

NON-STANDARD WORKERS: GOOD PRACTICES OF COLLECTIVE BARGAINING AND SOCIAL DIALOGUE

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1. Introduction

Globalization has intensified competition and the need for enterprise flexibility, bringing about changes in the production system, with more emphasis on supply chains and multi-tiered contracting. Technological changes and new work processes made it possible for companies to outsource services and parts of their production. Such economic and technological changes have led to profound changes in the organization of work, particularly in the labour market, giving rise to an increasing variety of “non-standard” work arrangements.² “Non-standard” work arrangements are defined in this paper as: (a) those associated with employment relationships in which workers are directly employed but with various types of fixed-term or short-term contracts, or part-time and home-work contracts; or those in which workers are not employed directly by the user company, but by a subcontractor or a temp work agency;³ (b) those outside employment relationships with civil and commercial contracts, including where employment relationships are disguised as self-

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² Casale, G. 2011. *The Employment Relationship: A Comparative Overview*. Geneva: ILO/Hart.

³ ILO. 2012a. *Fundamental Principles and Rights at Work: From Commitment to Action*, International Labour Conference, 101st Session, Geneva: ILO.

employment or the existence of an employment relationship is unclear.⁴ In other words, the term “non-standard work” is used to distinguish such work from the standard or regular model of full-time, permanent and direct employment with a single employer, recognizing that in many countries the latter is no longer being seen as “standard”.⁵

The expanding use by businesses of both existing and emerging non-standard forms of work has led to changes in labour market regulation, while fiercer global competition equally has driven many countries toward labour market deregulation, resulting in increased flexibility in labour markets which allows various work arrangements for workers. These structural changes in the organization of work have on one hand created greater choice, freedom and opportunities to work, with both workers and employers benefiting from a variety of forms of non-standard work arrangements, some of which have facilitated mutually agreed ways of working flexibly. On the other hand, however, the increasing use of non-standard work arrangements which allow greater flexibility has led to more uncertainty and precariousness among the growing number of workers who involuntarily engage in them.⁶

A combination of a number of elements stemming from the nature of the contract as well as the characteristics of non-standard work arrangements, together with the preferences (willingness) of those who engage in non-standard work, determine precariousness.⁷ As compared

⁴ Casale, G., *op. cit.* See also ILO. 2006. *The Employment Relationship*, International Labour Conference, 95th Session. Geneva: ILO. A particular problem which commonly arises is that the legal structure of the working arrangement does not clearly correspond with the legal definition of an employment relationship. In some cases, the difficulties stem from deliberate manipulation of the legal structure of the work arrangement, or from the employer treating an individual as other than an employee, in a way that hides the latter’s true legal status as an employee; in other words, efforts to disguise employment relationships.

⁵ There is no single and universally accepted terminology describing such existing and emerging forms of work and, depending on the country, region and political or socio-economic background or labour market, a variety of terms have been used. Thus, “non-standard” work is variously referred to as “atypical”, “non-regular” or “contingent” work.

⁶ Casale, G., *op. cit.*.

⁷ The concept of “precarious work” is strongly interrelated with that of non-standard work. For example, Fudge and Owens identify “precarious work” as “work that departs from the normative model of the standard employment relationship (which is a full-time and year-round employment relationship for an indefinite duration with a single employer) and is poorly paid and incapable of sustaining a household”. See Fudge, J., and R. Owens, eds. 2006. *Precarious*

with standard workers, non-standard workers tend to be associated with conditions such as lower job security or employment protection; lower wages, income and non-wage welfare benefits; limited training opportunities; lower occupational safety and health protection; fluctuations in hours of work and/or volume of work; lower social security and social protection coverage; limited mobility toward better-quality jobs or positions; low or no trade union representation or collective bargaining coverage; and low or no labour law coverage or its application.⁸ The global financial crisis of 2008 further worsened the work and life prospects of precarious groups in most countries, in particular workers in small and medium-sized enterprises (SMEs), contract and temporary workers, and vulnerable groups such as migrant workers, women, young workers and the poor.⁹ The crisis is widely thought to have had a particularly severe impact on workers engaged in non-standard forms of work. The ways that these workers, despite their preference to engage in better-quality jobs, continue to face such unfavourable situations involuntarily either due to lack of labour market alternatives or limited upward mobility, has led to greater segmentation of the labour market, in which disparity persists in terms of job quality and job security between workers with different contractual status or work arrangements.

Among a number of conditions associated with non-standard working arrangements, this paper provides a comparative overview of how collective bargaining and social dialogue¹⁰ are used to improve job quality

Work, Women and the New Economy. Oxford: Hart. The ILO notes that “the definitions of ‘precarious’ and ‘atypical’ overlap, but are not synonymous” and that “‘precarious’ work refers to ‘atypical’ work that is involuntary—the temporary worker without any employment security, the part-time worker without any employment security, the part-time worker without any pro-rated benefits of a full-time job, etc.”. See ILO. 2010. *Employment Policies for Social Justice and a Fair Globalization*, International Labour Conference, 99th Session. Geneva: ILO.

⁸ ILO. 2011a. “Policies and Regulations to Combat Precarious Employment,” Background paper presented at the International Workers’ Symposium on Policies and Regulations to Combat Precarious Employment, Geneva, Switzerland, October 2011.

⁹ ILO. 2011b. *World of Work Report 2011: From One Crisis to the Next?* Geneva: ILO.

¹⁰ Collective bargaining is defined to extend to “all negotiations which take place between an employer, a group of employers or one or more employers’ organizations, on one hand, and one or more workers’ organizations, on the other, for: (a) determining working conditions and terms of employment; (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers’ organization or workers’

and job security, as well as the overall labour market status of non-standard workers. The second section of this paper identifies the underlying factors which have resulted in a limited capacity of non-standard workers to exercise collective bargaining. The third section attempts to map a variety of good examples of how collective bargaining has been structured to reduce representative segmentation and expand its coverage to non-standard workers, as well as how various issues are negotiated to improve their job security and job quality.¹¹ The fourth and fifth sections briefly touch upon the roles that other forms of social dialogue—tripartite social dialogue and workplace-level information sharing and consultation—play in supporting collective bargaining developments which benefit non-standard workers.¹² The paper draws on a number of national studies, which were conducted as a pilot project by the Industrial and Employment Relations Department of the ILO,¹³ and secondary sources.

2. Obstacles to Effective Collective Bargaining for Non-standard Workers

Freedom of association and collective bargaining has been acknowledged as a means for improving and regulating terms and conditions of work and advancing social justice since the ILO's very

organizations" (ILO Convention No. 154). Social dialogue in the ILO definition includes "all types of negotiation, consultation or simply exchange of information either among the social partners, or by tripartite partners at the national level, on issues of common interest relating to economic and social policy" (ILO. 1996. *Tripartite Consultation at the National Level on Economic and Social Policy*, International Labour Conference 83rd Session, Geneva: ILO).

¹¹ Some such initiatives were demonstrated at the ILO's High-level Tripartite Meeting on Collective Bargaining, Geneva, 19-20 November 2009. http://www.ilo.org/ifpdial/events/conferences/WCMS_168318/lang--en/index.htm (accessed 6 February 2013).

¹² The paper limits its scope to country-level collective bargaining and social dialogue practices; the examination of social dialogue at the international level is left for a future research agenda.

¹³ The national studies on India, Japan and South Africa are available as working papers: <http://www.ilo.org/ifpdial/information-resources/publications/lang--en/index.htm> (accessed 6 February 2013).

foundation in 1919.¹⁴ The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), are recognized as fundamental rights and principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The 1998 Declaration recalls that all member States, from the very fact of their membership in the Organization, have an obligation to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant Conventions. The realization of freedom of association is an essential precondition for the effective realization of the right to collective bargaining. These fundamental rights apply to all workers with the exception of members of the armed forces and the police (Convention No. 87, Article 9; Convention No. 98, Article 5), and public servants engaged in the administration of the State (Convention No. 98, Article 6), irrespective of their work arrangements or employment status.¹⁵ The ILO Declaration on Social Justice for a Fair Globalization also underscores the significance of fundamental principles of freedom of association and the right to collective bargaining as both rights and enabling conditions for attaining the ILO's strategic objectives – promoting employment, developing and enhancing measures of social protection, promoting social dialogue and tripartism, and respecting, promoting and realizing the fundamental principles and rights at work.¹⁶

A wider use of non-standard work arrangements poses multiple challenges to their application and practices. National statistics on the overall unionization rates and collective bargaining coverage of non-standard workers remain scarce except for some countries and/or some specific categories of workers.¹⁷ In Japan, for example, the overall

¹⁴ ILO. 1919. *Part XIII of the Treaty of Versailles, Declaration of Philadelphia, and Constitution of the International Labour Organization*.

¹⁵ The ILO supervisory bodies have underlined in the cases dealing with different categories of workers that these fundamental rights should be afforded to all workers. The authorized exceptions set out in the Conventions are also interpreted in a restrictive manner by the ILO supervisory bodies. For more details, see Rubiano, C. "Precarious Workers and Access to Collective Bargaining: Are There Legal Obstacles?" circulated at the International Workers' Symposium on Policies and Regulations to Combat Precarious Employment, Geneva, Switzerland, October 2011. See also ILO. 2012b. *Giving Globalization a Human Face*. International Labour Conference, 101st Session, Geneva: ILO.

¹⁶ ILO. 2008. *ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 97th Session, Geneva: ILO.

¹⁷ ILO. 2012a, *op. cit.*

unionization rate was 18.5% in 2010, but that of part-time workers was far lower at 5.6% in the same year.¹⁸ Such a huge disparity in trade union representation by employment type applies to the Republic of Korea, where the unionization rate of temporary workers is merely 1.0%, but that of full-time regular employees was 20.5% in 2009.¹⁹ It is also observed that a growing number of complaints to the Freedom of Association Committee of the Governing Body of the ILO (CFA) are related to the situation facing non-standard workers.²⁰ Limitations in terms of their ability to engage in collective bargaining and to have access to collective bargaining tend to be associated with the fact that these non-standard working arrangements do not fit within the traditional model of “standard” employment associated with full-time, permanent, direct employment with a single employer, on which national legislation as well as industrial relations institutions and practices have long focused.

One major hindrance to advancing collective bargaining for non-standard workers is their limited attachment to a single workplace/employer as compared with standard workers.²¹ When workers are directly employed for a long period by a single employer, their interests are easier to represent collectively. However, non-standard “employees” in employment relationships are either (a) directly employed, but with non-stable and/or temporary employment, so that association with the single employer is limited (e.g. part-time, fixed-term workers); or (b) not directly employed by the “principal” or “factual” employer (e.g. user enterprises, client firms) for which or where they actually work. In countries where enterprise bargaining is predominant, such limited attachment to workplaces poses a serious challenge to exercising collective bargaining. These workers are often excluded from trade unions or the bargaining unit of standard workers, whose attachment to single employers is strong, creating difficulties in forming a similarly effective bargaining unit.²² Even in countries where bargaining at a more centralized level is predominant, in cases where such workers move

¹⁸ JILPT website [in Japanese]: <http://www.jil.go.jp/kokunai/statistics/shuyo/index.html> (accessed 6 February 2013).

¹⁹ Kim, H., and J.-H. Part. 2012. “Rebuilding the Employee Representation System: Necessity and Basic Direction,” KLI Working Paper No. 53, Seoul: Korea Labor Institute.

²⁰ ILO. 2012a, *op. cit.*

²¹ Wills, J. 2009. “Subcontracted Employment and Its Challenge to Labour,” *Labour Studies Journal* 34, No. 4:443-444.

²² ILO. 2011a, *op. cit.*

beyond sectors from one job to another, sectoral representation and solidarity become difficult.²³ Under these circumstances, even when the rights of such workers to organize and bargain collectively are guaranteed under the applicable industrial relations legislation, it is difficult for them to effectively exercise those rights. Such erosion of the direct employment relationship with a single employer has thus resulted in a decline in trade union membership and the fragmentation of collective bargaining.²⁴ Moreover, growing numbers of workers nowadays engage in work not as employees but as self-employed workers through individual commercial contracts (e.g. independent contractors and freelance workers). In many countries, particularly developing countries, the magnitude of the informal economy is such that workers often work without any formal contractual relationships, or the applicable law is not enforced to protect them.²⁵

Second, non-standard workers themselves can be reluctant to exercise rights to organize and bargain collectively because of fear of job losses, even when they can do so in practice or in theory.²⁶ A fragmented workforce implies that there are different segments of workers in the same workplaces with diverse interests and different contractual status, which can trigger and intensify conflicts among the workers themselves instead of labour-management conflict, thereby hindering solidarity among workers. The trade union members in standard employment may regard unorganized workers in non-standard employment as a threat.²⁷

Third, in cases of triangular employment relationships involving agencies or subcontractors, identification of the employer that can be “practically” responsible as a negotiating party has been a difficult task.²⁸ In such triangular settings, actual contractual employers (e.g. agencies, subcontractors) are not necessarily the appropriate and influential negotiating parties with the ultimate decision-making power in negotiating

²³ Bosh, G. 2010. “Low-Wage Work in Five European Countries and the United States,” *International Labour Review* 148, No. 4:337-356; Nissen, B., ed. 2001. *Unions in a Globalized Environment: Changing Borders, Organizational Boundaries and Social Roles*, New York: M.E. Sharpe.

²⁴ ILO. 2011a, *op. cit.*

²⁵ ILO. 2012a, *op. cit.*

²⁶ Anwar, R. P., and A. Supriyanto. forthcoming. “National Study on Indonesia: Non-standard work, Social Dialogue and Collective Bargaining,” DIALOGUE Working Paper, Geneva: ILO.

²⁷ Theron, J. 2011. “Non-standard Workers, Collective Bargaining and Social Dialogue: The case of South Africa,” DIALOGUE Working Paper No. 28, Geneva: ILO.

²⁸ Rubiano, C., *op. cit.*

terms and conditions of work.²⁹ For example, contracting/subcontracting firms or temporary work agencies are often small and medium-sized enterprises facing fierce competition and coming under pressure from those with the real power over the contracting process. The client enterprises may deliberately use subcontractors or agencies for the purposes of the “outsourcing” of responsibilities and burdens for employees that “legal” employers bear.³⁰ In these cases, negotiating better terms and conditions of work with “legal” employers might end up in job losses due to loss of competition with competitors. Meaningful collective bargaining thus may not take place unless negotiation involves “factual” employers in power (e.g. user/client enterprises).

Finally, the applicable industrial relations legislation which regulates workers’ collective rights is often either not responsive enough or fails to cover certain categories of workers.³¹ Sets of restrictions on who may join or form which unions, which unions may exercise the right to collective bargaining, and legal uncertainty or ambiguity about the scope of employment relationships or the legal notion of “workers” under the legislation, can hinder certain categories of non-standard workers from exercising their collective rights.³² Covering certain categories of non-standard workers under the applicable legislation may become narrower when it sets its scope only to “employees” in employment relationships.³³ While the employment relationship is a notion which creates a legal link between a person, called the “employee”, with another person, called the “employer”, to whom she or he provides labour or services under certain conditions in return for remuneration,³⁴ the term “worker” is a broader term that can be applied to anyone performing work, regardless of whether or not she or he is an employee. Neither ILO Convention No. 87 nor No. 98 limits their scope of application to those who are associated with employment relationships. Moreover, even when the industrial relations legislation does not include restrictions on the scope of workers to be

²⁹ Wills, J., *op.cit.*

³⁰ Davidov, G. 2004. “Joint Employer Status in Triangular Employment Relationships,” *British Journal of Industrial Relations* 42, No. 4:727-746.

³¹ See for example, Casale, G., *op. cit.*

³² See for example, ILO. 2012b. *Giving Globalization a Human Face*. International Labour Conference, 101st Session, Geneva: ILO.

³³ Ebisui, M. 2012b. “Non-standard Workers: Good Practices of Social Dialogue and Collective Bargaining,” *E-Journal of International and Comparative Labour Studies* 1, No. 3-4:211-246

³⁴ ILO. 2006. *The Employment Relationship*, International Labour Conference, 95th Session, Geneva: ILO.

covered and provide an enabling environment for these workers to have access to and engage in collective rights, other areas of labour law and policies that are intended to offer certain protections (e.g. working conditions, employment protection, occupational health and safety, social security measures and protection) to those who are in a legally constituted employment relationship may result in a substantively limited negotiable agenda and have an effect of limiting capacity for exercising collective bargaining.³⁵ Developments in various areas of labour law and industrial relations advancement are thus inseparable.

3. Good Practices of Collective Bargaining for Non-standard Workers

Country experiences demonstrate that social partners have explored various ways to overcome obstacles to exercising collective bargaining, and to address a variety of issues regarding non-standard workers, albeit limited so far in terms of the numbers of workers covered and the impact achieved. Such attempts can be categorized largely into approaches that frame the collective bargaining structure to strengthen its functioning and its coverage for non-standard workers, as well as actual content negotiated so as to improve quality and security of work and labour market status for non-standard workers. This section first examines *collective bargaining approaches*: (a) collective bargaining outside workplaces; (b) extending negotiated outcomes to non-negotiating parties; (c) joint-employer bargaining; and second, *matters negotiated in bargaining*: (a) attaining regularization and employment security; (b) equal pay for work of equal value and equal treatment; (c) limits and conditions on the use of non-standard work arrangements; (d) specific needs and interests of non-standard workers; and (e) identification and clarification of employment relationships.

3.1. Collective Bargaining Approaches and Frameworks

3.1.1. Collective Bargaining Outside Workplaces

³⁵ Casale, G., *op. cit.* See also ILO. 2006. *The Employment Relationship*. International Labour Conference, 95th Session, Geneva: ILO.

Collective bargaining outside workplaces is one common approach that is used to overcome challenges posed by limited attachment of non-standard workers to a single employer/workplace. This approach is particularly important where bargaining takes place predominantly at workplace level in such a way that some categories of non-standard workers tend to be excluded. For those whose association with a single workplace is weak, negotiations only at workplace level do not often offer favourable, convenient or equitable outcomes.³⁶ Inter-sectoral or sectoral bargaining arrangements typically represent the interests of broader coverage of both workers and employers.³⁷ An OECD study also shows that high trade union density and bargaining coverage, and the centralization and co-ordination of wage bargaining, tend to go hand-in-hand with lower wage inequality.³⁸ For example in a number of countries, collective bargaining for agency workers takes place at the sectoral level (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden), and in some countries also at the enterprise level.³⁹ For example in Denmark, company-level agreements together with sectoral-level bargaining fully regulate the temp agency work sector, since there are no statutory provisions laid down in relevant legislation.⁴⁰ In Asia, the social partners in the Republic of Korea have been attempting to strengthen sectoral organization, in response to a dramatic increase in the number of non-standard workers, with a view to boosting solidarity among workers by restructuring and centralizing the trade union movement from predominantly the enterprise level to the sectoral level.⁴¹ Albeit limited in effect, there has been some shift to sectoral bargaining in the banking, health and metal sectors.⁴²

³⁶ Heery, E., and B. Abbott. 2010. "Trade Unions and the Insecure Workforce," in *The Insecure Workforce*, eds. Heery, E., and J. Salmon, (London: Routledge).

³⁷ ILO. 2009. *Collective Bargaining: Negotiating for Social Justice*, ILO High-level Tripartite Meeting on Collective Bargaining, Geneva: ILO.

³⁸ OECD. 2006. *Employment Outlook: Boosting Jobs and Income*. Paris: OECD.

³⁹ Spattini, S. 2012. "Agency Work: A Comparative Analysis," *E-Journal of International and Comparative Labour Studies* 1, No. 3-4:170-210.

⁴⁰ *Ibid.*

⁴¹ Choi, S. 2006. "Kankoku ni okeru roudoukumiai, jugyoin daihyo seido no sintenkai," [A New Trend of Union and Employee Representation System in Korea], *Japanese Journal of Labour Studies*, No. 555:66-77.

⁴² Yoon, Y. 2009. "Comparative Study on Industrial Relations and Collective Bargaining in East Asian Countries," DIALOGUE Working Paper No. 8, Geneva: ILO.

However, sectoral-level representation also poses a challenge when non-standard workers move from one sector to another. In such cases, inter-sectoral/national, occupation-based or regional- or community-level representation is used to conduct negotiation, by which they can exercise collective rights with multiple employers across different sectors.⁴³ In Europe, cross-sectoral bargaining and national-level social dialogue play a significant role in regulating temp agency work taking place at the sectoral level in a number of countries (e.g. Belgium, Ireland, Poland, Spain, Sweden).⁴⁴ In the United States, the Service Employees International Union (SEIU) developed the Justice for Janitors campaigns and enabled the union to win recognition in several major cities, including Miami, Los Angeles, Boston and Houston.⁴⁵ These campaigns are mainly targeted at low-paid precarious workers who are predominantly female. They use public attention, community pressure and political lobbying as strategies to pressure employers. The Houston victory in 2006 was won after janitors at five major cleaning contractors participated in a one-month strike including local, national and international demonstrations.⁴⁶ As a result the cleaning contractors entered into a collective bargaining agreement with the union, covering about 5,300 janitors, mostly women of Latin American origin. The agreement raised wages from an average of \$5.30 per hour to \$7.75 per hour as of 1 January 2009 and offered individual and family health insurance cover starting in 2009 for \$20 and \$175 per month, respectively. In addition, the shift length of the janitors was extended to six hours by 2009 as a result of the agreement.⁴⁷ Because the agreement covers the five major building services contractors in the region, employers cannot simply change contractors in order to avoid the costs of improved working conditions for contracted workers. The agreement was renegotiated in 2010 and includes a wage increase from \$7.75 per hour to \$8.35 per hour in 2012 and a 32% increase in contributions from

⁴³ Kalleberg, A. L. 2009. "Precarious Work, Insecure Workers: Employment Relations in Transition," *American Sociological Review* 74, No. 1: 1-22; Damarin, A. D. 2006. "Rethinking Occupational Structure: The Case of Web Site Production Work," *Work and Occupations* 33, No. 4: 429-463.

⁴⁴ See, for example, Spattini, S. *op. cit.*; Eurofound. 2009a. *Temporary Agency Work and Collective Bargaining in the EU*. Dublin: Eurofound.

⁴⁵ Osborn, M. 2006. "Houston Justice for Janitors Campaign Wins!": <http://www.nosweat.org.uk/story/2006/11/21/houston-justice-janitors-campaign-wins> (accessed 8 February 2013).

⁴⁶ *Ibid.*

⁴⁷ Russakoff, D. "Houston Janitors Strike Ends with Agreement," in *Washington Post*, 21 November 2006.

employers towards maintaining workers' individual health care coverage.⁴⁸ This type of bargaining arrangement is particularly useful to mitigate the effects of private contractors competing on lower terms and conditions of work as well as to provide broader coverage for those who engage in similar jobs in different sectors.

In Argentina, different organizations have recently been established for the representation of semi-dependent or independent workers: the Construction Workers' Union of the Argentine Republic (UOCRA); the Union of Support Staff at Private Homes (UPACP); the Trade Union of Newspapers and Magazines Sales Staff of the Federal District of Buenos Aires (SIVENDIA); the Argentine Single Trade Union of Freighters (SIUNFLETRA); the Argentine Street Vendors Trade Union (SIVARA); the Federation of Taxi Drivers of the Argentine Republic; the Trade Union of Home Garment Workers (STTAD); the Argentine Union of Rural Contract Workers of Vineyards and Fruits; the Trade Union of Garden and Park Workers; the Argentine Federation of Press Workers (FATPREN); the Trade Union of Workers for Hairdressing (SUTPEABA); the Association of Fashion and Image Workers in Advertising (AMA); the Single Trade Union of Public Entertainment Workers (SUTEP); and the Single Trade Union of Watchmakers, Jewellers and Related Workers (SURJA). Some of them are successful in conducting collective bargaining and improving working conditions, both by incorporating workers into the social security schemes and by securing respect for the basic regulations provided by the Argentine legislation.⁴⁹

In Japan, community-based unions,⁵⁰ located in a specific region, organize any individual workers regardless of where/how they work and what forms of work they engage in, including those who work in non-

⁴⁸ SEIU website: <http://www.seiu1.org/2010/06/28/janitors%E2%80%99-new-contract-improves-jobs-strengthens-houston%E2%80%99s-economy/> (accessed 8 February 2013).

⁴⁹ Martínez-Chas, J. M. 2011. "National Study on Argentina: Non-standard work, Social Dialogue and Collective Bargaining," unpublished national study commissioned by the ILO.

⁵⁰ Although Japan's general unionism has a long history, it is only since the late 1980s—when so-called "community unions" appeared—that workers' organizations have begun operating as unions that are established outside individual enterprises. In addition to traditional general unions of the National Union of General Workers National Council (Zenkoku-Ippan), the Japanese Trade Union Confederation (RENGO) established regional unions in 1996 and the National Confederation of Trade Unions (Zenroren) established local unions in 2002, all of which resulted in strengthening community-based general unionism.

unionized SMEs, independent contractors, dispatched (agency) workers, migrants and unemployed workers. As Japan's enterprise unionism tends to confine union membership in practice to regular workers, and large numbers of non-regular workers tend to be excluded from enterprise-level representation, these community unions are successful in organizing different categories of non-regular workers as their members.⁵¹ Their central role has recently been to provide labour consultation and advisory services, and negotiate and solve disputes through negotiating directly with individual enterprises on behalf of their members. Japan's Trade Union Law provides for an employer's duty to bargain collectively, and an employer's refusal to do so without proper reasons is an unfair labour practice. The rate at which disputes are resolved voluntarily by community unions through negotiation stood at 67.9% in 2008, though there remains intense debate about the way an agreement concluded between an employer and the community union after such negotiation on behalf of a single worker can be interpreted in terms of collective bargaining/representing processes. There has been a growing need addressed in Japan to establish legal institutions to respond to such negotiation processes.⁵²

3.1.2. Extending Negotiated Outcomes to Non-negotiating Parties

One of the traditional approaches to reaching out to non-union members is the extension of all or part of collective agreements concluded between single employers or their representative organizations and the representative organizations of workers, such as trade unions, to workers and employers that are not represented by the social partners signing the agreement. Through the adoption of such an approach, the negotiated outcomes can be applicable to certain categories of non-standard workers who are not organized. How negotiated outcomes are extended varies in terms of, for example, whether there are legal mechanisms for extension or that can be implemented by voluntary agreement of the signing parties; or whether it requires the demand of one or both negotiating parties,

⁵¹ Oh, H. 2010. "Go-do ro-so no genjou to sonzai igi" [Organization, Activities and Significance of Community Union in Japan], *Japanese Journal of Labour Studies*, No. 604:47-65.

⁵² Michiyuki, T. 2012. "Perspectives of Resolving Community Union Collective Dispute Cases [in Japanese]," *Business Labour Trend*, March.

depending on the country. Legal procedures for extending collective agreements exist – for example, EU member States (excluding Cyprus, Denmark, Italy, Malta, Sweden and the United Kingdom), South Africa, Japan, Mauritius and Namibia, though the degree and manner of extension differs in terms of whether an extension procedure is initiated only on the demand of one or both of the social partners that signed the collective agreement; or it can be done automatically by the competent government institution; whether there are minimum requirements, and how frequently they are used in practice.⁵³ The scope of non-standard workers to be covered in extended collective agreements also differs depending on the nature of the extension mechanism or whether their right to bargain collectively is legally guaranteed.⁵⁴

Country experience of collective agreement extension shows that it is a common practice to target “employees” in a particular sector, with some cases including certain categories of non-standard “employees” (e.g. fixed-term or part-time employees) associated with direct employment relationships, or other cases excluding them explicitly.⁵⁵ In the field of temporary agency work, collective agreements signed between association(s) of agencies and organization(s) of temp agency workers may be extended for broader coverage of temporary agency workers across sectors. For example in the Netherlands, the inter-sectoral collective agreement signed between the leading association of agencies (ABU) and the trade unions representing agency workers (FNV, CNV, De Unie and LBV) was declared generally applicable with the effect of covering about 90% of temp agency workers.⁵⁶ If the extension has the effect that its terms cover “all workers” engaged in an industry or particular regions, it can certainly function as a powerful tool to increase collective bargaining coverage for non-standard workers regardless of their association with employment relationships. In reality, however, it is difficult for the social partners to agree on such broader coverage of workers.

Apart from such legally supported possibilities to extend collective agreements, there are also cases where agreements or provisions thereof are extended (*de facto* extension) by “soft factors” such as informal

⁵³ Eurofound. 2011. “Extension of Collective Bargaining Agreements in the EU,” background paper. Dublin: Eurofound.

⁵⁴ Eurofound. 2002. *Collective Bargaining Coverage and Extension Procedures*. <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm> (accessed February 8, 2013).

⁵⁵ *Ibid.*

⁵⁶ Eurofound. 2009a, *op. cit.*

agreement, habit, custom or other voluntary practices.⁵⁷ In Japan, for instance, a collective agreement applies only to workers who are members of the trade union that is party to the collective agreement, as a general rule.⁵⁸ However, some enterprise unions, which organize both regular and non-regular workers, negotiate better working conditions for them, and extend part of the negotiated outcomes to unorganized non-standard workers. For example in the 2008 *shunto* (annual wage negotiations), in the middle of the economic recession, a trade union at Japan Post Holdings Co. Ltd. (JP), which was privatized in October 2007, decided to defer demands for pay increases for regular workers and to prioritize the needs of non-regular employees. After long negotiations, the union obtained a 2,000 yen monthly wage increase for fixed-term employees working under a monthly salary system (there are also fixed-term employees under an hourly wage system). In the 2010 *shunto*, the union obtained a 2,000 yen increase in the basic monthly wages of fixed-term contract employees working under a monthly salary system and the commitment of the JP to regularize 2,000 fixed-term employees. The negotiated outcomes were *de facto* extended to non-unionized fixed-term contract workers under the monthly salary system, as a result of autonomous governance based on mutual trust among labour and management.⁵⁹ A survey of collective agreements in Japan found that of the 2,597 company-level unions that responded, 91.4% had collective agreements in 2011, of which those saying that the agreements either fully or partially applied to part-time or fixed-term workers were 41.9% and 45% respectively. The proportion jumps where such workers were union members (68.4% and 69.2% respectively). The survey reveals that the proportion of company-level

⁵⁷ Eurofound. 2002, *op. cit.*

⁵⁸ The Trade Union Law (TUL) provides for two exceptions to this principle and extends the coverage of the collective agreement: plant-level extension (Article 17) and regional extension (Article 18), under the majority principle. The TUL provides that “when three-fourths or more of the workers of the same kind regularly employed in a particular factory or other workplace come under application of a particular collective agreement, such agreement shall be regarded as also applying to the remaining workers of the same kind employed in the same factory or workplace”. This provision and its interpretation have led to controversy in a number of aspects. With regard to its applicability to non-standard workers, it is limited to “the remaining workers of the same kind employed” and rules out certain categories of non-regular workers. *See* Trade Union Law: <http://www.japaneselawtranslation.go.jp> (accessed 8 February 2013).

⁵⁹ Hamaguchi, K. and N. Ogino. 2011. “Non-regular Workers: Legal Policy, Social Dialogue and Collective Bargaining: The Study of Japan,” DIALOGUE Working Paper No. 29, Geneva: ILO.

unions whose agreements are applicable to these two categories of workers rose from the previous survey in 2006 (33.5% and 42.7% respectively).⁶⁰

3.1.3. “Joint-employer” Bargaining: Involving “Principal Employers” that Hold Power in Negotiations

Another key bargaining approach that can be used for non-standard workers is “joint-employer” arrangements which involve factually “principal” employers (e.g. user enterprises, client enterprises), which are not “legal” employers of these workers (e.g. temp work agencies, subcontractor firms) but hold real power in determining their terms and conditions of work. Such “joint-employer” bargaining is useful in dealing with non-standard workers in triangular settings who are not directly employed by the “principal” or “core” employer in power for which they actually work, particularly when actual “legal” employers are not influential negotiating parties (e.g. small- and medium-sized temp work agencies or subcontractors). Unless their “legal” employers are influential negotiating parties, meaningful negotiation becomes difficult in triangular employment relationships even when these workers are legally entitled to collective bargaining. Enterprises in power may use such arrangements deliberately to outsource employers’ responsibilities for meeting labour- and employment-related obligations to third parties, whose capacity is limited in terms of bearing such duties or complying with legal obligations.⁶¹ From the point of view of agency workers, the longer they perform services for the same user/client enterprise and the more interested they are in parity with permanent employees as well as working conditions, and the more beneficial and meaningful collective bargaining with the user/client enterprise becomes.⁶²

In addition to such power structures existing between enterprises as well as the diverse interests of workers involved in triangular settings, national legislations as well as courts have adopted a variety of regulatory approaches towards “with whom” these workers have bargaining rights.⁶³ Thus, the complexity and difficulty involved in determining the allocation

⁶⁰ The survey targeted 4,086 such trade unions. Ministry of Health, Labour and Welfare. 2012. *2011 Collective Agreement Survey* [in Japanese], <http://www.mhlw.go.jp/stf/houdou/2r9852000002dlia-att/2r9852000002dlqh.pdf> (accessed February 8, 2013).

⁶¹ Rubiano, C., *op. cit.*

⁶² Davidov, G. 2004. “Joint Employer Status in Triangular Employment Relationships,” *British Journal of Industrial Relations* 42, No. 4: 727-746.

⁶³ Rubiano, C., *op. cit.*

of duties and responsibilities between user/client enterprises and the “legal” employers is indeed identified as a major hindrance to protecting and implementing collective rights in practical terms.⁶⁴ How such responsibilities are allocated differs depending on how temp agency work or subcontracting is regulated, how national legislation regulates employers’ responsibilities in different subject areas (e.g. working conditions, occupational safety and health, social security contributions, workers’ collective rights), and how the existing legal scope of employment relationships influence laws and regulations concerning employers’ labour- and employment-related legal obligations.⁶⁵ Moreover, the industrial relations context, including to what extent collective agreements are used in regulating triangular settings, also affects the outcomes. In any case, covering various bargaining agendas in a comprehensive and integrated manner is a challenge due to the complexity and ambiguity in terms of the legal responsibilities and duties that multiple parties bear. Under these circumstances, non-standard workers may end up taking the risks associated with such triangular settings. Although examples are scarce, social partners in some countries have been attempting to curtail such cases by directly engaging or including “factual” employers jointly or severally in the bargaining process.⁶⁶

In Japan, a union’s attempt to engage in collective bargaining with a client enterprise resulted in the court case in 1995 which established the criteria concerning client enterprises’ duty to bargain in triangular settings. The Asahi Broadcasting Company (ABC) concluded a service contract with three contractors for filming and lighting tasks at its production sites. The trade union representing those employed by these contractors engaged in collective bargaining and concluded collective agreements with these contractors. The union also requested collective bargaining with the ABC for wage increases, but ABC refused to bargain on the grounds that “it is not the employer of these dispatched workers”. The union therefore filed an unfair labour practice charge against ABC. The Supreme Court ruled that

⁶⁴ Rubiano, C., *op. cit.* See also, Spattini, S., *op. cit.*; Hayter, S., and M. Ebisui. Forthcoming. “Negotiating Parity for Precarious Workers,” *International Journal of Labour Research*.

⁶⁵ For a comparative overview of developments in national legislation in respect of allocation of employers’ responsibilities, see Spattini, S., *op. cit.* and Rubiano, C., *op. cit.* Certain countries have established joint and several employers’ liabilities to increase protection for workers.

⁶⁶ For a comparative overview of how European and North American countries deal with such cases, see Davidov, G., *op. cit.*

the employer in a general sense is an entity who concludes an employment contract. However, since Article 7 provides certain types of anti-union conduct as unfair labour practices and aims at restoring normal labour-management relationships by remedying such unfair labour practices, an entity other than the 'employer' under Article 7, when and only to the extent that such an entity receives dispatched workers from their employer, has them work in its own business activities, and is in a position to be able to determine their essential working conditions actually and concretely is, even if partially, equivalent to the employer as a party to an employment contract. Therefore, to the extent that ABC is an 'employer' within the meaning of Article 7 of the Trade Union Law, ABC's refusal to bargain with the union is in violation of the Trade Union Law.⁶⁷

In India, joint-employer bargaining takes a variety of forms. First, an ad-hoc representative body of contract workers arising out of a spontaneous action negotiates either with the principal employer or the contractors (e.g. Hero Honda). Second, a contract workers' or regular workers' trade union negotiates with the principal employer and reaches a collective agreement or memorandum of understanding, or draws up a letter of exchange to be implemented by the contractors (e.g. public sector units such as Neyveli Lignite Corporation and private sector units such as Sandvik, Reliance Energy or Madras Atomic Power Station in Kalpakkam, Tamil Nadu). A regular workers' union sometimes negotiates on behalf of contract workers with the principal employer, and the understanding is legalized in an agreement by the contract workers' representatives and the contractors (e.g. Glaxo in Nabha, Thermax in Pune). There are also cases in which the contract workers' union or the regular workers' union negotiates directly with the contractors and reaches an agreement with the contractors' association (e.g. TNPL in Tamil Nadu). The contract workers themselves sometimes form a co-operative service society, which supplies contract labourers to the principal employer and negotiates or plays an important role in determining their service conditions (e.g. NLC, Kalpakkam Atomic Energy and others, especially in Tamil Nadu).⁶⁸

⁶⁷ Central Labour Relations Commission v. Asahi Broadcasting Co., Supreme Court, February 28, 1995. See Yamakawa, R. 1995. "Client Company's Duty to Bargain with Dispatched Workers' Union: Asahi Broadcasting Case," *Japan Labor Bulletin* 34, No. 12.

⁶⁸ Sundar, S. K. R. 2011. "Non-regular Workers in India: Social Dialogue and Organizational and Bargaining Strategies and Practices," DIALOGUE Working Paper No. 30, Geneva: ILO.

In Indonesia, the Freedom of Association (FOA) Protocol was signed in 2011 by five trade unions (Federasi GARTEKS, KSBSI, SPN, KASBI, and GSBI), sportswear companies of brand holders and suppliers from the sports apparel industry. To date, Adidas, Nike, Puma, New Balance, Pentland and Asics, as well as a number of their Indonesian suppliers, have committed to abide by the agreement. This agreement legally binds the signing parties, but its provisions include the following: (a) all holders of the company brand and/or services in the sports apparel industry supply chain in Indonesia must respect and implement the right to freedom of association; (b) suppliers are required to disseminate the contents of this protocol and encourage its implementation by their subcontractors. The FOA Protocol is implemented in all of the signing companies regardless of whether they already have a collective agreement or not. The FOA Protocol does not set wages and working conditions, but it requires companies to conduct collective bargaining within six months after the enterprise union is established.⁶⁹

3.2. Regulatory Strategies through Collective Bargaining

3.2.1. Regularization and Employment Security

Regularizing non-standard workers (shifting to direct and permanent employment) is used as one of the best models of achieving “inclusion” of those who are excluded from various conditions and benefits that are afforded to standard workers. There have been a number of individual company cases in which regularization was achieved under certain conditions.

In Japan, Aeon, one of the country’s major merchandising companies, reached an agreement with its trade union to unify the qualification system for regular employees and part-timers in 2004. There were 79,000 part-timers at Aeon, accounting for 80% of its entire workforce. The wage system was also changed to be linked to qualifications, with the pay of highly competent part-timers approaching that of regular employees, in order to narrow the wage gap between them. Under the new system, part-timers wishing to advance their positions are evaluated using the same appointment tests and promotion screenings used for regular employees, and are entitled to the same training opportunities previously limited to standard workers. As a result, a large number of part-timers were

⁶⁹ Anwar, R. P., and A. Supriyanto, *op. cit.*

appointed to managerial positions at their respective stores, and about 150 of these part-timers were regularized.⁷⁰

In India, trade union demand for regularization can be justified on four grounds: (a) the workers are doing the work of regular workers and hence the core activity of the enterprise concerned; (b) the contract workers are working under the supervision and direct control of the “principal employer” and doing work of a permanent nature; (c) the contract labour system is a sham and in fact the contract workers are employees of the “principal employer”; and (d) long years of service in the same enterprise. India’s public sector employs a large number of contract workers. For example, in the Tamil Nadu Electricity Board, employing 21,600 contract workers, negotiations started in May 2005 towards regularizing these workers as permanent employees. An agreement was reached in 2007 for the immediate regularization of 6,000 workers and the gradual regularization of the remaining contract workers during 2009.⁷¹

In South Africa, the South African Transport and Allied Workers Union (SATAWU) succeeded in negotiating with the parastatal enterprise Metrorail and had 1,063 fixed-term workers employed with a permanent contract in 2009. Some of these workers had been employed on a fixed-term basis for as long as ten years.⁷² In Indonesia, the Federation of Indonesian Metal Workers’ Union (FSPMI) and Lomenik (Federation of Metal, Machine and Electronics) have been successful in organizing contract and outsourced workers in the Export Processing Zones in Batam in Kepulauan Riau Province. According to FSPMI estimates, around 98% of all workers in Batam’s EPZs are hired through labour agencies. FSPMI and Lomenik have set out strategies and are making efforts to change the temporary status of contract workers to permanent, as well as negotiate collective agreements that contribute to a decrease in the number of contracted workers.⁷³

However, depending on the business circumstances, it is not easy to achieve regularization. When it is not possible, the social partners have been exploring other ways of securing more stable employment for non-standard workers. One way is to shift indirect employment to direct employment. For example in Colombia, an agreement was signed between the cement factory Argos and the trade unions Sutimac, Sintrargos and Sintraceargos. In the process of merger of the management of all its

⁷⁰ Hamaguchi, K. and N. Ogino, *op. cit.*

⁷¹ Sundar, S. K. R., *op. cit.*

⁷² Theron, J., *op. cit.*

⁷³ Anwar, R. P., and A. Supriyanto, *op. cit.*

cement factories based in Colombia, negotiations among the trade unions and Argos's management proceeded for a long time. Academic experts as well as members of the National School of Trade Unions (Escuela Nacional Sindical) were invited to participate. In the end, in exchange for their consent to the merger process, the unions obtained the direct employment of a significant number of workers that were previously employed through temporary agencies.⁷⁴ Another way is to ensure continuity of employment. In India, the unions have been pragmatic enough to modify their position and demand "continuity of employment" of the contract workers even when the contractors change, by obtaining an assurance from the "principal employers" or sometimes from the contractors themselves. The grounds that the unions use in such demands are the same as for regularization.⁷⁵

3.2.2. Equal Pay for Equal Value of Work and Equal Treatment: Non-Discriminatory Principles

Advancement of non-discriminatory principles is a common strategy that has been used to narrow the gap between terms and conditions of work for standard and non-standard workers. In a number of countries, it is addressed in collective bargaining and broader social dialogue, and the developments in collective bargaining in this regard are often associated with legal developments in non-discriminatory principles and equal treatment. Progress has been made particularly in terms of improving the situations facing non-standard workers where comparable standard workers are easily identifiable in prevailing wage-determining machinery and practices.

The European Union (EU) has been advanced in influencing non-standard work regulations in its member States, adopting the principle of non-discrimination, based on a comparison with a comparable permanent, full-time worker who engages in the same or similar work or occupation in the same establishment. EU Directives on part-time and fixed-term work⁷⁶

⁷⁴ DaCosta-Herrera, A. 2011. "National Study on Colombia: Non-standard Work, Social Dialogue and Collective Bargaining," unpublished national study commissioned by the ILO.

⁷⁵ Sundar, S. K. R., *op. cit.*

⁷⁶ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; and

ensure the appropriate protection of these categories of workers through application of the principle of equal treatment relating to employment conditions. In the absence of a clear comparable benchmark, “comparison shall be made by reference to the applicable collective agreement”. If there is no applicable collective agreement, comparison is made according to national laws, collective agreements or practices. The Directive on temporary agency work, adopted in 2008, also ensures that temporary agency workers should be entitled to “equal treatment” with regard to “basic working and employment conditions”, although it also allows for the possibility of derogation by collective agreements concluded by the social partners, while respecting the overall protection of temporary agency workers.⁷⁷ The Directives together with collective agreements thus form important means of regulating non-standard workers in many countries in the EU.

In France, on July 6, 2007, the temporary agency work employers’ confederation (PRISME) and the five main trade union organizations signed an equality, diversity and non-discriminatory agreement. The agreement set guidelines that aim to guarantee equal treatment against every type of discrimination and apply to both the agency and the user company. Among the most important provisions, the agreement establishes that the user company should set clear and non-discriminatory recruitment standards and favour the diversity of its staff; that the temporary work agency is responsible for the equal treatment of its employees in the user company; and that both the agency and the user companies should promote equal training as a means for equality of opportunities.⁷⁸

In Germany, the IG Metall trade union reached a collective agreement for the steel industry in 2010, ensuring that temporary agency workers in the industry are paid the same as direct employees of the industry.⁷⁹ IG Metall also signed a collective agreement with the two temporary

Council Directive 1997/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP.

⁷⁷ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

⁷⁸ Accord du 6 juillet 2007 pour la non-discrimination, l’égalité et la diversité dans le cadre des activités de mise à l’emploi des entreprises de travail temporaire, http://prisme.eu///Addon_Site/Upload/Autres/Accord%206%20juil%202007%20in%20terimaires.pdf (accessed February 10, 2013).

⁷⁹ Eurofound. 2010a. *New Package of Wage Agreements for Steel Industry*, <http://www.eurofound.europa.eu/eiro/2010/10/articles/de1010019i.htm> (accessed 10 February 2013).

employers' organizations (BAP and iGZ) for temporary workers in the metal and electrical engineering industries in 2012, which contributes to closing the pay gap between permanent and temporary workers. Depending on the length of temporary workers' deployment in the company, they are entitled to a sector-related supplement amounting to between 15% and 50% of their wages. The supplement must also be paid in the case of deployment in a company within those industries which is not covered by a collective agreement.⁸⁰

As in fact happens in some European countries, when wage levels are objectively determined by classification of jobs/occupations, equal pay for work of equal value could be easier to implement by comparing pay levels between comparable standard and non-standard workers. However, where wage disparity is attributed to contractual status involving the clear distinction between human resources management practices applied to those with non-standard and non-standard employment, indicators for non-discrimination principles are not easily identified.

In Japan, for example, wages for regular employees are determined in the internal labour market, while non-regular workers are outside its scope, and terms and conditions of their work are determined on the basis of external labour market conditions. Since overarching human resources management practices and the way terms and conditions are determined are so different between regular employees with long-term employment security in the internal labour market and non-regular employees in the external labour market, it has been unrealistic to articulate common indicators in determining what is equal treatment. In order to remove this barrier and tackle such persistent wage disparity associated with labour market dualism, the social partners at sectoral and national levels have been seeking ways to identify wage levels by jobs/occupations. The Japanese Electrical, Electronic and Information Union, an affiliate of the IMF-JC, introduced an occupation-based wage demand formula in the 2007 *shunto* bargaining round in order to achieve equal pay for work of equal value in each occupation, while in the 2010 *shunto* the Japanese Trade Union Federation (RENGO) for the first time released wage data concerning a list of major representative jobs/occupations that the sectoral unions had submitted. RENGO intends to enhance this data in order to equalize pay levels for equal jobs/occupations, utilize the data as

⁸⁰ IG Metall, *New Collective Agreement in the Metal and Electrical Industries and Agreement for Temporary Agency Workers about Sector-related Supplements*, 2012, <http://www.powerinaunion.co.uk/wp-content/uploads/New-Agreement-20125.pdf> (accessed 10 February 2013).

indicators for equal and balanced treatment among regular and non-regular workers, and ultimately pave the way to achieving equal pay for work of equal value.⁸¹

In contrast, in Australia, where under the standard job classifications and wage levels set in the awards, a certain level of parity is maintained in enterprise agreements, Fair Work Australia (FWA)—the national workplace relations tribunal—has responsibility for making and varying awards in the national workplace relations system. An award is an enforceable document containing minimum terms and conditions of employment in addition to any legislated minimum terms. In general, an award applies to employees in a particular industry or occupation, and is used as the benchmark for assessing enterprise collective agreements before approval. Awards cover a whole industry or occupation, and provide a safety net of minimum pay rates and employment conditions. Although enterprise agreements can be tailored to meet the needs of particular enterprises, they are not allowed to derogate from the dispositions established by the relevant sectoral awards. Each sectoral award presents a wage scale developed according to 14 job classifications, exclusively determined by the employees' skills and training. Minimum wages and wage differentials among job levels differ across industries. Fair Work Australia annually updates wage levels according to productivity increases and inflation rates. The wage scale (i.e. the ratio between wages of different classes of workers) is, however, fixed and cannot be regularly negotiated.⁸²

3.2.3. Limits and Conditions on the Use of Non-standard Working Arrangements

Both legislation and collective agreements in many countries establish various limits, restrictions or other conditions on the use of certain categories of non-standard employment arrangements, in terms of a maximum duration permitted, the types of jobs/tasks or the sectors allowed, the proportion of non-standard workers allowed, or other conditions required to resort to non-standard working arrangements, so as to protect workers and prevent abuse of such arrangements (e.g. repetitive

⁸¹ JILPT. 2010. "2010 Shunto report" [in Japanese], *Business Labour Trends*, 44-48.

⁸² Fair Work Australia website: <http://www.fwa.gov.au/index.cfm> (accessed 8 February 2013).

renewal of short-term contracts for the purpose of avoiding regularization of fixed-term workers or abrupt termination of such contracts).⁸³ Even where legislation does set a limit on the use of such arrangements, collective agreements are often used to modify it.⁸⁴ Such a limit is often discussed with a view to facilitate shifting temporary employment to permanent status, but the measures aimed at controlling and limiting the use of non-standard work do not always benefit such workers, and require well-balanced design to avoid situations in which they end up taking more insecure work, or are pushed into unemployment or the informal economy.⁸⁵

The ILO Termination of Employment Convention, 1982 (No. 158), calls for adequate safeguards against recourse to contracts of employment for a specified period of time (Article 2). The accompanying Recommendation (No. 166) provides that such recourse should be limited to cases in which, due either to the nature of the work to be performed or to the interests of the worker, the employment relationship cannot be of an indeterminate duration (Article 3). The ILO has also pointed out that “where contracts are concluded for a fixed term or for a specific task and then repeatedly renewed, the worker may not acquire certain rights, and may therefore not obtain the benefits provided for employees by labour legislation, or by collective bargaining.”⁸⁶

In South Africa, for instance, where no limit is set in the legislation on the period during which a worker may be temporarily employed, the Road Freight Bargaining Council’s agreement, adopted in 2006 and extended to non-parties in 2007, provided that a worker who was supplied “to one or more clients on a continuous basis for a period in excess of two months shall be deemed to be an ordinary employee”.⁸⁷ In Belgium, in the collective agreements for the chemical industry in 2007 and the hairdressing and beauty care sector in the same year, the social partners

⁸³ Spattini, S., *op. cit.*

⁸⁴ Rönmar, M. “Labour Policy on Fixed-term Employment Contracts in Sweden,” presented at the JILPT Comparative Labour Law Seminar on Fixed-term Employment Contracts, Tokyo, Japan, March 2010,

http://www.jil.go.jp/english/events_and_information/100308_report.htm (accessed 8 February 2013); Nyström, B. 2009. “Sweden,” in *Fixed-term Employment Contracts: A Comparative Study*, eds. Blanpain, R. and C. Grant, (Brugge: Vanden Broele Publishers).

⁸⁵ Gumbrell-McCormick, R. 2011. “European Trade Unions and ‘Atypical’ Workers,” *Industrial Relations Journal* 42, No. 3:193-310.

⁸⁶ ILO. 2006, *op.cit.*

⁸⁷ Theron, J., *op. cit.*

agreed that if, after successive fixed-term contracts, a worker is finally employed under an open-ended contract, in the same position and with an interruption of less than four weeks, there is no need for a new trial period and the seniority already acquired under the fixed-term contract is maintained.⁸⁸ In Australia, in an enterprise-level collective agreement signed in 2009 between AMWU and Nestlé Australia Limited, the parties agreed that the need for utilization of temporary, part-time, casual and contract employment would be monitored and reviewed by the union delegates at each site on a quarterly basis. The company would provide and discuss information including but not limited to (a) full particulars of the nature and extent of the work to be performed; and (b) the reasons why casual employees are required as opposed to part-time, temporary or full-time employees.⁸⁹

3.2.4. Specific Needs and Interests of Non-Standard Workers: Tailored Bargaining

Employers may be reluctant to invest in human resources development and training or social welfare for non-standard workers, whose attachment to a single employer is weak. Yet such workers need both skills upgrading, to remain competitive in external labour markets, and appropriate social security provision, which is not often offered in the internal labour markets by their employer or workplace. A diversified workforce means there may be different and even conflicting interests among workers. Instead of equal treatment with comparable standard workers, some may opt for flexible working time arrangements so as to balance between work and family, while others may prioritize portable social security benefits and skills upgrading to remain competitive in the external labour market. For these workers, suitable bargaining models are not necessarily those targeting “inclusion” of these workers in the standard permanent workforce in the same workplace, but are “tailored” responding to their specific needs and interests. Such models are seen as typical of “occupational” unionism in which the rules specific to internal labour markets, such as seniority, are rejected but, for example, benefits portable

⁸⁸ Eurofound. 2009b. *Belgium: Flexibility and Industrial Relations*.

⁸⁹ Fair Work Australia. 2012. Decision s.185 Approval of enterprise agreement: Nestlé Australia Limited (National Framework) Agreement 2009-2012 (food, beverages and tobacco industry).

in external labour markets are sought.⁹⁰ There are a number of examples of good practice for such tailored bargaining.

In Belgium, collective agreements for temp agency work are concluded through the joint committee structure. In 2007, collective agreements concluded in the joint committee involved improvements to pension benefits for agency workers in several sectors; training; the end-of-year benefit; benefits in the event of accident or illness; other allowances; and the creation of a safety fund.⁹¹ In Denmark, the Danish Business (DE) organization signed an agreement in 2007 with the Union of Commercial and Clerical Workers in Denmark (HK) which reduced the qualifying periods for agency workers to be eligible for employment benefits such as maternity entitlements.⁹² In France, temp agency workers are covered by a specific vocational training policy, which is governed by national collective agreements that require compulsory contributions from agencies.⁹³

In Italy, an agreement was reached in 2007 between the main journalist employer confederations (FIEG) and the two main trade unions (FNSI and INPGI) under the supervision of the Italian Ministry of Labour, in order to guarantee fair treatment to freelance journalists with the so-called co.co.co arrangement.⁹⁴ The agreement contained provisions responding to external labour market needs, including: (a) those on employers' pension contributions, which should have gradually increased within four years to reduce the gap in social protection between co.co.co and standard workers; and (b) those for limiting the use of co.co.co contracts, by financial incentives committed by the Government for the transformation of co.co.co contracts into fixed-term dependent contracts with a minimum duration of 24 months.⁹⁵

⁹⁰ Cella, G. P. 2012. "The Representation of Non-standard Workers – Theory and Culture of Collective Bargaining," *Transfer* 18: No. 2:177.

⁹¹ Eurofound. 2009a. *op.cit.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Collaborazioni coordinate e continuative (co.co.co) and Contratti di collaborazione per programma (co.co.pro)* are work contracts covering so-called employer-coordinated freelance workers. They are legislatively considered autonomous employees but generally work within the production cycle of a firm and are subordinated to the needs of the employer.

⁹⁵ *Giornalisti—Siglato accordo fra Min. Lavoro e Inpgi, Fiege e Fnsi per stabilizzazione co.co.co*, 2007, <http://www.italiannetwork.it/news.aspx?ln=it&id=634> (accessed 16 February 2013).

In Indonesia, KSPSI (Konfederasi Serikat Pekerja Seluruh Indonesia) formed the Building and Public Works Union (SPBPU) in the construction sector and the Indonesian Transport Workers Union (SPTI) in the transport sector, most of whose members are informal workers. The members of SPBPU automatically become members of SPBPU's cooperative and professional associations. As members of the cooperative, informal workers receive economic protection, and as members of the professional association they can receive occupational protection, such as training for professional certificates. Currently, KSPSI is cooperating with the Public Work Department of Indonesia in the certification programmes for 1 million construction workers. In order to grant economic protection, SPBPU's cooperative acts as a subcontractor to negotiate tariffs for work with the employers. By becoming a member of the cooperative, informal workers can get jobs directly from it and accordingly earn higher incomes than when they obtain jobs through supervisors on construction sites.⁹⁶

3.2.5. Identifying and Clarifying the Scope of Employment Relationships

There are countries whose industrial relations legislation applies to “workers” which are defined more broadly than “employees” (e.g. Japan, the United Kingdom), but in cases where the applicable industrial relations legislation is designed to cover those who are in employment relationships, certain non-standard workers face difficulties in access to and participation in collective bargaining when the existence of an employment relationship is disguised or unclear (e.g. self-employed workers such as independent contractors, freelancers).⁹⁷ In other cases, certain non-standard work arrangements simply fall outside the scope of application of national legislation. With regard to self-employed workers, particularly those who are economically dependent, even where applicable industrial relations legislation does not exclude them, conflict between collective bargaining and competition law which considers agreements on prices or tariffs to be anti-competitive practice may result in difficulty for them to access and exercise collective bargaining. Collective agreements concluded on behalf

⁹⁶ Anwar, R. P., and A. Supriyanto, *op. cit.*

⁹⁷ ILO. 2012a, *op.cit.*

of self-employed workers might be interpreted to fall under competition law.⁹⁸

The ILO Employment Relationship Recommendation, 2006 (No. 198), provides that national policy on the employment relationship should at least include measures to provide guidance to the parties on the establishment and identification of employment relationships, measures to combat disguised employment, and the general application of protective standards that make clear which party is responsible for labour protection obligations (Article 4). The Recommendation also provides that ILO member States should apply a national policy to review, and where necessary clarify and adapt the scope of, relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship (Article 1). As part of national policy, the Recommendation provides that member States should promote the role of collective bargaining and social dialogue as a means, among other things, of finding solutions to questions related to the scope of the employment relationship at the national level (Article 18).

Although the role that collective bargaining plays in determining and clarifying the scope of the employment relationship is limited and it is left largely to national legal and judicial development, there are a few countries where collective agreements are used in defining the “employment relationship”/“employment contract” to better protect certain categories of non-standard workers (e.g. the Netherlands, Sweden, Romania and Denmark).⁹⁹ There are also countries where collective bargaining contributes to clarifying the scope of the employment relationship or the concept of “worker” for certain categories of self-employed workers, or where their terms and conditions of work were negotiated upon clarification of the scope of the employment relationship by the relevant law.

For example in Japan, there have been increasing numbers of cases in which community unions (*see* Section 3.1.1.) bargain on behalf of an independent contractor but the employers refuse to bargain collectively on the grounds that these are not “workers” in terms of Article 3 of the Trade Union Act. Since determining criteria are non-existent, there has been a discrepancy between the orders of Labour Relations Commissions and lower court judgements, thereby creating issues in terms of legal stability

⁹⁸ For more comprehensive analysis of conflict between collective bargaining and competition law in dealing with self-employed workers, *see* Rubiano, C., *op. cit.*

⁹⁹ ILO. Forthcoming. *Regulating the Employment Relationship in Europe: A Guide to Recommendation 198 Implementation*. Geneva: ILO.

and predictability. The Ministry of Health, Labour and Welfare therefore set up a Study Group and released a report proposing criteria for determining the “worker relationship”. Administrative notice was given to the Central and Local Labour Relations Commissions concerning use of the report as a reference, in order to give it wider publicity.¹⁰⁰ In Argentina, SIVARA (Argentine Street Vendors Trade Union: 17,000 members) represents street vending workers of various kinds, in both the public and private sectors, including street sale of services and health care plans, delivery sale, and direct sales of products. SIVARA has developed a strategy to pressure employers (dealers) to recognize these workers’ dependent relationship with them and win enterprise collective agreements. So far, 25 agreements have been concluded for vendors who sell food on the streets, on trains and in parks.¹⁰¹ In Germany, self-employed freelance journalists, who are considered “similar to employees” by law if they are economically dependent and either usually work exclusively for one client or more than 50% of their income (30% in the media sector) is paid by one client, are exempt from the antitrust regulation forbidding the conclusion of agreements on common fees and prices. A number of company-level agreements exist between trade unions and public broadcasting companies which contain agreed rates of pay. In 2009, the national Federation of German Newspaper Publishers (BDZV), several regional publisher associations and the two main trade unions of the sector (DJV and ver.di) signed a collective agreement covering self-employed journalists, who are interpreted by the law as being similar to the employees at daily newspapers in western Germany. It includes collectively agreed fees in detail for articles and pictures/images provided by self-employed freelance workers, in order to set common rules “towards legal certainty and transparency”. Self-employed freelance workers are required to demonstrate that their main occupation is journalism, so as to ensure that only economically dependent self-employed workers are covered by the agreements.¹⁰²

¹⁰⁰ Ministry of Health, Labour and Welfare (MHLW), Japan. 2011, <http://www.mhlw.go.jp/stf/houdou/2r9852000001juuf-att/2r9852000001juw5.pdf> (accessed 16 February 2012).

¹⁰¹ Martínez-Chas, J. M., *op. cit.*

¹⁰² Eurofound. 2009c. *Germany: Self-employed Workers*. <http://www.eurofound.europa.eu/comparative/tn0801018s/de0801019q.htm> (accessed 10 February 2013). See also *Joint Remuneration Rules for Professional Freelance Journalist Working for Daily Newspapers*, 2009. <http://europe.ifj.org/assets/docs/065/140/8c5e541-197558c.pdf> (accessed 10 February 2013).

4. Supporting Collective Bargaining for Non-standard Workers: Roles of Tripartite Social Dialogue

The ways in which national tripartite social dialogue deals with issues regarding non-standard work are diverse. It has a critical role to play in advancing more inclusive and equitable collective bargaining as well as reducing disparity among workers at a time of burgeoning labour market segmentation, through designing and agreeing policies or legislative changes based on mutual consensus. The Committee of Experts on the Application of Conventions and Recommendations of the ILO indeed highlighted the importance of examining in all member States, within a tripartite framework, the impact of these forms of employment on the exercise of trade union rights.¹⁰³ Collective bargaining developments for non-standard workers are influenced by legal and policy developments in industrial relations laws made through tripartite consensus, such as those aimed at guaranteeing access to freedom of association and collective bargaining. However, legal or policy changes which influence the outcome of collective bargaining include broader areas, such as those regulating specific categories of non-standard work arrangement, equal treatment and non-discriminatory principles at work, the scope of the employment relationship, employment protection (e.g. minimum working conditions, protection from dismissal, occupational health and safety), social security and protection, as well as employment and labour market policies. While there is certainly a need for a more comprehensive analysis of how such a wide range of labour law reforms and policy changes interact with collective bargaining practices for non-standard workers, this is outside the scope of this paper. The outcomes of tripartite social dialogue can also take other forms, such as national agreements, non-binding declarations or guidelines. There are some innovative tripartite initiatives and measures that have been taken to address issues regarding non-standard working arrangements.

In Argentina, the National Agricultural Work Committee (CNTA) was created in 1980 in the agricultural sector as a tripartite social dialogue institution with the participation of the Coninagro (Intercooperative Rural Confederation), FAA (Argentine Agrarian Federation), SRA (Argentine Rural Society), CRA (Argentine Rural Confederations) and UATRE (Argentine Association of Rural Workers and Dockers). In 2004 another

¹⁰³ ILO. 2012b, *op.cit.*

tripartite institution (RENATRE) was created with the aim of promoting social dialogue in the Argentine agricultural sector. This forum deals with informal workers and employers, encouraging their legalization and incorporation into social security schemes. One core element is the granting of benefits through the Comprehensive Unemployment Benefits System. For this, a pocket job record book is issued to register every change of employer in the case of non-permanent workers so that they may become eligible for the unemployment protection system.¹⁰⁴

In Singapore, tripartite partnership is used as a way to address issues affecting the increasing number of contract and casual workers, largely related to the expansion in outsourcing services. In 2008 the Tripartite Advisory on Responsible Outsourcing Practices¹⁰⁵ was issued to encourage end-user companies awarding outsourcing contracts to demand that their service suppliers or contractors help raise employment terms and benefits as well as the CPF (Central Provident Fund) status of low-wage contract workers, as required by the law. More especially, companies are encouraged to consider the following: (a) making compliance with Singapore's employment laws a condition in service contracts with their suppliers; (b) encouraging written employment contracts between service suppliers and their contract workers; (c) conducting checks on the financial standing of service suppliers; (d) awarding performance-based contracts to service suppliers; (e) retaining experienced workers; and (f) helping workers qualify for employment benefits under the Employment Act. According to a survey in 2010, more than 50% of companies that outsourced cleaning, security and landscaping services adopted three or more of the six responsible outsourcing practices listed in the 2008 Advisory.¹⁰⁶ Taking into account feedback obtained from industry stakeholders, trade unions, workers and the public, the Advisory was updated in 2012 and renamed the Tripartite Advisory on Best Sourcing Practices,¹⁰⁷ to further encourage service buyers to outsource responsibly

¹⁰⁴ Martínez-Chas, J. M. *op. cit.*

¹⁰⁵ For full text, *see* the Ministry of Manpower website, <http://www.mom.gov.sg/Documents/employment-practices/Tripartite%20Advisory%20Booklet-ROP.pdf> (accessed 10 February 2013).

¹⁰⁶ Information obtained from the Ministry of Manpower (October 11, 2011).

¹⁰⁷ Ministry of Manpower website, <http://www.mom.gov.sg/employment-practices/Pages/BestSourcing.aspx> (accessed 10 February 2013). For full text, *see* [http://www.mom.gov.sg/Documents/employment-practices/Tripartite%20Advisory%20on%20Best%20Sourcing%20Practices%20\(27032012\).pdf](http://www.mom.gov.sg/Documents/employment-practices/Tripartite%20Advisory%20on%20Best%20Sourcing%20Practices%20(27032012).pdf) (accessed 10 February 2013).

and adopt best practices. This provides greater clarity on the ways that workers, service buyers and providers can benefit from best sourcing. It encourages service buyers to consider the following: (a) safeguarding the best employment rights of workers in accordance with Singapore's employment laws, such as the Employment Act, Central Provident Fund Act, Employment of Foreign Manpower Act, Workplace Safety and Health Act and Work Injury Compensation Act; (b) specifying service contracts on the basis of service-level requirements rather than headcount; (c) recognizing factors that contribute to service quality (e.g. provision of written employment contracts to workers, grading and accreditation level of the service providers, investment in the training of workers, recognition of experienced workers, and provision of appropriate tools and equipment); (d) checking that service providers are financially sound; and (e) seeking to establish a long-term collaborative partnership with service providers. The tripartite partners have also developed a step-by-step guidebook for service buyers that illustrates the best sourcing cases and gives detailed practical guidance on implementation. It includes examples of clauses that can be used for tender requirements, scoring templates for evaluating proposals from potential service providers and examples of key performance indicators for managing the service provider.¹⁰⁸

Attempts have also been made in various countries to overcome the lack of representation of the non-standard workforce in national tripartite social dialogue by introducing changes to its structure. For example, in the Netherlands, self-employed workers (9% of the total workforce) gained representation in the tripartite Social and Economic Council (SEC) in March 2010, through participation of the Chair of the Platform for Self-employed Workers, the largest Netherlands organization of self-employed workers, with more than 20,000 affiliates. In September 2010 the SEC issued its first recommendations on self-employment. The main objective was to reduce the gap in labour market legislation between self-employed and dependent employees. The SEC proposed an agreement on minimum rates for self-employed workers, with the aim of avoiding excessive risks for such workers. One of the provisions aims at relaxing the annual working hour regulation with which self-employed workers must comply for tax benefits, since many self-employed workers are unable to reach the

¹⁰⁸ Ministry of Manpower; National Trades Union Congress; Singapore National Employers Federation, *Best Sourcing: Step by Step Guidebook for Service Buyers*, [http://www.mom.gov.sg/Documents/employment-practices/Step-by-step%20Guidebook%20on%20Best%20Sourcing%20\(27032012\).pdf](http://www.mom.gov.sg/Documents/employment-practices/Step-by-step%20Guidebook%20on%20Best%20Sourcing%20(27032012).pdf) (accessed 16 February 2013).

annual threshold of 1,225 hours to be eligible for tax breaks, due to the economic downturn. The SEC recommended that the tax authorities adopt a more lenient approach, for instance by counting also the number of hours spent on canvassing customers.¹⁰⁹

5. Supporting Collective Bargaining for Non-standard Workers: Roles of Workplace-level Information Sharing and Consultation

The growing need for representation and collective bargaining outside workplaces for non-standard workers in turn poses questions about the state of workplace democracy and workers' representation at workplace level. The role that various workplace-level information-sharing and consultation schemes (e.g. works councils, labour-management consultation bodies, grievance settlement bodies) play in promoting more equal and inclusive access to workplace social dialogue is critical in terms of reflecting unheard voices at work and filling in existing representation gaps. In some European countries where a double-channel representation system is adopted, these schemes can also be used to monitor and ensure the implementation of collective agreements, or set more preferable conditions and standards than what is agreed at the sectoral level related to non-standard work arrangements. These schemes can complement collective bargaining developments for non-standard workers, so long as they are not used to undermine collective bargaining and weaken the position of trade unions, as set forth in a number of international labour standards.¹¹⁰ The participation and involvement of various categories of workers with different interests have equally entailed challenges, not only for trade unions but for information and consultation schemes,¹¹¹ but there are some positive examples in this regard.

¹⁰⁹ Eurofound. 2010b. *Self-employed Workers Join Social and Economic Council*. <http://www.eurofound.europa.eu/eiro/2010/04/articles/NL1004019I.htm> (accessed 16 February 2013).

¹¹⁰ See for example, ILO Convention No. 135 (1971) on Workers' Representatives, Convention No. 154 (1981) on Promoting Collective Bargaining, Recommendation No. 91 on Collective Agreements (1951), Recommendation No. 94 (1952) on Cooperation at the Level of the Undertaking, Recommendation No. 129 (1967) on Communications within the Undertaking, and Recommendation No. 130 (1967) on the Examination of Grievances.

¹¹¹ Weiss, M. 2011. "Re-inventing Labour Law?" in eds. Davidow, G. and B. Langille, *The Idea of Labour Law* (New York: Oxford University Press).

In Germany for example, works council agreements are often used in regulating the use of temp agency workers in specific user companies in the metal working sector, to establish further settlements between the agency, user enterprise and the union or works councils, which are superior to those set at the sector level.¹¹² In 2012, the employer association for the metal and electrical industry in Baden-Württemberg (Südwestmetall) and IG Metall signed a collective agreement in which the works councils are given greater co-determination rights in terms of regulating the use of temporary agency workers through works council agreements, including the purpose and area of deployment of agency workers, volume of temporary work, and employment of such workers as permanent employees. The works councils are also given the right to object if equal pay and treatment principles are not respected.¹¹³

In Japan, joint labour-management consultation committees (LMCCs) exist as widespread employee participation practices, which have long contributed to sound and amicable industrial relations. There is no legal requirement to establish such bodies, but the presence of voluntarily established ones is quite high, particularly in enterprises with trade unions and in larger firms. Trade unions at the enterprise level are often parties to LMCCs and collective bargaining, and deal with the same subjects, such as working hours, wages, holidays and occupational safety and health issues. LMCCs are generally seen as an informal process in which an employer and a trade union can discuss any issues in a cooperative way and which thus functions to complement the formal collective bargaining process.¹¹⁴ Some companies are adopting innovative ways of providing more job security for non-standard workers through labour-management consultation, when full regularization is unrealistic given the surrounding business situation. They have created new categories of regular employees with restricted tasks or duties, or with specified geographical areas of work without transfer involving relocation (hereafter “restricted regular employees”), as compared with regular employees. Recent research targeting 1,387 establishments reveals that 312 of these had “restricted regular employees” with restricted jobs/duties; 163 had such employees with specified geographical areas of work; and 74 had both categories of

¹¹² Eurofound. 2009a, *op. cit.*

¹¹³ Eurofound. 2012. *Collective Agreements Concluded in the Metal Industry*. <http://www.eurofound.europa.eu/eiro/2012/06/articles/de1206019i.htm> (accessed 10 February 2013).

¹¹⁴ JILPT. 2006. *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives – 2006 JILPT Comparative Labour Law Seminar*. Tokyo: JILPT.

“restricted regular employees”.¹¹⁵ The research also shows that regular employees with restricted jobs/duties are more frequently used in construction, medical and welfare services, and educational or other services, while area-restricted regular employees are more commonly utilized in construction, finance and insurance services, real estate and lease services.¹¹⁶ Such schemes seem to be introduced largely through labour-management consultation and agreements,¹¹⁷ with lower terms and conditions of work than those of regular employees given the relevant “restrictions”, but contribute to providing better employment security.

6. Conclusion

Promoting more inclusive social dialogue and collective bargaining is one of the key means of promoting an equal voice for all workers and advancing a more equitable world of work. Albeit limited in terms of the coverage of workers and the impact achieved amidst growing inequality and insecurity, various examples demonstrated in this paper show the potential of social dialogue and collective bargaining as tools that can respond to the needs and interests of non-standard workers. Some specific implications can be drawn from a review of a variety of collective bargaining and social dialogue practices demonstrated in the paper.

- Trade union representation and bargaining which are not bound to workplaces are useful in increasing the proportion of the non-standard workforce with access to representation and negotiation. Examples include not only bargaining at higher levels (e.g. sectoral or national level) but negotiation between an employer/employers and a trade union/unions which is/are established at regional, local or community level, or on an occupational basis.
- Extension of collective agreements, where there is legal machinery for such arrangements, is another approach to reach out to unorganized non-standard workers, but its applicability tends to be limited to those who are in employment relationships. Outcomes of collective

¹¹⁵ Takahashi, K. 2012. “Restricted Regular Employees and Issues regarding Non-standard Employment” [in Japanese], JILPT Discussion Paper 12-03, Tokyo: JILPT.

¹¹⁶ *Ibid.*

¹¹⁷ Takahashi, K., and J. Nishimura. 2012. *Hearing Survey concerning Human Resources Management of Diversified Regular Employees* [in Japanese]. Tokyo: JILPT.

agreements can also be *de facto* extended to non-bargaining parties as a result of mutual consensus at the workplace level. This can be a step toward more solidarity and more inclusive dialogue that has the potential to encourage trade union membership among non-standard workers.

- Involving the “principal” or “factual” employer in power together with the “legal” employer in negotiations (joint-employer bargaining) is a powerful tool to allow non-standard workers to exercise substantively meaningful collective bargaining, when they are workers in subcontracting or temp agency work arrangements in which the “legal employer” is not influential in determining their working conditions. This type of bargaining setting can also reduce the vulnerability of such workers to the risk of abusive cases where triangular settings are intentionally used to avoid employers’ employment- or labour-related responsibilities. Such joint-employer agreements may also benefit big brand companies, end-user companies and their suppliers, with a view to better supply-chain management and corporate social responsibility (CSR). Singapore’s Tripartite Advisory on Best Sourcing Practices, adopted through tripartite consensus, also shows that engagement on the part of multiple employers is a key to improving terms and conditions of work in outsourcing services. To what extent a “factual employer” can be responsible for employers’ responsibilities is significantly influenced by laws and legislation, as well as judiciary developments dealing with allocation of responsibilities between user/client enterprises and legal employers. In order to prevent workers from bearing risks associated with unclear triangular settings, more clarity appears to be necessary to ensure that they are used on one hand to facilitate generating more jobs, and on the other to protect workers appropriately.
- Collective bargaining and other forms of social dialogue have been used to reduce disparity between standard and non-standard workers through pursuing equal treatment either fully or partly, or in a transitional manner, in respect of pay and other working conditions. The latter include non-wage benefits, but also employment/job security, as well as access to training opportunities, to social security protection and to collective rights. The limits and conditions on the use of certain types of non-standard work arrangements are also being used as a bridge to facilitate a shift to more stable or standard employment. At the enterprise level, many criteria have been established through collective bargaining or other forms of social dialogue to transform non-standard employment to standard employment, such as length of

service, appointment tests, promotion screening, or allocated tasks and responsibilities. Innovative attempts have been also made to create new categories of permanent employees with fewer duties and responsibilities but reasonably lower terms and conditions of work to those of standard workers. This has the potential, for example, to respond to the needs of female non-standard workers with care or family responsibilities.

- The way collective bargaining pursues equal pay for equal value of work is influenced by prevailing wage determination systems and practices. Generally, it appears that it can be easier to achieve where wage levels are objectively determined by classification of jobs/occupations. Where such clear classification does not exist, the social partners are attempting to establish objective indicators. The definitions and indicators that are used to meet this goal, as well as their impact, deserve further analysis.
- Collective bargaining can also be tailored to respond to the diversified needs of different categories of non-standard workers. When benefits available in internal labour markets are limited, benefits which are portable in external labour markets are favoured for non-standard workers. Tailored agreements can also facilitate mutually agreed ways of working flexibly while enhancing the general labour market positions of non-standard workers.
- The role that collective bargaining can play in regulating those who are outside employment relationships (e.g. economically independent self-employed workers) or informal workers is still limited. However, some initiatives to engage in collective bargaining on their behalf have contributed to clarifying their collective rights, including with whom they can exercise such rights. In most countries, regulating such forms of work outside employment relationships seems to be left largely to national legal and judicial developments in clarifying the scope of the employment relationship and the notion of “employer”, or in using the notion of “worker” for wider coverage of workers.
- Admittedly only a few examples in the paper show that tripartite social dialogue and workplace-level information sharing and consultation play critical roles in influencing and supporting collective bargaining developments for non-standard workers, and this requires further research. Trade unions have also adopted various strategies that support collective bargaining for non-standard workers through organizing efforts, political lobbying, coalition and network building

with other social movements, and advisory or educational activities.¹¹⁸ Increasing trade union membership among non-standard workers is a priority enabling condition for the effectiveness and sustainability of collective bargaining in some countries. When the proportion of unorganized non-standard workers in a single workplace or in a sector becomes larger, it may also prevent trade unions from obtaining the regulatory thresholds of representativeness required in many countries to gain recognition as the bargaining agent.¹¹⁹ There is also a need for further research on what businesses, particularly those with real power, have contributed as part of their CSR or supply-chain management initiatives, to promoting more inclusive and equitable collective bargaining.

Globally, there is certainly a need for deeper comparative research analysing each of the different categories of non-standard work arrangements, taking into consideration relevant legal and policy developments. The effectiveness of collective bargaining developments for non-standard workers is very much linked to labour law and policy developments in various areas: different forms of employment/work contracts, employment protection, employment and working conditions, occupational safety and health, equal treatment, social security and social protection, scope of employment relationships/concept of worker and, also, overarching industrial relations legislation. However, by defining “non-standard workers” fairly broadly, this paper has adopted a rather “holistic” approach to look at the degree of complexity in terms of issues and possible responses by different parties, at different levels, and by different regulatory tools arising from the existence of various possible non-standard work arrangements. Such complexity has led to unclear allocation of responsibilities (“who is responsible for what”) and ambiguity in how non-standard workers substantively can access and exercise collective bargaining in a consolidated manner, thereby exposing them to a greater risk of abusive practices and inappropriate protection.

Divergent work arrangements have created different “layers” among non-standard workers themselves, which have then resulted in not only labour market segmentation, but also fragmentation of possible responses. This in turn questions the way each of the various non-standard work relationships is structured and regulated separately either through legislation or social dialogue and collective bargaining. The divergence existing in each of national legislation and industrial relations practices

¹¹⁸ See Ebisui, 2012a, *op. cit.*; Hayter, S., and M. Ebisui, *op. cit.*

¹¹⁹ Hayter, S., and M. Ebisui, *op. cit.*

further compounds this complexity. The low ratification levels of the ILO Conventions dealing with specific categories of non-standard workers¹²⁰ may also imply a need for a more “holistic” or “integrated” approach to dealing with the growth of “precariousness”, “inequality”, “vulnerability” and the “low-mobility trap”, regardless of the forms of work arrangements such workers engage in. Exploring improved coordination and integration between multi-faceted actions and measures taken at different levels by different actors appears to be necessary, so that they can interact and reinforce each other in moving towards a more inclusive and equitable world of work based on solidarity, rather than one that is split into different, often unequal segments.

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¹²⁰ Fourteen countries have ratified the Part-Time Work Convention, No. 175 (1994), while 26 have ratified the Private Employment Agencies Convention, No. 181 (1997) and 36 have ratified the Termination of Employment Contract, No. 158 (1992), as of 16 February 2013.

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