationship such as hiring, firing, discipline, supervision, and direction" according to the American National Labour Relations

[137] Jan Theron, 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (2008) 29 Industrial law journal 1

[138] Ibid

[139] Ibid

[140] Feldman (n.94)

Board.[141] In the relationship under consideration however, these powers are not exclusively vested with one person. As the traditional responsibilities of employer are shared between the two parties, neither of them should exclusively be considered employer.[142] Rather they should be joint employers of the workers.

There is also a fourth approach to the issue. Neither of them should be considered employers according to this approach.[143] The mere exercise of control and supervision by the user enterprises cannot make them employers since there is no contract directly concluded between the user enterprise and the worker.[144] When it comes to the agencies, they have contractual relationship with the workers but they do not exercise control as to how the work is to be done.[145] Neither of them have sufficient ground to be considered the sole employer like the employer in bilateral relationship. As a result of this, neither of them shall be considered as employer. This approach is widely held by British courts which in most of cases ruled that workers of agencies are not even employees.[146] In Britain workers hired by agencies are considered employees of neither the agencies nor the user enterprises. This approach is very problematic when it comes to protecting the workers because it may leave them without any remedy available in labour law. If there is no employer in what is likely an employment relationship, it means there is no person to discharge legal responsibilities of employer. Identifying the employer in this relationship is very essential because identifying the employer means the party who discharges the legal obligations of employers and against whom the workers would institute legal proceeding in case of violation of right is identified.

Countries have their own rationales for using any of the approaches discussed above. Under Ethiopian labour law, as discussed above, a person has to conclude contract of employment with another person and make this person work under his control and supervision to be considered as employer. When we see triangular employment relationship in light of this definition, the

[141] Timothy (n.77)

[142] Ibid

[143] Davidov (n.78)

[144] Ibid

[145] Ibid

[146] Ibid

requirements the law provide to be employer are dispersed between the user and the agency/ provider. So, if we have to strictly follow what is provided by the law, neither of them qualifies as employer solely. But the responsibilities shared between the agency and the user together constitute the whole role of employer. On the other hand there should be a certain person/s that should be considered as employer.

The employment exchange Proclamation talks about only the conclusion of employment contract between the agency and the worker and it says nothing whether the user enterprise will also conclude contract of employment with the workers. But it would be against the very purpose of entering into this arrangement if user enterprises are forced to enter into employment contract with workers. If the users have to conclude contract of employment with the worker directly, there will be no reason for the former to contract with agencies. So, it is the agency that has the only employment contract with the workers. Due to this, in terms of concluding employment contract, it is the agency that qualifies as employer.

In terms of controlling the worker according to "the right to control test" used in the US and many other countries to identify the employer in such relations, the user comes to the picture as controlling the day to day activities and supervision of the work is exercised by the same. But other activities like pay roll, disciplinary measures, termination of contract… etc. which are also elements of control are handled by the agency. Therefore, controlling is not also exclusively exercised by the user. Acts which constitute control in employment relationship are shared between the agency and the user enterprise as both are exercising activities which have elements of control but not exclusively. Thus, conferring joint employer status on each of them is the more appropriate way. Under Proclamation No. 632, though joint employer status is not expressly recognized, joint and several liability for both the provider and user is provided. This implies the law is somehow towards the joint employer status approach. If this is not the case, making a person who is not considered employer jointly and severally liable with the one that concludes employment contract does not be meaningful. It can be concluded that the Ethiopian law prefers the joint employer approach. The joint and several liability scheme makes both the user and the provider liable for any deprivation of right of workers.

This approach puts the obligation on user enterprises to closely follow the way the agency is treating the workers and whether the employment contract is performed properly because any

violation of the terms of the contract would make the user equally liable. The same is true for the agencies because even if there is no fault on their part, failure to discharge the obligation on the part of the user enterprises would make them part of the liability. In conferring joint employer status on both the agency and the user, this approach protects workers from potential abuse by the two parties in attempting to escape liability and is the most appropriate way in balancing interests of workers, users and agencies. So the appropriate answer to the question "who is the employer" in triangular employment relationship of this kind is both the agency and the user enterprise jointly.

One point worth mentioning here is, under Proclamation No. 632 joint and several liability comes when there is violation of the contractual terms. But what if the contract is with less favorable terms than the minimum working conditions legally stipulated? Should the performance of such contractual obligation relieve the agency and the user from liability while the workers are working under a less favorable working condition than they should be provided with according to the law? After all, what is the fate an employment contract providing the workers with working conditions below the minimum working conditions which is the floor?

Maintaining the minimum working conditions should be taken as a validity requirement for employment contracts. This has to do with the rationale behind legally stipulating the minimum working conditions which is the difference in bargaining power between the stronger employers and weaker workers. So, employment contract not observing the minimum working conditions shall be considered as a defective contract. This shall hold true even in case the worker agrees to waive the legal entitlements where termination is agreed according to Art. 25(1) of the Proclamation. The FSC cassation has also affirmed this stand on the case between China Highway group Ltd. and Ato Wubshet Engdaw. In triangular employment relations as well a contract of employment between the agency and workers providing lower terms and conditions than the legally stipulated conditions shall not be considered a valid contract even if there is the consent of the worker. The joint and several liability scheme should also be construed in a way to capture situations where the terms and conditions under the contract may not be violated but terms and conditions under the law violated. However, in case the employment contract has more favorable terms than the legally stipulated minimum working conditions, there is no reason to go

back to the minimum conditions. In this case it is the violation of the contractual terms with more favorable terms that will entail the liability.

One of the main reasons behind the joint and several liability scheme is related with the vulnerability of the workers in triangular employment relationship as a result of its unique feature. It gives agency workers relatively better alternative as they are interacting with two persons who, one way or the other, may be responsible for the violation of their rights. They can proceed against any of the two or both of them jointly as they wish.[147] This is even something not available for workers in the standard labour relationship who are interacting with a single employer and can claim only against the same. In this regard it can be said workers in triangular employment relationship are in a better position. Since there is no distinction as to the violation of which terms and conditions that would make the user liable and which one brings liability to agencies, both the user and the provider are considered jointly and severally liable for any violations of terms in the contract or the law. This approach (making both persons jointly and severally liable for all deprivations) could be justified for different reasons. Both parties might have contributed for the violation in the first place. The other justification might be discouraging user enterprises from using agencies for the sole reason of avoiding their legal obligations as employers.[148] If liability is inevitable, users may only use agency workers for some legitimate purposes (like flexibility, expertise, efficient allocation of resources etc…) other than mere avoidance of obligation as employer.

Some argue that instead of making both the agency and the user jointly and severally liable it would be better if the responsibilities of each of them are provided separately.[149] If the respective responsibilities of the agency and the user are provided separately, then the one who failed to discharge his responsibility would be the only person to be held liable and there would be no confusion on workers on the identity of the employer. These persons argue that "who is responsible for what" shall be mentioned in a clear manner and this would make things easy for the workers.[150] If it is the agency that does not perform what is provided as its obligation, then

[147] Employment exchange service proclamation, Article 22

[148] Davidov (n. 78)

[149] Dominick (n.120)

[150] Ibid

there is no reason to make the user liable for something which is not its fault and vice versa. According to these persons, failure to provide the roles and responsibilities of the agency and the user is the main gap they identify in the existing law.[151] If this is provided, workers would not be confused on against which of the parties to claim and institute legal proceeding. Furthermore the joint and several liability would most likely result in unfair result as a party with minor or no contribution to the infringement would be left to bear the major or even the total liability share. To avoid this, each party should be clearly provided with responsibilities and shall be held liable upon failure to handle such responsibility.

If priority is given to protection of workers, the joint and several liability scheme provides better alternative for the workers. It is highly likely that workers will be fully redressed when the agency and user are jointly and severally liable for all deprivations than each made liable for certain violations. In case one of them is absent or insolvent, the remaining party would be held liable. If only the agency/ user is made liable for a certain violation however, the other party could easily avoid liability. In this case if the responsible party is insolvent, the worker may fail to recover. But if the two are jointly and severally liable, the worker can recover from the party in a position to redress. So the joint and several liability scheme shall not be seen as weakness in the law rather it shall be seen as providing strong protection to workers. It will also make both parties to act cautiously and responsibly.

Furthermore, it would be much easier for the user enterprise to supervise and control whether the provider is acting properly towards the rights and protections of workers than to hire and deal with every single employee, making the user enterprise a joint employer enables to protect the rights of workers and providing them with alternative remedies incase where their rights are violated, without totally defeating the purpose of job externalization.

This being the case with regard to the law, practically many workers under triangular employment relationship do not have clarity on the identity of the employer. Most the workers lack of clarity on "who is their employer".[152] They said the one who first contacted them is the

[151] Ibid

[152] Around 70 % of workers out of the total of 150 workers who took part in the study are under uncertainty on the identity of the employer.

agency or the provider but the ultimate beneficiary of their labour is the user enterprise and they are confused as to which of these persons are their employers and against which of them shall legal proceeding be instituted where their rights are violated.

As discussed above more than half of agency workers who replied the questionnaire answered that they are confused as to the identity of their employer. The situation is aggravated by the fact that most of the agencies do not provide the workers with an employment contract of any kind providing the rights and duties of each party. Art. 4(2) of the Labour Proclamation No. 377/2003 makes it clear that a contract of employment shall be stipulated clearly in such a way that it will leave no room for uncertainty as to the respective rights and obligations of the parties. However in practice some agencies are not working in accordance with the law.[153] They do not even disclose the fact that they are the employers. 40 % of the workers participated in the study pointed at the user when asked who their employer is. 30% of the workers who answered the questionnaire replied that they learnt their contract of employment is with the agency after some time from the user enterprises. The remaining 30% workers replied the agency is their employer. However, almost all of them do have some doubt. The fact that this kind of work arrangement is relatively a recent phenomenon to this country has also contributed to the confusion because had there been long experience of the work arrangement, things would have been clearer through experience.

Confusion on who is one's employer leads to inconvenience in an attempt to enforce legal rights. Not having a clear understanding on who is going to be liable for a wrong done against oneself is a big barrier to enforce one's rights. This is so however, not because the law has not addressed the issue but most of the workers are not aware of the joint and several liability of the user enterprise and the agency.[154] This can be evidenced by the reply of almost all workers that they do not know they have the right to bring legal action against both of them jointly and severally. Both the user enterprises and the agencies also take advantage of the lack of awareness on the

[153] 75% of agency workers out of the 150 workers replied the agencies do not clearly inform the workers the rights and obligations of the agencies and the workers.

[154] A total number of 150 workers were asked whether they are aware of the joint and several liability scheme and all of them replied they are not aware of the existence of this scheme. This is supported by lack of awareness about the underlying triangular employment relationship.

workers' side. When the agency is asked to perform a contractual term or what is stipulated in the law, the agency would reply, "Since you are providing the service to the user enterprise, it should be the user enterprise that should do so and so…." User enterprises on their part respond to the questions of workers negatively. Their reason is "you don't have direct contractual relationship with us, and in the absence of contractual relationship, you cannot claim anything from us." Workers complained that user enterprises said "since it is the agency that has contractual relationship with you, you should claim anything from the same." This attempt of escaping legal obligations together with absence of awareness on the part of the workers is causing inconvenience on the workers. As discussed above however workers can institute legal proceeding against both of them.

Generally conferring joint employer status on both the user and the agency is the best mechanism to protect workers. As discussed above this is the approach adopted by Proclamation No. 632/2009 under the joint and several liability scheme. Because had the law does not intend to confer employer status on the user, it would not have make the user jointly and severally liable with the agency. However, there is a serious lack of awareness about the legal rights and entitlements they have on the workers' side. The main source of complaint of workers in this relationship related with identity of the employer is lack of awareness about what is provided by the law. The law cannot be blamed in this regard. The fact that workers do not know the joint employer status and joint and several liability scheme does not mean there is no law that govern the matter or it does not mean there is gap in the law.

3.2.3. Worker, Agency and Client relationship where an overall service provision is outsourced

In this arrangement a contract is concluded between the provider and the user in which the provider undertakes to perform a certain work or provide a service/s to the user. The outsourcing firm/ user enterprise assigns the delivery of services or execution of work to the provider.[155] In providing the service/ work outsourced to it, the provider must meet exactly the requirements

[155] Corinne Perraudin, Nadine Thevenot and Julie Valentin, 'Avoiding the employment relationship: outsourcing and labour substitution among French manufacturing firms' (2013) 525 International labour law review 152

and technical specifications given by the outsourcing firm.[156] What makes this relation different from the one discussed above is, the provider makes available a full scale service or work, not only the labour performing the work and human resource management/ personnel service. The provider makes the service available using workers, with which it has employment contract, utilizing its own equipment necessary for the work. It also controls the workers in all aspects as any employer does. It may however be argued what the provider basically does is making the workers available at the premises of the user. But this time it is not the user but the provider that controls, directs and supervises the workers and the work. So it is way beyond mere supply of labour and management.

The role of the provider covers hiring the workers (concluding contract of employment with them), placing them to work, giving direction to and controlling them which may include imposing disciplinary measures and paying wage. Terminating the contract of employment which can be taken as manifestation of the highest degree of power in employment relationship is also vested with the provider. The user enterprise is there to receive a complete service which is an end product and may supervise the overall work to check whether it is done according to the service contract. However the user will not supervise each and every worker. What is outsourced is the performance of a certain work/ provision of service not only the provision and management of certain affairs of workers. In the relationship discussed above where the provider supplies the workers and human resource management, the role of employer is somehow shared between the user and the provider. In the relationship where the provider provides service or performance of a certain work like cleaning, security service, messenger service etc…, the role of employer seems to be completely held by the provider and no role of employer seems left to the user enterprise except being the ultimate consumer of the work. As a party to the service contract, the user is interested only on the performance of the contract. The supervisor assigned by the user does not direct and supervise each and every worker but the overall work.

The most common works/ services outsourced in this arrangement in Ethiopia are services like cleaning, security, messenger, gardening, etc. As said earlier if, for instance, security service of user enterprise "X" is outsourced to security service provider "Y," it is provider "Y" (of course using its worker) that is keeping enterprise "X." the workers are receiving direction not from the

[156] Ibid

management of "X" as to how they work. Rather direction, supervision and control come from service provider "Y". The provider has supervisors who conduct on sight supervision at the premises of the user. To provide the distinction between the two of triangular employment relationships, in the relation where labour and human resource management are provided by the agency, the agency serves as human resource management department of the user enterprise as far as the workers it provides are concerned. On the other hand in the relationship where overall service is provided by the agency let say cleaning service, the agency serves as the cleaning department of the user enterprise but this includes HR services as well for the workers placed by the agency.

Applying the right to control test in this relationship leads to the conclusion that the provider is the employer since all elements of control are exercised by the provider. The user is there to receive the final service without involving in the production process. Thus the confusion on identity of employer does not seem as big issue as it is in the relationship discussed in the proceeding subsection.

Should the joint and several liability be applicable to service providers discussed in this section and their clients/ user enterprises is a question that should be addressed. In other words "are the service providers discussed in this section employment agencies?" The joint and several liability is for employment agencies who make workers available to a third party (by concluding contract of employment) and the third party to whom workers are provided in this manner. On one hand it is argued that what is provided by the service providers is a service or performance of work using the workers with whom a contract of employment is made like any other service providing firm.[157] There is no direct provision of labour to users. If the labour is taken as the raw material and the service is the final product, what the providers deliver is the product not the raw material. So they should not be equated with those who provide raw material.[158] Due to this providers shall not be considered employment agencies and hence there should be no joint and several liability of clients of the providers.[159]

[157] Davidov (n.77)
[158] Ibid
[159] Timothy (n.78)

On the other hand it is argued, even if it is said the provider provides service/ work and not the workers, since the main element in the provision of service is the labour and the user is beneficiary of this labour of the workers, it should be concluded that what is provided is the worker (together with the labour process under the control of the agency). There is no sufficient ground to exclude providers from being considered employment agencies and both the user and the provider shall be held jointly and severally liable. This argument is more appropriate because since the user is benefiting from the labour/ service of the workers it should bear responsibility in cases where the rights of workers enshrined under the law and contract of employment are violated. If these providers are not considered as employment agencies then their clients will not be jointly and severally liable to the workers. This is against the purpose of the law which is protecting workers in such work arrangements that may make workers vulnerable to abuse. It will also reduce the workers' alternative they have in joint and several liability scheme.

The economic status of the providers and users should also be taken into account. Users are in a better economic position as compared to the providers in most of cases. If users are not made liable jointly and severally with the providers it is allowing them to benefit from the service of these workers but leaving them without any liability in cases of violation of workers' rights despite the better economic position they have. Even if users do not exercise control over the workers, the nexus comes from the fact that they are the ultimate consumers of the labour service.

Furthermore, having a look at the definition of agency under the law is important. Concluding contract of employment with workers and making them available to a third party is sufficient to be considered as employment agency. Who directs, controls and supervises the workers is not a requirement to be considered as employment agency but it can be considered as a value addition to making workers available. So the agency may perform such tasks of making workers available to the third party together with exercising control and supervision or it may only provide the workers in which case the user exercises the directing, controlling and supervising tasks. The value addition to the main task of agency does not exclude the provider from being considered agency.

So long as the provider does not have a place of work of its own which is different from the work place of user enterprises, it is basically making workers available to a third party. Since the law

does not distinguish between the one who exercises control and supervision and the ones who do not do the same, they should all be considered employment agencies. The service providers might be providing somehow advanced service but this does not exclude them from being considered agencies. So the joint and several liability scheme should work for such agencies and their clients as well.

Making the user enterprise jointly and severally liable for violation of the contract between the agency and the worker implies that the third party cannot be free of any liability because it is not part of the contract. The law is warning user enterprises even if you are not part of the contract, you will be held liable if the contract is violated. Users shall make sure that the employment contract between the workers and agencies is not violated to avoid liability. This gives workers wider alternative for remedy in case there is violation of rights.

Lack of awareness about the features of this work relationship (basically on workers' side) is a problem in this arrangement as well. Around 30% of the workers involved in the study are not clear as to whether the user or the provider is their employer. 65% workers understand the provider is their employer. However they are not interested on the fact that the provider still remains part of the employment contract and even more, the consideration of the same as their employer. They argue "since the ultimate beneficiary of our labour is the user enterprise, the provider should not remain in the relationship permanently". They further argue that "once the agency connects the workers and the user it should go out of the relationship." This argument of the workers emanates partly from not understanding the concept of outsourcing. Providers are supplying service because users are outsourcing these services basically to focus on their core activities and enhance their efficiency. What the workers want on the other hand is to be directly employed and administered by users without any contact with the providers. This can be taken mainly as misunderstanding the concept and operation of outsourcing.

To conclude on the identity of the employer, in both types of triangular employment relationships both the agency and the user shall be considered joint employers of the workers. They are also jointly and severally liable for any violation of the contract of employment and the law. This is the approach adopted by the Ethiopian legislature. Since it gives wider alternative to workers, workers are protected sufficiently at least as far as the law is concerned. Practically workers are seen getting confused but this is mainly attributable to lack of awareness.

3.3. Temporary help Vs. Long term/ permanent employment service agencies

Agencies are classified as temporary help agencies and permanent/long term service providers based on the duration and the purpose for which they provide workers to user enterprises. Accordingly, the temporary help agencies are those who conclude employment contract with workers and make them available to user enterprises for a short term/ on a temporary basis**.** The user enterprises seek service of these agencies not permanently but for a short term to fill gaps that may be created for different reasons. Some of the reasons that lead user enterprises seek this service are:-[160]

- To substitute workers who are temporarily absent due to annual leave, sick leave, maternity leave and other causes.
- To fill vacant positions temporarily until they find worker that best fits the position
- When there is abnormal work pressure that cannot be covered by the permanent employees of the user
- When there are certain seasonal works for which the user enterprise may not need permanent workers
- When there is an urgent work that may not be completed using only the permanent workers of the user

In these and other related circumstances where the user enterprise need workers on a temporary agreement, the agency would make workers available who would work for the user enterprise for the agreed period of time. Upon end of the period agreed, the contract the agency has with the user will terminate and the workers will no longer work for the user enterprise. The agency would place these workers to the work place of another user enterprise with which it has a contract for provision of service. Due to the reason for which they are placed to work, these workers would stay working for the same user enterprise for a short period of time. The relatively permanent relationship these workers have is with the agency.

[160] Susan N. Houseman; Arne L. Kalleberg; George A. Erickcek, 'The role of temporary agency employment in tight labour markets' (2003) 105 Industrial and labour relations review 57

In long term/ permanent service workers are provided to the user enterprise not for short term service. Rather they are placed to work for a relatively longer period if not for an indefinite period of time. These workers are not needed to fill a temporary gap in the user enterprise but to provide work/ service of independent nature and needed on an interrupted manner. These difference in the duration and purpose for which the service of providers is needed may have its own impact on the determination of the identity of the employer and responsibility of the user enterprise toward these workers. If the contract is temporary, the duration the worker would stay at the same user's place of work would most likely be a brief period.

3.4. Legal frame work on triangular employment relations in Ethiopia

Though not specifically address the issue of triangular employment relationship, the FDRE constitution and labour Proclamation No. 377/2003 provide for working conditions and workers protections. Proclamation No. 632/2009 on employment exchange service is the most pertinent law expected to address issues on triangular employment relationship. These are more or less the laws in one way or another address labour relationships in general and triangular employment relationship in particular. At international level there is the ILO convention on Private Employment Agencies Convention, C181, 1997 to which Ethiopia is a signatory. A brief overview of these laws will be made below.

3.4.1. The FDRE Constitution

The FDRE Constitution under Art. 42 provides for rights of labour. One of the labour rights enshrined under this provision is the right to form association. This right includes the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests and the right to strike. The principle of equal pay for equal work especially in the case of women workers is also recognized. The other important labour rights in the constitution include the right to work for a reasonably limited working hours, periodic leaves with pay, remuneration for public holidays and right to work in a healthy and safe work environment. These rights are provided for all workers irrespective of the nature of employment i.e. whether the workers are directly employed by user enterprises or agencies.

Ethiopia, being member of the ILO has ratified 23 of the ILO conventions including the 8 fundamental conventions.[161] Out of these conventions 1 has been denounced.[162] All these conventions are considered parts of Ethiopian labour law regime by virtue of Art. 9(4) of the constitution. Among these ILO conventions, the Weekly rest Convention no. 14 provides that workers are entitled to an uninterrupted weekly rest period of not less than 24 hours in each period of seven days. Furthermore this convention provides the weekly rest day shall be the day of the week established as a day of rest by the traditions or customs of the place. The other important convention on occupational health and safety provides for the right to work in a healthy and safe environment of the workers. In order to ensure enjoyment of this right, obligations to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment is imposed on member states.

Termination of employment without valid reasons like one related with the capacity or conduct of the worker or based on the operational requirements of the employer organization that justifies the termination, is another right recognized in Convention no. 158. Workers are also entitled to establish and join organizations of their own choice without any influence from the employer's side. There should also be no discrimination on the basis of unionization. Right to collective bargaining is recognized under Convention no. 98.

As discussed above, since Ethiopia ratifies these conventions, they form integral part of Ethiopian labour law. There is the issue of hierarchy as far as international conventions are concerned as to whether these conventions are parts of the constitution, subordinate to the constitution but equivalent to proclamations or subordinate to proclamations.[163] However, the issue of hierarchy of laws is beyond the scope of this study and is not discussed in detail.

[161] Available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102950

[162] Ibid

[163] Ayele Bogale**,** 'Hierarchy of Laws within the Present Federal Legal Structure of Ethiopia' (Unpublished, Addis Ababa University, Faculty of Law, 1999) 15

3.4.2. Labour Proclamation No. 377/2003

This proclamation is the one providing for the basic principles which govern worker-employer relations and labour condition. It provides the minimum working conditions below which the terms of contract may not stipulate. Setting minimum conditions legally for a contractual relation may somehow seem against the doctrine of freedom of contract. However it is justified for employment contracts basically due to the unequal bargaining power between workers and employers.

Employment security, normal working hours, providing safe and healthy work environment which includes taking preventive and remedial measures are among the minimum working conditions provided under the proclamation. Minimum wage is one of the items in minimum working conditions in many jurisdictions. This is not however, true in the case of Ethiopian labour law regime. There is no legally determined minimum wage so far. The issue of wage is left to be determined by the parties based on the principle of market economy. This approach is blamed for equating labour with commodity. However, the Ethiopian government prefers this approach so far. There are however, series of discussions held at MOLSA on incorporation of minimum wage on the labour law regime and there is frequent pressure from ILO.[164] We will see if these efforts could succeed in introducing minimum wage in the future. Absence of minimum wage has its own impact in triangular employment relationship. This will be discussed in the next chapter.

Right to form trade unions, be member and participate in different capacities including in managerial positions in the trade union is the other major right recognized for workers under this proclamation. Establishing trade unions is not an end itself. It is rather a means to undertake collective bargaining in which both workers and employers come together to defend their interests. Especially in the case of workers collective bargaining is much important due to the weak bargaining power individual workers have. They can put pressure on the employer together than separately.

[164] Interview with Ato Abebe Haile, (n.96)

3.4.3. Employment Exchange Service Proclamation no. 632/2009

This proclamation regulates private employment agencies. Private employment agency is defined in a broad way so as to cover persons who provide service of matching offers locally without being party to the employment contract, service of making workers available to a third party locally by concluding contract of employment and making workers available to a third party abroad being party to the contract of employment under Art. 2(1). An employment agency may perform all of these activities, any one or two of them. This proclamation was initially meant to regulate all these activities. However another proclamation was issued to regulate private employment agencies that make workers available to third parties abroad. Ethiopia's overseas employment Proclamation No. 923/2016 is the new proclamation that repealed the employment exchange service proclamation as far as making workers available to a third party abroad is concerned. This is clearly mentioned under Art. 77(1) of the Proclamation.

As discussed above Proclamation No. 632/2009 is still in force regulating local employment exchange service. Any person interested in engaging in employment exchange service is required to obtain license from the competent authority.[165] Pre-conditions that need to be fulfilled to obtain license and renewal of license are provided under Arts. 7 and 10. With regard to liability towards workers, as discussed above it is provided that the private employment agency and the third party shall jointly and severally be liable for violation of the contract of employment.

3.4.4. ILO Convention on Private Employment Agencies

The ILO Convention on private employment agencies-Convention No. 181 is adopted by ILO in order to regulate the employment relationships of a triangular nature. Private employment agency is defined in somehow a similar way as in Proclamation No. 632.

State parties to the convention are required to take measures to ensure the right to freedom of workers employed by the agencies. Private employment agencies are required to treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national

[165] The regional labour and social affairs Bureaus are the responsible authorities to issue license for agencies if the service is rendered in regions according to Art. 5(1) of the proclamation. So the BOLSAs of the nine regional states together with their counterparts at the two city administrations are the licensing organs.

extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability.

Collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits, access to training, occupational safety and health, compensation in case of occupational accidents or diseases, maternity protection and benefits, and parental protection and benefits are also among the recognized rights and protections under the convention. Most of these protections are in the labour proclamation as well.

Chapter Four

4. Impacts of triangular employment relationship on workers' right in Ethiopia

As repeatedly discussed in this study triangular employment relationship has some unique features which distinguishes it from the standard bilateral labour relationship. The impact these unique features may have on workers and the overall work environment is discussed in this chapter.

4.1. Confusion on the identity of the employer

As discussed in the previous chapter, one of the main problems noticed in labour relationships of a triangular nature is the confusion created on workers as to the identity of the employer. This confusion is caused on them due to the fact that they are dealing with two persons with certain attributes of employer. However, in addition to the nature of the relationship, lack of awareness about the work relationship and the legal frame work together with the recent introduction of the work arrangement has contributed to this confusion. But this issue should no more be considered a problem because the law has provided the joint and several liability scheme. This scheme can be interpreted in a way employer status would be extended to both the agency and the user jointly. Since there is no distinction on which terms and conditions make any of them liable, they shall be jointly and severally liable for any violation. So, the question "who is the employer?" is answered as both the agency and the user are joint employers.

4.2. Controversies in relation to wage and "service charge" in triangular employment relationship

One of the main issues in triangular employment relationship is in relation to wage. A total number of one hundred fifty workers participated in the study and all of them do not believe they are earning what they deserve. Of course this cannot be something unique to them especially in a developing country like Ethiopia. However their main concern is "providers are taking the significant portion of their wage" and they believe agencies and service providers are exploiting

them.[166] In the contract between the agencies and user enterprises there is payment the user enterprises agree to pay per person. The question of workers is "we are not getting this payment fully. Agencies are collecting huge amount of money as if they will pay the same to their workers but what the workers actually earn is very much less than what is agreed as payment per worker."[167]

Issues related with wage and service charge needs to be discussed separately for agencies to which HRM/ personnel service is outsourced and to agencies to which performance of work/ provision of service is outsourced. In the case of the former, the wage of the workers is determined on the negotiation between the workers and user enterprises or the wage of the worker is based on the salary scale of the user enterprise for the position.[168] On the other hand there is an agreement between the user and the agency that the user will pay certain amount of commission or service charge for the service it provides. This amount is usually determined based on the wage of the workers.

Agencies receive service charge for each worker they provide. A certain agreed percentage of workers' wage will be paid to them. However this payment is not deductible from the workers' wage rather it is the user that covers this for the service it gets.[169] For instance let's take a wage agreed between an agency and a worker[170] which is birr five thousand and the agreed service charge between the user and the agency is 10% of the workers' wage, then the user will pay birr five hundred to the agency which is 10% of five thousand in addition to the gross wage. However this does not mean the worker will get five thousand birr net income. There are certain inevitable deductions like income tax and pension contribution which are common to all workers whether employed by agencies or directly by users. In the example used above if the gross wage of the worker is birr five thousand, employment income tax of birr 697.05 will be withheld by the employer based on the Ethiopian tax system. There is also 7% pension contribution of the worker according to Art. 10(2) of Private Organization Employees' Pension Proclamation. This

[166] Interview with Ato Kassahun Folo, president of confederation of Ethiopian trade union(CETU) (Addis Ababa, Ethiopia, 11 March 2019)

[167] All the 150 workers who took part in the study agree on this point unanimously.

[168] Interview with Ato Yesuf, (n.134)

[169] Ibid

[170] Names of the agency and the worker is not mentioned for confidentiality purpose.

is birr 350. Birr 1047.05 will be deducted. It is the agency that will make deduction to this amount as part of its pay roll service. These deductions are normal in any employment relationships and not unique to triangular relations. Workers cannot claim this amount is deducted from their wage as a result of triangular employment relationship. The other expenses the agency incurs include costs for providing safety equipment for workers like uniform, safety shoes and the likes. In relation to the service charge, some workers believe, had there not been the agency's involvement, the service charge paid to it would also be part of their wage.[171] This is however a wrong assumption because the user is paying the agency for the HRM service and this payment is not part of the workers' wage. Workers in this type of triangular employment relationship are getting the wage they have already agreed with the user.

On the other hand in the case of agencies to which provision of other services like security, cleaning etc. are outsourced, there is no direct negotiation between the workers and the user enterprises on how much their wage will be. It is the provider that determines how much it shall pay its workers. In the contract of service between the user and the provider they agree on the gross payment the user will pay the provider per person. Out of this agreed amount it is the provider that will determine what it will pay the workers. It should be noted that there are number of expenses the providers incur in the process of providing service. This includes:-[172]

- Employers' pension contribution which is 11% of the wage of workers
- Expense for insurance of the workers
- Expenses for providing safety equipment for the workers including training costs
- Allowances for workers like transport and house allowances
- Expenses that will be incurred to replace workers absent as a result of annual leave, sick leave, maternity leave etc.
- Expenses incurred in the process of recruitment
- Administration costs of the provider and other related costs.

[171] 75 agency workers out of the total of 150 workers to whom the questionnaire was sent think so according to their reply.

[172] Interview with Ato Yesuf (n.134) and Ato Yeshitla (n.104)

Generally the payment the provider receives from the user is divided among[173]

- Wage and other benefit package for the worker which is directly paid to the worker based on pay roll which includes wage, house allowance, transport allowance, representation allowance etc. Other payments like medical expenses and pension contribution of the employer can also be considered as indirectly paid to the worker.
- Administrative costs to run the service which covers logistics costs, management costs, training and supervision costs etc.
- Profit of the provider. As providers are not charity organizations, they need to get certain profit from the service in order to stay in the business and benefit from the transaction. The profit is also subject to income tax. The net income the provider gets is after deduction of income tax.

So, according to the providers most of the payment they receive as a service charge is paid directly or indirectly for the workers. What is kept by providers as a profit is insignificant as compared to the total payment and the costs incurred directly and indirectly for the workers. The profit margin of many providers ranges between 10-20% of the total payment they receive per person as service charge.[174] We should note here that the more the profit of providers, the lesser the wage of the workers will be and vice versa other things remain unchanged. Workers and their representatives argue "even if we consider the costs other than profit are justified because related with the worker and the work, the profit margin is exaggerated".[175] They further argue that the costs are also presented in a much exaggerated manner which does not show the actual costs.

How should this issue of wage be resolved? The issue is aggravated by absence of legally stipulated minimum wage. Had there been minimum wage clause in our law, it could at least be said that providers shall not pay workers below the minimum wage. Since we don't have a minimum wage clause this is not the solution at least currently.

[173] Interview with Ato Yeshitla,(n.104)

[174] Interview with Ato Yeshitla (n.104), Ato Yesuf (n.134) and Ato Endalkachew (n.101)

[175] This is evidenced by the reply of all the 150 workers that took part in the study.

According to the providers, determining profit margin should be solely left to them because they are the ones providing the service with their cost benefit analysis.[176] Like any business organizations, service providers wish to be free to determine what to get from their business. Since other organizations who are engaged in production of goods, in the service sector or other fields of business are free to set the wage they pay their workers and to determine their profit margin, the same shall be the case with service providers.[177] Any intervention to determine profit margin or the wage workers be paid is against the free market principle and discriminatory on service providers. They believe it would also amount to applying double standard to let others freely decide what they pay their workers and determining wage of workers for service providers in the absence of legally stipulated minimum wage uniformly applicable to all employment relationships. This argument of agencies and all employers for that matter, is the result of employers' objective of maximizing profit through subordination of workers at minimum costs according to the classical and Marxist theories of production.[178]

On the other hand, it is argued that service providers shall not be allowed to take whatever they want from the payment they receive for a service that is entirely provided using the workers labour. The first choice of workers is even the abolition of this arrangement so that the "exploiting" providers will be expelled out and workers will directly deal with the users.[179] If this is not possible due to users' interest on outsourcing, the profit of providers should be kept to the minimum possible amount so that the workers would earn as much as possible from the service charge. The principle of "labour is not a commodity" enshrined under ILO conventions is in support of this view of the workers.

In providing the service the main element the providers utilize is the labour of workers not a certain commodity. Due to this, providers should not be allowed to determine the price of the labour or they should not be allowed to buy labour in the same way they buy raw materials or

[176] Yeshitla (n.104), Yesuf (n.134) and Endalkachew, (n. 101)

[177] Ibid

[178] F. C. Anyim and D. A. Ideh, 'Triangular employment relationship, employment practices and opportunities for career growth of agency workers in the Nigerian banking industry' (2017) 4 UDS international journal of development 80

[179] This view is held by all the 150 workers who participated in the study

machineries. If agencies are freely left to determine what the workers should be paid, the transaction would be like the agency buys labour for a cheap price and sell it to users for an expensive price. This would result in exploitation of workers. To avoid the likely occurrence of exploitation the law should set the maximum amount of profit agencies should take from the service charge they receive from users.

Actually the amount the users agree to pay the providers is not the wage they allocate to the workers rather it is the total budget they allocate for the service. They already know there are costs the provider will incur in the process and will take some profit. Had the user not outsource the service, most of the costs the provider incurs which are discussed above were to be covered by the user. The service charge users pay providers is the budget they allocate for the service including all the costs, had they directly employ workers. They would have used this budget for the costs related with the workers and the wage of workers. Probably the profit providers take would make the only difference. For instance if a certain company "X" decides to outsource security service to provider "Y" and the agreed payment for the service is birr 4000 per person, it should not be understood as this amount is agreed as payable to the worker. It is known that there are different expenses that would be incurred in providing the service. It is up to the provider to allocate this amount so that it will cover the wage of the worker, all necessary expenses and the profit. But in doing so the agency shall not be allowed to equate labour with other commodities. The argument that the agency shall pay workers all what it received from users on the part of workers however is a baseless one and the result of misunderstanding.

Since many enterprises prefer the outsourcing arrangement and providers are the agents for outsourcing, it will be irrational to say they should not earn any profit. We should not also forget they are profit oriented entities. If there is a need for outsourcing, profit for the providers is inevitable. There is a need to balance interests of workers which is getting better payment for their labour and the need to maintain certain profit from the transaction which is the interest of providers. On the other hand the view held by the providers that profit shall be freely determined by the provider is not acceptable as this would give absolute freedom to providers to determine the value of labour. So, setting by law the maximum percentage the providers shall retain as profit is necessary to avoid this controversy. The setting of minimum wage legally would also help to avoid this problem.

The other point that needs attention is the way providers get the works. Most of the time user enterprises outsource services using tender. As a common rule of tender, the bidder with least price is the one most likely to win the tender. Thus, it is the provider demanding least payment for the service that is going to take the work. This fact also has its contribution to the lower wage workers are earning. If the least service charge among the competitors is winning, it can be argued that providers are bidding with a price that cannot enable them pay decent wage to workers just for the sake of winning the tender and getting the work. When the costs and profit are deducted from this amount, what will remain as wage will be very much lower. Users' interest of "cutting costs" using outsourcing arrangement aggravates the problem. In this transaction, providers bidding with a relatively higher price are getting out of the market.[180] So, users should also have a role in this process by, for instance, rejecting bids with unreasonably lower price which cannot enable to pay reasonable wage for the workers. However it is not reasonably expected from users to do so voluntarily because they are interested in lower price and cannot voluntarily undertake to pay higher service charge. The fact that they are simply promoting the least price is leading to a "race to the bottom" in terms of the workers' wage among agencies. So, there should also be restriction on users that they shall not deal with providers that come with unreasonably low price. It is also necessary to set legally the minimum price for which users outsource services in addition to setting the profit margin for providers. This may be done for instance by setting the minimum service charge which is to be used as a floor for different services.

Workers have another complaint which is related with the service contract between the user and the provider. Providers are not disclosing the service charge they are receiving in the contract.[181] Workers access these contracts in certain occasions accidentally without the knowledge and willingness of the provider as many workers replied in the questionnaire. On the part of providers this fact is not denied. Their argument is however they should not be forced to disclose the service charge they receive to their work. According to Ato Yesuf and other service providers, since any enterprise engaged in providing certain goods or service to another

[180] Interview with Yeshitla (n.104)

[181] All the 150 workers engaged in the study replied they have no access to the service contract between the user and the provider. 75% of them do not have a clear understanding on the contract they have with the agency and on what basis they are working in the work place of the user enterprise.

enterprise is not required to disclose what it is paid by the enterprise to which it provides the goods or services, the case of labour service providing enterprises should not be seen differently. For instance an audit firm or ICT solution providing firm to which the respective works are outsourced are not required to tell their workers how much they (the firms) are paid for the service. Likewise a provider of security or cleaning service shall not be required to inform his workers the service charge according to them.

In this regard the providers shall make clear how much they receive per person for the service because the wage of workers is dependent on this payment. Not only this but they should also disclose all the expenses they incur and the profit they are keeping for themselves clearly so that there will be no misunderstanding on workers' side and taking unfair advantage on the side of providers.

Most of agency workers are paid lower wage as compared to workers directly employed by user enterprises.[182] Furthermore they are not getting periodical wage increment, promotion and are not enjoying benefit packages available for workers of user enterprises working in the same place.[183] Providers and users try to justify this difference as it is caused by the difference in the person with whom they have contract of employment. Since agency workers have employment contract with agencies while workers of the user have contract with the user, the terms and conditions in the contracts might be different. There is a possibility for this difference because what is provided by the law is the minimum working condition. Employers who provide better conditions are welcomed by the law. As a result of the difference in the terms and conditions of the contracts, the payment and benefit packages would most likely be different. The concern of workers in this regard is the user enterprise shall treat them in the same way it treats workers hired directly since the ultimate consumer of services of agency workers and workers of the user enterprise, there should not be difference among them.[184]

There is no contractual relation between users and agency workers and due to this the latter should not as of right claim the same treatment with workers of user enterprises. The treatment

[182] Interview with Ato Kassahun, (n.158)

[183] Ibid

[184] All the 150 agency workers who answered the questionnaire replied that they are not being treated similarly with workers of user enterprises with whom they are working together for the same user enterprise.

users provide to their workers is based on their contractual obligation. Failure to observe the same would entail liability. But in the case of agency workers, there is no contractual obligations users undertake towards them and there is no legal ground to force them. Even if users are said to have relationship with agency workers, it is an indirect one through the agency.

The joint employer status discussed above is also based on the employment contract entered into between the agency and its workers and the minimum working conditions under the law. The joint employer status of the user should be construed in a way to cover terms and conditions in the contract between the agency and its workers and the legally stipulated minimum working conditions. The user is considered joint employer of the workers only as far as the terms and conditions in the contract and the law are concerned since there is no contractual undertaking between the user and the workers from which obligations of the user arise. This can be understood from the joint and several liability clause according to which the joint and several liability arises in case of violation of the contract of employment between agency and workers. As discussed above, a contract with less favorable conditions than the conditions in the law shall not be considered valid. So long as the terms and conditions in the contract (at least with the minimum working conditions) are fulfilled and workers are provided with the payment and benefit package in the contract and the law, there is no legal basis for them to claim treatments which is not part of the contract and minimum working condition.

The user has contractual relation only with the agency and if obligations it undertake in this contract are observed and there is no violation of contractual and legal terms between the agency and the workers, users shall not be forced to treat these workers in the same way they treat their workers. This view may be supplemented by the difference in the category of work as well. As discussed earlier, most of outsourced works do not form part of the core activities in the outsourcing enterprise at least in the current context. Having this fact in mind, it might not be economical for users to treat workers performing their core activities and agency workers working on ancillary activities. Furthermore, it is not usual to find workers of user enterprises and agency workers engaged in virtually identical work. If a user has outsourced its security service for instance, it does not employ workers for security purpose as the practice shows.

The principle of nondiscrimination among workers does not help workers in this regard. Employers are prohibited from discriminating among workers on different grounds listed under

Art. 14. The list is not exhaustive but it does not seem to prevent differential treatment based on certain objective grounds like for instance between workers for fixed period and permanent workers.[185] However, to invoke this provision, the discrimination should be made among workers of the same employer even if we consider treating agency workers and user enterprise workers differently as discrimination. In our case, it is the agency that has employment contract with workers while the employer of the other workers is the user enterprise. There is difference in the identity of employers. The joint employer status, as said above, should also be construed only in relation to the contract between the agencies and their workers i.e. the user will be jointly and severally liable to the workers as if it is signatory of the contract of employment between the agency and workers. Furthermore even if the user is considered to be the direct employer of agency workers, differential treatment of workers on certain grounds like the type of contract (whether it is fixed or not) is a justified ground according to the Federal Supreme Court Cassation division.[186] On this case the cassation held differential treatment among workers hired permanently and for fixed term is not unlawful. As it is discussed in the following section the contract of employment between agencies and workers is a fixed term in almost all cases. So this can also be another justification for the different treatment. Generally the workers cannot claim similar treatment with workers of the user enterprise at least legally speaking. This should not also be seen as an adverse effect of triangular employment relationship so long as the workers get what they have contracted for and what the law provides as minimum working conditions at least.

4.3. Minimum working conditions in triangular employment relationship

In this section the impact triangular employment relationship has on some minimum working conditions is discussed. Furthermore, whether triangular employment relationship has inherent negative impact on workers' rights is discussed.

[185] EEPCo V Taju Abagaro, Federal Supreme court Cassation division, file no. 44218
[186] Ibid

4.3.1. Security of employment

Almost all of the service contracts between providers and users are made for a fixed period.[187] This is so among other things because users want to see other alternatives if they are not satisfied with the service, need provider with a lesser price as cutting costs is among reasons for outsourcing or want to terminate the contract for some other valid reason. Due to this, providers also hire workers on a fixed term. Upon the expiry of the contract of service, it may or may not be renewed. This is basically done unilaterally by the user. There is nothing providers can do if the contract expires and the user does not want to renew the contract. If the contract is extended based on the will of the user, the provider may retain its workers. But if the service contract is not extended and the provider does not have another sight to which it may place workers, the employment contract terminates and workers security of employment is always at risk.

Due to the fixed term contracts they have with users, agencies hire workers on a fixed term basis. As a nature of fixed term contract, the employment contract comes to end upon the expiry of the time specified in the contract. In this case the most likely fate of the workers is losing their job. Thus employment insecurity is somehow an inherent problem of triangular employment relationship and workers are always at risk of losing their job. But one thing we should bear in mind is that hiring workers for a fixed term is not practiced only by agencies. Organizations that directly hire workers may also make contract for fixed term. So we cannot say this is something unique to triangular employment relationship. But the number of workers employed for fixed term triangular employment relationship is higher than its bilateral counterpart.[188]

4.3.2. Normal working hours and weekly rest day

With regard to working hours, 50% of the workers who participated in the study replied that they are forced to work for more than 8 hours per day and 48 hours per week. Furthermore they are not paid overtime fee for the additional hours they work. These workers at the same time complained that they are not given weekly rest day in a uniform manner. They are given weekly rest only based on the will of the agencies or the user enterprises. AABOLSA has also confirmed

[187] Most of the service contracts are for two years. For instance, a service contract between commercial bank of Ethiopia and commercial nominees, between Sebhatu and Sons and Hilton Addis Hotel, most of service contracts of Agar etc. are made for two years.

[188] Interview with Ato Kassa Seyoum (n.109)

that there are agencies identified during supervision that are not respecting the law with regard to the normal working hours and overtime work payment.[189] This is not however the problem of agencies only. Enterprises that directly hire workers are also at times found violating the law in this regard.[190] It cannot be said this is an inherent and unavoidable problem in triangular employment relationship even with the existing legal framework.

4.3.3. Right to association and collective bargaining

Forming trade union, being member thereto and taking part in the management of it is one of the rights provided to workers. Workers have also the right to take part in collective bargaining with their employers through their representatives. Since agency workers are also employees, these rights are equally available for them as well. What is unique in case of agency workers is the involvement of two persons with certain attributes of employer. With which of these persons shall workers undertake collective bargaining? The user or the provider? is the issue. As frequently discussed users do not have contractual relationship with the workers. Their liability towards the workers arise from the contract of employment between the agency and the workers. Due to this the agency is the party with whom workers shall have collective bargaining and it is the agency that should bargain with the user for better treatment of workers. So, agencies are duty bound (legally) not to prevent or create any obstacle that prevent workers from exercising their constitutionally recognized right to form associations.

Practically however, there are some agencies that are preventing their workers from exercising these rights.[191] According to the data obtained from AABOLSA there are 549 trade unions with 86112 members that took license until 2010. There are total of 105 different organizations that prohibit their workers from exercising their right to form association and undertake collective bargaining with them.[192] But this number includes agencies as well as other organizations that directly employ workers.[193] There are agencies that respect these rights of workers and facilitate

[189] Interview with Ato Dereje Tefera, Team leader of work conditions supervision directorate at AABOLSA (Addis Ababa, Ethiopia, 15 March 2019)
[190] Ibid

[191] Interview with Ato. Seyoum, team leader of industrial relations at AABOSA (Addis Ababa, 10 April 2019)

[192] Ibid

[193] Interview with Ato Dereje (n.176)

the way. So preventing workers from forming associations is not an inherent problem to triangular employment relationship.

4.3.4. Safe and healthy working environment and safety equipment

Providing safe and healthy working environment together with safety equipment is the responsibility of employers. As the agency and the user enterprise are joint employers of workers in triangular employment relationship they shall provide the same to their workers. In practice however there are workers who are working on environment that exposes them to risk without safety equipment sufficiently.[194] However this is not again unique to agency employees rather it is also prevalent on workers who are hired directly by users.[195] So there is no sufficient ground to conclude this is an inherent problem in triangular employment relationship.

Generally, the law has provided for minimum working conditions to be observed in any employment relationship. There is no distinction between workers of agencies and other workers. Triangular employment relationship does not have an inherent and unavoidable negative impact on these conditions and on workers' rights in general. In other words there is no direct relationship between triangular employment relationship and violation of the minimum working conditions or workers' right except for employment security. The problem is with regard to enforcement of what is provided by the law. Due to the week regulatory and enforcement mechanism, there is rampant violation of workers' rights in both bilateral and triangular employment relationships.[196]

The main problem with regard to enforcement is the failure of the regulatory organs to enforce what is provided by law. The number of employers is too much (more than 40000 only in Addis Ababa including agencies)[197] but the regulatory organ is not sufficiently organized with the

[194] 75 out of 150 workers that took part in the study replied that their work environment is one way or the other not free of risk. They also replied that they are not provided with safety equipment sufficiently.

[195] Interview with Ato Seyoum (n.175)

[196] Interview with Ato Dereje (n.176)

[197] Ibid

necessary logistics and man power to enforce the law and take measures on those violating the law.[198]

4.4. Impact of triangular employment relationship on workers of user enterprises

In the proceeding parts of the study the impact triangular employment relation may have on workers of agencies is discussed. In this subsection a brief discussion will be made on the impact of this relationship on workers of the user as its side effect. Outsourcing or job externalization in general is devised to substitute works that have been performed by enterprises themselves internally by an outside service provider. Enterprises have different motives behind like ensuring flexibility, focusing on core activities, cutting cost etc… as discussed above. This decision on the other hand has a significant impact on workers that have been working on the activities that are decided to be outsourced. In short, when the enterprise outsources these activities to an external service provider, it may no more need workers that have been assigned for these tasks. If this is the case, what will be the fate of these workers is the question that follows.

Under Ethiopian labour law this decision of the enterprise may constitute a valid ground for terminating the contract of employment as per Art. 28(2) (C). According to this provision a decision to alter work methods or introduce new technology with a view to raise productivity is a ground for termination of contract with notice. Due to this employers may terminate contracts of these workers lawfully. In this case the alternative users give to their workers are either termination of the employment relation once and for all or hiring them on few vacant positions they may have.[199] The end result of this process most of the time is creating employment insecurity on the workers that has been hired by user enterprises. Of course employment opportunity is created for agency workers but it is at the expense of other workers.

[198] Interview with Ato Kassa Seyoum (n.109)

[199] Group discussion with Ato Samuel, Ato Bekele, Ato Habtamu, W/ro Senayt and w/ro Tigist who are all agency workers(the names are changed for confidentiality purpose) (Addis Ababa, Ethiopia, 10 April 2019)

Chapter five

5. Conclusions and Recommendations

5.1. Conclusion

Employment is the most common source of livelihood for many people than any other economic activity. There are certain requirements based on which employment relationship can be categorized as standard or nonstandard. These requirements were developed with the emergence of large scale industries and workers' struggle for their rights. Eventually they become the standards in business and industry. Some of these requirements to classify a relationship as standard/ nonstandard are the duration/ length of time for which the employment will stay in force, the working hours for which the worker provides service to the employer, the place from which the worker delivers the service…etc. Accordingly an employment relationship for an indefinite period of time, full time work, workers providing service at the premises of the employer, for a single employer…etc. are considered standard employment relationships. Labour law, collective bargaining and social security systems were developed within this framework.

However recently there is a move towards work relationships that deviates from what is accepted as standards. This is basically the result of employers' desire to introduce more flexible work arrangements. The competition among firms to introduce new work arrangements and control the market is one of the driving forces for their desire to flexibility. Fixed term contracts, part time contracts, homework arrangement, on call work arrangement, triangular employment relationship are some of the nonstandard labour relationships introduced as a result of employers' desire to attain flexibility.

A contract of employment is considered to be made for fixed term when it is made for a certain definite period of time upon the expiration of which the contract terminates automatically. This can be done in two ways. The first one is the duration for which the contract stays in force may be provided expressly in the contract as 2 years for instance. The other alternative is the contract may be made for a certain work piece and in this case the completion of the work piece is the condition that would bring the contract to an end.

Part time work is an arrangement in which the worker provides service to the employer for a reduced working hours than what is provided as normal working hours. Employers may for different reasons related with flexibility not want full timers. There are also workers who are willing to work for a reduced working hours than the normal working hours. On call work is another variety of part time work in which workers will be available to work whenever they are required to. In a homework arrangement on the other hand, the worker provides service from somewhere else, a different place than the premises of the employer.

Triangular employment relationship is the nonstandard counterpart for bilateral labour relationship which is the typical employment relationship. In this labour relationship there are three parties involved which are the worker, the agency/ service provider and the service user enterprise. The main distinguishing feature in this arrangement is the agencies/ service providers conclude contract of employment with the workers with a view to making them available to a third party i.e. the user enterprise. The user is considered third party to the employment contract because it does not conclude contract with the workers directly. However the user has contract with the agency which is a commercial contract. It is through this contract that the user enterprise gets the power to make agency employed workers work under its authority in the absence of contract between the two.

Since there are two persons with certain attributes of employer, who is going to be considered the actual employer for legal and practical reasons is the main issue in this relationship. There are four different approaches to this question. The first approach is making the user the only employer. The base of this approach is that the user is the one that exercises control and supervision or it is the user that exercises significant control on workers and due to this it should be the user that should be considered the employer. The element of control exercised by the agency is not sufficient to confer the status of employer to the agency. The second approach considers the agency the sole employer. According to this approach the agency is the one that hire the workers, pay wage, take disciplinary measures, administer the paid leaves of the worker and these are more than enough to consider the agency as employer. The role of the user enterprise is only controlling and supervising the work which is not sufficient to make the user employer in this relationship.

According to the third approach both the agency and the user shall be considered as the joint employers of the workers. This approach bases its argument on the fact that elements that constitute exercising actual control in the relationship are found dispersed or shared between the agency and the user. Both parties exercise somehow significant control and neither of them qualify to be considered the sole employer. Due to this, it is better to confer joint status on the two parties. The fourth approach denies neither of them employer status. According to this approach neither of the two parties do not exercise control on the relationship sufficient to be considered as employer. Due to this neither of them shall be considered as employer.

Considering all the approaches, the third approach, making both the agency and the user enterprise joint employers of the workers is the most appropriate one as compared to the others. This approach takes the facts on the ground in to consideration. An employer shall exercise all the tasks exercised by the user and the agency in bilateral labour relations. But in triangular employment relationship they are not exclusively vested with neither of them. So in this case making the two joint employers is the best mechanism. This approach can better solve the problems that may arise in relation to the identity of the employer. Workers shall not be confused as to the identity of the employer because both are made joint employers.

Proclamation No. 632/2009 provides for joint and several liability of the user and the agency in case of violation of workers' rights. There is no distinction as to violation of which terms and conditions make either of them liable so it can be concluded that they are jointly and severally liable for all deprivations on workers. This joint and several liability scheme adopted by the law can be taken as indicative for the adoption of the joint employer approach under our law. Even if the law does not clearly make the user and the agency joint employer, making the user which does not have contractual relationship with the workers jointly and severally liable with the agency that have contract with the workers is the manifestation of the joint employer status conferred on the agency and the user.

Joint employer status and joint and several liability provides better protection to workers engaged in this arrangement. This is so because workers do have two alternatives when they think of claiming their rights and instituting legal proceedings. Even if one of the parties is

absent, insolvent or not in a position to meet the demands of workers for different reasons, the remaining party will be under obligation to redress the workers. This alternative is not available to workers in the standard labour relationship as there is a single employer and it is only this employer that is available for workers whenever they have certain claim and if this employer is not a position to make good the damage on workers there is no second alternative.

The joint and several liability also have the effect of making both the user and the agency act seriously towards their respective responsibilities because failure to discharge the obligations by either of them would bring liability to the other as well. Especially user enterprises should seriously follow up the agencies as to how they are handling workers. They should not consider outsourcing labour service as contracting out all responsibilities related with workers and make themselves free of any responsibility. In addition to properly exercising their controlling power they should also watch out the agencies whether they are exercising their power properly.

The other controversial issue in triangular employment relationship is in relation to workers' wage. In the traditional bilateral relationship, the employer would pay the worker what is agreed as wage in the contract of employment and the worker receive this agreed amount after all the necessary deductions like tax and pension contribution of the workers are withheld by the employer. In triangular employment relationship where the agency provides only human resource management as well the worker will directly enter into agreement with the user as far as the amount of wage is concerned. This does not mean however there is contract between the two. Rather they will arrive at agreement on the wage and the worker will enter into contract of employment with the agency. Like any employer, the agency will pay wage for workers after withholding tax, pension contribution and other deductions if any. The user, in return for the service it receives from the agency pays service charge the amount of which is as determined in their contract. Workers think had there not been the agency between them and the user, the wage they are receiving and the service charge will be paid to them. But this is wrong because what the user pay the agency is not part of workers wage but the price it pay to the HRM service.

On the other hand agencies that are engaged in delivering service/ work enter into contract with the users but the workers they hire do not directly negotiate with users about their wage. Rather it

is the agency that determines what it pays the workers. The agreed amount in the service contract covers the wage of workers, expenses necessary in providing the service and the profit the agencies get from the transaction. Workers concern in this regard is the profit the agencies are making is exaggerated one while what the workers receive actually is insignificant part of the payment users pay the agencies per worker. On the other hand the agencies argue that around 80-85% of the service charge directly or indirectly goes to the workers. The direct payments include wage and different allowances, training costs and costs of providing safety equipment. Indirect payments include employers' pension contribution, insurance premium and the likes that are not directly visible on the payroll. There are also administrative costs they incur to provide the service and what they take as profit is very small amount as compared to the service charge they receive per person.

The main controversy here is in relation to the amount of profit agencies make from the transaction. The agencies argue like any employer or service providers they shall freely determine what they should pay their workers. This argument of agencies however shall not be accepted because the main asset they have in the process of delivering service is the labour of workers. Even if the agencies are said to deliver service or work practically the workers are the ones that perform the actual work. Due to this agencies shall not be freely left to determine the wage of workers who are the actual providers of the service. If agencies are left free to determine what workers shall be paid, this may lead to exploitation of workers. Workers should be able to get reasonable wage for the service they deliver. This problem would have been solved had there been legally stipulated minimum wage. However, even if there is no minimum wage, due to the unique feature of the work arrangement, the profit for agencies shall be legally fixed in order to prevent workers from possible exploitation by agencies. Restriction should also be made on the payment users pay for agencies so that they would not agree for an amount that will not enable agencies to pay reasonable wage for workers.

In relation to the minimum working conditions stipulated under the law, there are agencies that are working in accordance with the law i.e. maintaining the minimum working conditions and in some cases with better terms and conditions. At the same time there are agencies that are not meeting the minimum working conditions requirement. The same is true for employers that directly employ workers without agencies concluding employment contract. There are employers who provide terms and conditions in accordance with the law and even with better terms in some

instances. At the same time there are employers who deny workers the legally provided minimum working conditions. Furthermore there are user enterprises that have workers provided to them by agencies and workers they directly employ. Some of these users are found denying the minimum working conditions and protections for both workers. This shows that triangular employment relationship or its unique features do not have inherent negative impact on workers' rights.

Employment security is negatively affected more in triangular employment relationship than in bilateral relationship. This is so because most of the time the contract between agencies and users is made for a fixed term and due to this agencies hire workers for a fixed period. Upon the expiry of the period fixed in the contract the employment relation comes to end. This makes workers in triangular employment relationship less secure than those in the bilateral relationship.

Generally as agencies have good number of the labour employed under them and hence are creating job opportunity to many and do not have as such exaggerated negative impact that cannot be avoid using the existing legal framework with slight additions on few areas, the triangular employment relationship shall not be seen as totally devastating work arrangement for workers. Of course there are some problems observed. But as discussed above some of these problems are not really problems but are considered so because of lack of awareness about the work arrangement and the legal protections and entitlements. To fill the practical gaps, the regulatory organs shall strengthen themselves and a slight change on the legal framework in relation to wage is needed. This being the case the relationship shall be maintained as it has advantages in for instance enabling user enterprises focus on their core functions, creates opportunity for specialization and efficiency, flexibility etc…

5.2. Recommendations

Based on the findings of the study the following recommendations are made.

- Creating awareness to workers generally on the work arrangement and the legal protections and enforcement mechanisms provided under the law. This is necessary because due to lack of understanding, some of the protections they seek are already there in the law and the others do not go with the work arrangement. This shall be done by agencies, user enterprises, the government and civic organizations. Agencies and user enterprises should jointly work towards creating awareness before and after placing workers to work. The MOLSA and BOLSAs should also take the responsibility of creating awareness preparing different periodic forums. Civic organizations like CETU should also take part in this task. If workers do have sufficient understanding about the triangular employment relationship and their respective rights and duties as well as the responsibilities of each party involved in the relationship, most of issues raised as problems of the triangular employment relationship will be resolved even without introducing changes to the legal framework. Most of the issues can be handled even with the existing legal framework.
- In relation to service charge, the maximum profit agencies shall take from making workers and labor related service available to users shall be determined by the law. Absence of legally prescribed maximum profit for agencies from the total payment received could open the door for exploitation of workers. This can be done for instance, by putting the maximum percentage agencies shall take as profit from the total service charge they receive per person. So this shall be introduced in the legal framework like incorporating it under the Labour Proclamation or Employment exchange Proclamation.
- Since user enterprises' desire for cutting cost using outsourcing arrangement is also one of the factors for unreasonably lower wage workers are receiving, a legal restriction shall be made on user enterprises so that they shall not accept unreasonably lower service charge from agencies. This may be done for instance setting the minimum service charge per person for enterprises that wish to outsource certain services. This may also be introduced under the Labour Proclamation or the Employment exchange Proclamation.

- Introduction of minimum wage under the labour law will also bring solution to problems related with wage not only for workers employed by agencies but to all workers including those directly employed by users.
- Regulatory organs especially the labour inspection and supervision departments at MOLSA and BOLSAs should be properly organized so that they will be able to supervise the huge number of employers. This shall be done at the level of lower administrative units like woreda administrations as well. If there is a periodic and frequent inspection and supervision supplemented by taking measures on those agencies and any employer for that matter found violating the law, the number of employers engage in violation of laws and workers' rights in relation to their workers would decrease.
- Taking serious measures on those who are found violating the law repeatedly. Taking corrective measures will have deterrence effect on the wrong doers and will send a message to others that they should not engage in such illegal acts. To do this however, the regulatory organs should be organized and strengthen in a better way than they are currently. This shall be done financially, materially and with man power.

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Annexes

Addis Ababa University

College of Law and Governance

School of law

Annex I

Questionnaire to be filled by agency workers

Dear Respondents:

This questionnaire is designed to conduct a research on the topic 'the impact of triangular labour relationship on workers' right in Ethiopia'. The purpose of the study is for the partial fulfillment of the requirement of LLM degree in Business law. For the successful accomplishment of the study, your response have key role being used as valuable input for the study. The information that you provide is strictly confidential and will be used only for academic purpose. Thus, you are kindly requested to genuinely fill the questionnaire.

1. Sex
   a. Male b. Female
2. Age
   a. 15-20 b. 21-25 c. 26-30 d. 31-35 e. above 36
3. Marital status

   a. Married b. single c. divorced

4. Level of education

   a. un educated b. primary c. secondary d. diploma e. degree or above

5. Where do you work now?

   a. financial institution b. private manufacturing c. public institution d. NGOs or embassy e. others

6. Who do you think is your employer?

   a. the agency b. the user enterprise c. both d. I am confused

7. Should the employer be considered your employer?

   a. yes b. no

8. Do you know the agency and the user are jointly and severally liable for violation of the contract you have with the agency?

   a. yes b. no

9. Do the agency and the user try to jointly discharge obligations of employer?

   a. yes b. no

10. Do you think you should be treated in the same way with the workers of user enterprises working along with you?

a. yes b. no

11. Do you think you are earning what you deserve in this relationship?

a. yes b. no

12. If your answer to the above question is no, what is the reason?

a. agencies are taking significant part of the service charge for themselves

b. the service charge users pay is small

c. there are many costs the agency incur

13. Do you have access to social security?

a. Yes b. No

14. Do you have access to annual leave?

a. Yes b. No

15. Do you have access to weekly rest?

a. Yes b. No

16. Are you entitled to paid sick leave?

a. Yes b. No

17. Are you entitled to paid Maternity leave? (only for female)

a. Yes b. No

18. Does your employer provide you with safety equipment?

a. Yes b. No

19. How many hours do you work in each day?

a. 8 hours b. below 8 hours c. Above 8 hours

2o. If your answer for Question No.19 is above 8 hours, are you paid for the over time works?

a. Yes b. No

21. How many hours do you work in each week?

a. 48 hours b. Above 48 hours c. Below 48 hours

22. Are you satisfied by your current job?

a. Yes b. No

23. Does your employer provide you with employment contract/ written or oral?

a. Yes b. No

24. What type of employment contract do you have with your employer(in terms of duration)?

a. Indefinite period b. definite period

25. Is there a trade union at your work place?

a. Yes b. No

26. Do you belong to a trade union?

a. Yes b. No

27. Do you want triangular labour relation to be banned by law?

a. yes b. no

28. If you have additional comments about the work relationship please specify them.

_____
_____
_____
_____
_____
_____.

Thank you for your cooperation!!!

Annex II

Interview questions to be answered by director/ manager of private employment agencies/ providers

1. Is your organization involved in Performance of work and service or HRM service only?
2. Who do you think is the employer in triangular labour relations? (according to the definition under Art. 2(1) cum Art. 4 of the labour proclamation no. 377/2003)
3. Is there sharing of legal responsibilities (attached with employers) under the law between your organization and the user enterprises?
4. Are employees you provide to user enterprises treated in the same way with other employees of the user enterprise? Do you have a mechanism to check the same?
5. Do you negotiate with user enterprises that the later shall provide a safe and healthy working environment, safety equipment and training on how to use them (most of which are under direct control of the user enterprise)?
6. Who is going to cover medical expenses for work related injuries covered by the labour proclamation?
7. Do you think triangular labour relation creates instability and insecurity on workers as compared to the standard labour relation?
8. Do you think triangular labour relation/ placing employees at the disposal of a user enterprise that do not have contractual relation with them/ is a threat to the survival of the principles of labour law?
9. Have you ever conducted assessment in relation to job satisfaction of workers you provide to other institutions? If so, what is their response?
10. What are the challenges your organization has faced so far in relation to triangular labour relation?
11. The law presumes any employment contract as one made for an indefinite period (art. 10 of proc. No 377/2003). Are contracts you conclude with workers for fixed term or indefinite period?
12. Do you charge payment against workers' wage?
13. Do your employees have trade unions/ are they allowed to have the same? Are they engaged in collective bargaining?

Annex III

Interview questions to be answered by user enterprises

1. Why do you prefer the triangular labour relation to the standard relation/ directly hiring workers?
2. Do you have other employees/ employees other than those provided by employment agencies?
3. Do you treat workers provided to you by agencies in the same manner with workers you directly employ?
4. What does your contract with the agencies provide with regard to liabilities in case of violation of the employment contract?
5. Is there any mechanism with which you check how the provider is handling its workers/ especially with regard to the rights and minimum working conditions under the law?
6. Do you make the work environment in which agency supplied workers work safe and healthy? Do you provide them with safety equipment with training?
7. Who is going to cover the medical cost of workers in case they suffer from occupational injury/ disease?
8. Are you aware of the joint and several liability you have with the employment agencies for the violation of employment contract made between the agencies and workers?
9. Do you share responsibilities attached with the status of employer with the agencies or you contract out all responsibilities?
10. How do you substitute agency worker you may find unsuitable for the work?
11. Do your organization directly contacts the workers or whenever there is a need to, you address the agency?

Annex IV

Interview questions for responsible persons at MOLSA and AABOLSA

1. Who is considered the employer in triangular labour relationship under Ethiopian labour law?
2. Does triangular labour relationship make workers insecure and instable as compared to bilateral labour relationship?
3. Are workers employed by agencies subject to abuse and violation of rights as compared to workers in bilateral labour relationship?
4. Does your institution have well organized inspection and supervision mechanism?
5. Do you take appropriate measures on employers found violating workers' right?
6. Do you think the alleged problems in triangular labour relationship are inherent and unavoidable?