

# International Labour Standards Regulating Employment Agencies

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## Introduction

Private employment agencies play an important role in the placement of natural persons into employment and help the state in the fight against unemployment. Contrary to state authorities, the private employment agencies provide their services for commercial purposes – making financial profit. In addition, apart from services for matching offers of and applications for employment and providing information related to job-seeking, the private employment agencies employ workers with a view to post them to perform work for a third party, so called user undertaking. Legislations of most developed countries regulate position and activities of private employment agencies in the labour market with the objective to prevent well-known abuses of workers or job-seekers using their services. The present paper is dedicated to regulation of private employment agencies at international level. Relevant instruments adopted by the International Labour Organisation (hereinafter the ILO) are analysed with respect to protection of workers using services of private employment agencies and effective functioning of labour markets. Particular attention is paid to standards adopted for the purpose of regulation of agency employment (temporary work) that is considered to be controversial in number of the ILO Member States.

## 1. Historical Background

First international standards relating to private employment agencies were adopted by the ILO during the World Economic Crisis. In 1933, the General Conference of the ILO adopted Convention no. 34 concerning Fee-Charging Employment Agencies and Recommendation no 42 concerning Fee-Charging Employment Agencies. The Member States that ratified this Convention were obliged to abolish all fee-charging employment agencies conducted with a view to profit within three years from the coming into force of this convention for the Member State concerned.<sup>1</sup> During the period preceding abolition of fee

<sup>1</sup> For the purpose of this Convention the expression *fee-charging employment agency* was defined as:

- a) Employment agencies conducted with a view to profit, that was to say, any person, company, institution, agency or other organisation which acted as an intermediary for the purpose of procuring employment for a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker; the expression did not include newspapers or other publications unless they were published wholly or mainly for the purpose of acting as intermediaries between employers and workers;

charging employment agencies the Member concerned was obliged to secure that any new fee-charging employment agencies conducted with a view to profit were established and that fee-charging employment agencies conducted with a view to profit were subjected to the supervision of the competent authority and could only charge fees and expenses on a scale approved by the said authority.

Convention no. 34 concerning Fee-Charging Employment Agencies stated exceptions from the obligation to abolish fee charging employment agencies conducted with a view to profit if such exceptions were allowed by the competent authority in exceptional cases, but only after consultation of the organisations of employers and workers concerned. Moreover, it was only possible to allow these exceptions for agencies catering for categories of workers exactly defined by national laws or regulations and belonging to occupations placing for which was carried on under special conditions justifying such an exception. Recommendation no 42 concerning Fee-Charging Employment Agencies explained that for certain occupations, the abolition of fee-charging employment agencies might involve certain difficulties in countries in which the free public employment offices were not in a position completely to take the place of the agencies abolished.

In 1949, the General Conference of the ILO decided to revise Convention no. 34 concerning Fee-Charging Employment Agencies. One of the reasons for adoption of the new Convention dealing with this issue was the low number of ratifications to the original Convention.<sup>2</sup> Compared to Convention no 34 concerning Fee-Charging Employment Agencies, the new instrument did not state the exact period of time for the abolition of fee-charging employment agencies conducted with a view to profit but provided that this period of time was to be determined by the competent authority. It is important to note that the revised Convention on Fee-Charging Employment Agencies enabled the abolition of such agencies only on condition that a public employment service was established. In addition, this Convention gave to the ILO Members which decided to ratify it the choice between two possibilities. The first possibility consisted in the progressive abolition of fee-charging employment agencies conducted with a view to profit and to regulate other agencies, the second possibility enabled the Member State only to regulate fee-charging employment agencies in general. It is noteworthy that the majority of 41 States that ratified the revised Convention concerning Fee-Charging Employment Agencies accepted the progressive abolition of these agencies and the regulation of other agencies. In practice, such measure led to the state monopoly in placement of persons into employment. "The application of the Convention has given rise to certain problems as regards the placement of performers and domestic servants, and

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b) Employment agencies not conducted with a view to profit, that was to say, the placing services or any company, institution, agency or organisation which, though not conducted with a view to deriving any pecuniary or other material advantage, levied from either employer or worker for the above services an entrance fee, a periodical contribution or any other charge.

<sup>2</sup> In fact, it was ratified by less than 10 countries.

more recently, in connection with the widespread establishment of fee-charging employment agencies.”<sup>3</sup>

Later several ILO Members denounced Convention no 96 concerning Fee-Charging Employment Agencies or several ILO Members decided to ratify it again and instead of the progressive abolition of fee-charging employment agencies to accept their regulation. The discussion relating to the organisation of placement services that is whether such services should be either public, or private continued. “The doubts expressed about the effectiveness of certain public employment agencies were obviously one aspect, the practices of private employment agencies another.”<sup>4</sup> At the 81<sup>st</sup> Session in 1994, the International Labour Conference dealt with private employment agencies and their role in the functioning of labour markets again and finally held the view that Convention no 96 concerning Fee-Charging Employment Agencies should be revised.<sup>5</sup>

## **2. Current ILO Standards Regulating Private Employment Agencies**

New instruments regulating private employment agencies were adopted by the International Labour Conference in 1997 as Convention no 181 concerning Private Employment Agencies (hereinafter the Convention) and Recommendation no 188 concerning Private Employment Agencies (hereinafter the Recommendation). Contrary to the abovementioned standards, this Convention does not focus on the abolition or strict regulation of fee-charging employment agencies but to the protection of workers using the services of private employment agencies. This approach is acknowledged by the International Labour Conference which took into consideration, in particular, the very different environment in which private employment agencies had operated, when compared to the conditions prevailing when Convention no 96 concerning Fee-Charging Employment Agencies had been adopted. Moreover, it recognises the role which private employment agencies may play in well-functioning labour market.<sup>6</sup> On the other hand, the International Labour Conference recalls the need to protect workers against abuses and recognises the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system.<sup>7</sup>

<sup>3</sup> Valticos, N., von Potobsky, G., International Labour Law, Kluwer Law and Taxation Publisher, Deventer, 1995, p. 139.

<sup>4</sup> Servais, J.-M., International Labour Law, Kluwer Law International, The Hague, 2005, p.175.

<sup>5</sup> The International Labour Conference reasoned among others that provisions of Convention no 96 concerning Fee-Charging Employment Agencies appeared to be removed from current practice in most labour markets and did not reflect current realities.

<sup>6</sup> See Preamble to the Convention.

<sup>7</sup> See Preamble to the Convention.

## 2.1. *Scope of Application of ILO Standards Regulating Private Employment Agencies*

The objective of the Convention is, among others, either to allow the operation of private employment agencies, or the protection of workers using their services within the framework of its provisions. For the purpose of the Convention, the term *private employment agency* is defined as any natural or legal person independent of the public authorities, which provides one or more of the following labour market services:

- a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationship which may arise therefrom;
- b) services consisting of employing workers with a view to making them available to a third party who may be a natural or legal person (referred to below as a user enterprise) which assigns their tasks and supervises the execution of these tasks;
- c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organisations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

The scope of application of the Convention includes all private employment agencies, all categories of workers and all branches of economic activity. However, the recruitment and placement of seafarers are excluded. It is worthy to note that for the purpose of the Convention the term *workers* includes jobseekers which means that provisions of the Convention protects both, persons before the establishment of the employment relationship and persons performing work for their employer.

As has been mentioned, the Convention does not prohibit the establishment or activities of private employment agencies. However, it states that a Member may, after consultation the most representative organisations of employers and workers concerned:

- a) prohibit, under specific circumstances, private employment agencies from operating in respect of certain categories of workers or branches of economic activity in provision of one or more services, or
- b) exclude, under specific circumstances, workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions, provided that adequate protection is otherwise assured for the workers concerned.<sup>8</sup>

The conditions governing the operation of private employment agencies in accordance with a system of licensing or certification shall be determined by a Member.

<sup>8</sup> Any prohibition or exclusion shall be specified in the reports submitted to the International Labour Office.

## *2.2. Equality of Opportunity and Equality of Treatment*

Since the principle of equal treatment and equality of opportunities is one of the most important principles governing relations between employers and workers the ILO standards are based on, the Convention expressly states the guarantees relating to the issue. A Member ratifying it shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability. The enumeration of prohibited grounds of discrimination stated by the Convention is thus open-ended. The principle of equal treatment provided by the Convention may be understood as including all mentioned grounds of discrimination or as guaranteeing protection against discrimination based on certain grounds such as age or disability only on condition that they are covered by national law or practice.<sup>9</sup>

Detailed provisions concerning the principle of equal treatment and equal opportunity are stated by the Recommendation that highlights the prohibition or prevention from drawing up and publishing vacancy notices or offers of employment in ways that directly or indirectly result in discrimination on grounds such as race, colour, sex, age, religion, political opinion, national extraction, social origin, ethnic origin, disability, marital or family status, sexual orientation or membership of a workers organisation. It can be seen that compared to the Convention, the Recommendation provides larger enumeration of grounds of discrimination recognised prohibited with respect to offers of employment.

However, the equality of treatment and equality of opportunity as defined by the Convention shall not be implemented in such a way as to prevent private employment agencies from providing special services or targeted programmes designed to assist the most disadvantaged workers in their job-seeking activities. Positive measures to promote placement of disadvantaged groups such as socially excluded persons, workers and jobseekers with special needs, persons with disabilities or elderly employees are not precluded by the Convention. According to the Recommendation private employment agencies should be encouraged to promote equality in employment through affirmative action programmes.

## *2.3. Protection of Workers Using Services of Private Employment Agencies*

As has been mentioned, one of the purposes of the Convention is the protection of workers using services of private employment agencies. This objective shall be reached by several guarantees for workers, in particular by:

- a) Protection of personal data
- b) Prohibition of charging any fees to workers
- c) Protection of collective rights

<sup>9</sup> See Komendová, J., *Mezinárodní a komunitární úprava agenturního zaměstnávání*. In *Liberalizácia pracovného práva a nové trendy vo vývoji pracovných vzťahoch*. Univerzita Pavla Jozefa Šafárika v Košiciach, Košice, 2010, p. 200.

Ad a) Processing of personal data of workers by private employment agencies shall be done in a manner that protects this data and ensures respect for workers privacy in accordance with national law and practice. In addition, such processing shall be limited to matters related to qualification and professional experience of the workers concerned or any other directly relevant information. According to the Recommendation private employment agencies should be prohibited from recording, in files or registers, personal data which are not required for judging the aptitude of the applicants for jobs for which they are being or could be considered.<sup>10</sup> Measures should be taken to ensure that workers have access to all their personal data as processed by automated or electronic systems, or kept in a manual file. These measures should include the right of workers to obtain and examine a copy of any such data and the right to demand the incorrect or incomplete data be deleted or corrected. The Recommendation pays particular attention to information on the medical status of a worker. Such information should not be required, maintained or used by the private employment agencies unless directly relevant to the requirements of a particular occupation and with the express permission of the worker concerned, or should be used to determine the suitability of a worker for employment.

Ad b) As has been mentioned throughout the paper, the Convention does not focus on the abolition of fee-charging employment agencies or on prohibition of their activities. In practice, employment agencies which are private operate with a view to make profit and provide their services which are paid. However, the Convention prohibits charging, any fees to workers. In other words, private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers. Fees charged by the private employment agencies are thus paid by other subjects for example employers using their services in order to find qualified workforce or user enterprises. Exceptions to this rule may be authorized by the competent authority in respect of certain categories of workers, as well as specified types of services provided by private employment agencies. In any case, such exceptions shall be stated in the interest of the workers concerned, and after consulting the most representative organizations of employers and workers.<sup>11</sup>

Ad c) The right to freedom of association and the right to bargain collectively are recognised as fundamental social rights of employees. The Convention acknowledges that these rights are not denied to workers recruited by private employment agencies. Particular attention is paid to the right to freedom of association and to bargain collectively with respect to workers employed by the private employment agency with a view to making them available to a third party – a user enterprise, which assigns their tasks and supervises the execution of these tasks. Moreover, the Recommendation states that private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.

<sup>10</sup> Private employment agencies should store the personal data of a worker only for so long as it is justified by the specific purposes for which they have been collected, or so long as the worker wishes to remain on a list of potential job candidates.

<sup>11</sup> A Member which has authorized these exceptions shall, in its reports, provide information to the International Labour Office on such exceptions and give the reasons therefor.

#### *2.4. Special Protection of Temporary Workers*

The most controversial activities of private employment agencies are the services consisting in employing workers with a view to making them available to a third party who may be a natural or legal person, called by the Convention user enterprise, which assigns their tasks and supervises the execution of these tasks. This form of employment, described in national legislations as agency employment or temporary work, is generally considered as one of the flexible forms of employment. At the same time, it is recognised as very risky as far as the social position and the social protection of employees concerned.<sup>12</sup> The Convention provides that a Member shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by the private employment agencies with a view to making them available to user enterprise. Apart from the freedom of association and collective bargaining mentioned above, such measures shall include: 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, compensation in case of insolvency and protection of workers claims and maternity protection and benefits, and parental protection and benefits. The purpose of such provision is to guarantee the protection of temporary workers with respect to fundamental working conditions and social security benefits. The guaranties in the field of social security are of particular importance because temporary workers are generally jeopardised by exclusion from the social security systems.

In practice, determination of responsibilities concerning work performance and related issues appears controversial because the worker performs work for other natural person or legal entity than his employer that is the private employment agency. The Convention states the rule that the respective responsibilities of private employment agencies providing services as employers assigning their workers to user enterprises and of these enterprises in relation to collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits, access to training, protection in the field of occupational safety and health, compensation in case of occupational accidents or diseases, compensation in case of insolvency and protection of workers claims and maternity protection and benefits, and parental protection and benefits shall be determined and allocated by a Member in accordance with a national law and practice.

#### *2.5. Cooperation between Private Employment Agencies and Public Employment Services*

The ILO instruments relating to employment services adopted before the Convention were based on the idea of state monopoly in placement of workers. By adopting the Convention the ILO recognised private employment agencies as regular placement services. Moreover, the purpose of its provision is, among others, to encourage collaboration between public employment services and

<sup>12</sup> See Gregorová, Z., *Agency Employment – Contracts Based on Unstable Work. Labour Law and Labour Market in the New World Economy*, Università degli Studi di Milano, Milano, 2010.

private employment agencies. A Member shall, in accordance with a national law and practice and after consulting the most representative organisations of employers and workers, formulate, establish and periodically review conditions to promote cooperation between the public service and private employment agencies. More details regarding to particular measures that could be adopted to promote such cooperation are stated by the Recommendation. They include, inter alia, pooling of information and use of common terminology so as to improve transparency of labour market, functioning, exchanging vacancy notices, launching of joint projects for example in training of staff.

However, the Convention expressly states that mentioned conditions should be based on the principle that the public authorities retain final authority for formulating labour policy and utilizing or controlling the use of public funds earmarked for the implementation of that policy.<sup>13</sup> Private employment agencies shall, at intervals to be determined by the competent authority, provide to that authority the information required by it, with due regard to the confidential nature of such information:

- a) To allow the competent authority to be aware of the structure and activities of private employment agencies in accordance with national conditions and practices;
- b) For statistical purposes.

The competent authority shall compile and, at regular intervals, make this information publicly available.

### 3. Conclusions

Standards relating to employment agencies adopted within the framework of the ILO make difference between placement services that are public and private employment agencies that may operate with a view to profit. As has been mentioned throughout the paper, the ILO has been regulating activities of private employment agencies since the World Economic Crisis in 1930s. Compared to original standards adopted at that time with the objective to abolish the existing fee-charging employment agencies and prevent the establishment of new ones, the current standards take into account the role of private employment agencies in well-functioning labour market. Private employment agencies are recognised as regular and useful placement services that should cooperate with public employment services. The ILO standards regulate only activities of private employment agencies with the objective to prevent abuses of workers or job-seekers using their services, in particular protection of workers employed by the private employment agencies with the purpose to be assigned to user enterprise. This protection includes working conditions such as health and safety at work, working hours, remuneration, right to association, collective bargaining or access to vocational training. Moreover, guarantees concerning social security for instance maternity benefits and parental benefits shall be assured for such workers as well.

<sup>13</sup> According to the Recommendation bodies may be established that include the representatives of the public employment services and private employment agencies, as well as of the most representative organisations of employers and workers.