Report of the United States of America
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Theme 3:

The self-employed: the legal regime and the extension to the same of rules and institutions of labor law

Characterization of Self-Employment

Are the following definitions of "employer and "self-employed" applicable to your country?

"Employer:" A person who operates his/her own enterprise or business, or develops his own career and that is responsible for one or more paid workers.

"Self-employed:" A person who operates his/her own enterprise or business, or develops his own career without any paid worker at his charge.

Yes, these definitions generally are applicable in the United States. An "employer" is a person or entity that employs employees and directs their work performance. A "self-employed" worker is in business for his/her self and is not subject to the direct control of an employing entity.

In the United States, self-employed workers include those defined by the ILO as "own-account workers." Such a worker is referred to in the United States as an "independent contractor" and is distinguished in status from that of an "employee." Members of a producers' cooperative and contributing family workers may have the status either of a self-employed partner working in a partnership, or, if subject to the direct control of the employing entity, the status of an employee. Some statutes in the United States exempt contributing family members who are minors from the definition of a covered employee.

What are the criteria that distinguish self-employment from that of employment governed by labor and employment law regulation? Is the essential difference located in the concept of "subordination" or "dependency?"

In general, labor and employment law regulation in the United States applies only to those workers who meet the definition of an "employee," but not to those workers legally defined as an "independent contractor." Thus, it is crucial to determine whether individual workers are employees or independent contractors.

The most frequently used test for determining employee status is based uponthe common law definition described in the Restatement (Second) of Agency. The Restatement states that an

employee or "servant" is "a person employed to perform services in the affairs of another . . . subject to the other's control or right to control." The Restatement goes on to list ten factors relevant to this determination:

> In determining whether one acting for another is a servant [i.e. employee] or an independent contractor, the following matters of fact, among others, are considered:
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> a. The extent of control which, by the agreement, the master may exercise over the details of the work;
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> b. Whether or not the one employed is engaged in a distinct occupation or business;
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> c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> d. The skill required in the particular occupation;
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> e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> f. The length of time for which the person is employed;
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> g. The method of payment, whether by the time or by the job;
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> h. Whether or not the work is part of the regular business of the employer;
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> i. Whether or not the parties believe they are creating the relation of master and servant; and
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> j. Whether the principal is, or is not, in the business.

Restatement (Second) of Agency § 220(2).

The United States Supreme Court in *Nationwide Mutual Insurance Co. v. Darden,* 503 U.S. 318 (1992) ratified the common law test as applicable to most labor and employment contexts. The Court stated that the common law test applies unless a particular statute expresses a contrary intention. In that decision, the Court made some minor modifications to the Restatement definition, adding, among other things, factors that address the economic aspects of the relationship. The Court described the factors to be considered as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method

> of payment; the hired party's role in hiring and paying assistants; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. 323–24. The Court further noted that these factors are to be considered in their totality, with no one factor being determinative.

A more expansive "economic realities" test is used to determine employee status for purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and the Family and Medical Leave Act, 29 U.S.C. §§ 2601-54. Under the economic realities test, the courts measure the economic dependence of the worker by considering certain factors in the parties' relationship, many of which are similar to the Restatement factors. The six specific factors to be considered are:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.

Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) and Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981)). In addition, courts should consider whether, as a matter of economic reality, the individuals "are dependent upon the business to which they render service." *DialAmerica*, 757 F.3d at 1382. The economic realities test has the practical effect offinding more workers to be covered employees than does the common law test.

In general, the tests used in the United States to determine employee status reflect the notion that employees are "subordinate" or "dependent," while independent contractors are not. This distinction, however, is not precise. It is widely recognized that the common law test may operate to define a worker as a non-covered independent contractor by application of the listed factors, even though such a worker may generally be dependent upon work provided by a single entity. *See* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. &POL'Y J. 187, 227 (1999).

Are these criteria derived from legislation, jurisprudence, or doctrine?

The criteria for determining employee status are derived from common law jurisprudence. While most labor and employment statutes expressly apply only to "employees," these statutes generally do not define who is a covered employee. As a result, the courts look to the judge-made criteria in determining employee status.

Does your country recognize a class of "economically dependent self-employees?"

Some countries recognize a class of economically dependent self-employees who are covered by labor and employment regulations even though they may not fall within the technical definition of an "employee." The United States does not recognize such a category, although some scholarly commentators have recommended such an expansion in regulatory coverage. *See* Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent* Work, 24 BERKELEY J. EMP. & LAB. L. 153, 173-74 (2003). As such, labor and employment regulation in the United States applies only to those workers who come within the formal definition of an "employee."

Does the law provide effective mechanisms for the occupational misclassification of workers as independent contractors?

Employers have a great incentive to classify workers as independent contractors in order to avoid labor and employment law regulation. In addition, contingent workers generally, but not always, receive less in pay and benefits than do full-time employees. Thus, some employers attempt to structure employment by contract or otherwise so as to avoid employee status. The case law makes it clear, however, that a worker's status is to be determined by an examination of actual work arrangements rather than by the label provided by a written contract.*See, e.g.*, *Fitzgerald v. Mobil Oil Corp.*, 827 F. Supp. 1301 (E.D. Mich. 1993).

The United States Department of Labor and many state governments are currently undertaking increased efforts to combat the misclassification of workers Nonetheless, the misclassification of workers is common and difficult to prevent.

Collective Rights

Does the Constitution or the law provide for the establishment of autonomous workers' unions? Do they have the right to bargain collectively? Do they have the right to strike?

Private sector employees in the United States have the right to join a union, to bargain collectively, and to engage in peaceful economic strikes under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69. Public sector employees are excluded from the NLRA, but a majority of states have adopted statutes that permit most public employees to join unions and to bargain collectively. A significant majority of state statutes prohibit public employee unions from engaging in strikes.

These collective rights are granted only to "employees' and not to independent contractors. Accordingly, self-employed workers do not have a protected right to bargain collectively or to engage in strike activity.

Workers who are employed by a staffing firm that leases such workers to user firms may organize into a union consisting of employees of the staffing firm. Such a union has the right to engage in collective bargaining and strikes with respect to the staffing firm employer. The National Labor Relations Board has ruled, however, that such leased employees may not be included in a bargaining unit with the non-leased employees of the user firm without the consent

of both the staffing firm and user firm employers. *See H.S. Care, LLC*, 343 N.L.R.B. 659 (2004).

Social Security

Is there a social security scheme? Is it mandatory or voluntary? What are the areas (health), pensions, unemployment) that are part of the social security system? Are there mechanisms to cover accidents at work?

The United States does not have a comprehensive national social security system. Instead, a variety of benefits are provided through a patchwork of federal and state programs.

1) Social Security Retirement Benefits. The federal Social Security retirement program is a mandatory defined benefit system that provides a modest level of retirement benefits for retirees with a prior work attachment. While most retiree benefits are financed by means of a joint employer and employee payroll tax, self-employed workers participate by making a somewhat higher annual contribution which is set off by a deduction for income tax purposes.

2) Pensions. Beyond Social Security retirement benefits, pension coverage in the United States is voluntary rather than mandatory. Self-employed workers have the option of contributing to tax-deferred individual retirement accounts which are in the form of a defined contribution plan.

3) Health. Until recently, the United States neither provided nor mandated health insurance for most workers. While a majority of employees received coverage through employer-sponsored plans, most self-employed workers did not have such coverage. The recently enacted Affordable Care Act mandates that by 2014 most individuals, including self-employed workers, must either obtain coverage through employment or subsidized health exchanges or pay a monetary penalty. It is anticipated that the statute will significantly increase the proportion of self-employed workers who are covered by health insurance policies.

4) Unemployment Benefits. Unemployment benefits are provided on a temporary basis (usually 26 weeks) through a combination of state laws and federal funding for employees who are unemployed, but actively seeking new work. Independent contractors are not eligible to receive such benefits.

5) Workers Compensation Benefits. Medical benefits and partial income replacement are provided under state statutes for work-related injuries regardless of fault. Independent contractors generally are not eligible to receive such benefits. Most state laws, however, extend coverage to circumstances in which an employer gets part of its regular work performed by the employees of a contractor that does not carry workers compensation insurance.

Family and Microenterprises

Is there specific legislation for family businesses or microenterprises? Does such legislation cover labor issues or promote the establishment of unions in such enterprises? Is the microenterprise entrepreneur treated as an employer or an employee for social security and tax purposes?

Family businesses and small enterprises with five or fewer employees certainly exist in the United States, but they represent a relatively small sector of the U.S. economy. In general, workers employed by such small businesses have the same rights and privileges as other employees, but there is no legislation that specifically regulates the employment terms of such enterprises.

A number of federal statutes do not extend social protection to the employees of small businesses. For example, Title VII, which prohibits discrimination in employment, only applies to employers having 15 or more employees. The Family and Medical Leave Act does not grant protected leave rights to the employees of firms having fewer than 50 employees. The National Labor Relations Act, which protects the rights of private sector employees to organize and collectively bargain, is not enforced with respect to retail enterprises having less than $500,000 in gross volume. In practice, very few employees of such enterprises are represented by unions.

The social security and tax treatment of a small business entrepreneur depends upon the legal organizational structure established for such an enterprise. If the enterprise is unincorporated, the owner will be treated as an employer. If the enterprise is established as a corporation with the entrepreneur serving as one of its employees, the corporation will be treated as an employer, but the entrepreneur's paid earnings will receive employee treatment.

Informality

What is the status of "informal" employment in your country? Statistically, what is the rate of the informal economy and employment? Is there a policy or plan to formalize the informal activities?

For much of the 20th century, the predominant employment model in the United States could be described as that of a "core worker system" characterized by long-term employment relationships. Today, in contrast, a large and growing group of workers provide labor or services based on a variety of arrangements that deviate from the traditional core worker model. This"contingent workforce," as it is known in the United States, encompasses a diverse group of non-core workers who provide work other than on a long-term, full-time basis. Contingent workers can be grouped into two broad categories. One group, consisting of independent contractors, contracted workers, and leased employees, are not legally classified as employees of the entity for whom they provide services. The second group, consisting of part-time and temporary employees, has the legal status of employees, but with a lessened degree of attachment to the workplace as compared to traditional "core" employees. Both groups of workers, however, are not typically considered a part of the corporate family and have lesser expectations of stable, long-term employment with a single employing entity. Although it is difficult to determine the exact number of contingent workers, reliable estimates range upwards

to 20 percent of all American workers. STEPHEN F. BEFORT& JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS 56-57 (Stanford University Press 2009).

Some studies indicate that as many as 60 percent of temporary employees and 25 percent of part-time employees would prefer more traditional full-time jobs. BEFORT& BUDD, *supra*, at 57.On the other hand, some contingent workers prefer that form of work arrangement. Among the cited reasons are as a means of obtaining new training and skill enhancement, exploring whether the work is suitable to them, and or gaining an opportunity to demonstrate potential as a regular hire. Also, some report a preference for the resulting variety in work activities or ability to adjust their work schedule to other demands or desires including family commitments, volunteer activities, recreation, formal education, or pursuing low paid or unpaid creative endeavors. See: M. Lundy, K. Roberts & D. Becker, *Union Responses to the Challenges of Contingent Work Arrangements*, in THE SHADOW WORKFORCE 99, 102 (S. Gleason, Ed. 2006).

Many firms see contingent work arrangements as a means to increase their labor market flexibility. Contingent workers add to the flexibility of the workforce by enabling companies to adjust personnel and staffing needs while avoiding the expense of hiring and laying off regular employees. Further, employers also have an incentive to hire contingent workers who typically work for lesser amounts of pay and benefits, especially those who, by virtue of falling outside the definition of an "employee," are exempt from most labor and employment regulation.

The principal shortcoming of this increase in contingent work arrangements is that many of these workers do not receive the social protection of U.S. labor and employment legislation even though many of such workers serve in a dependent or subordinate capacity. Workers who do not qualify as "employees," for example, do not have protected collective bargaining rights, protection against discrimination, or the benefits of unemployment compensation. While many scholars have urged a redefinition of the employment relationship and a greater parity in legal rights, the United States has not adopted a program to "formalize the informal activities" other than to provide additional scrutiny with regard to the misclassification of employees as independent contractors.