

# The triangular trap

Unions take action against agency labour



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Cover Image: Cherisse Fredricks, IndustriALL Global Union

Text: Jenny Holdcroft

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## **IndustriALL Global Union**

IndustriALL Global Union is a new international organization that brings together unions representing 50 million workers in 140 countries in the mining, energy and manufacturing sectors.

IndustriALL is a new force in global solidarity taking up the fight for better working conditions and trade union rights around the world. The organization came together at its founding congress in June 2012.

IndustriALL is working across the membership in 140 countries to build stronger unions, fight for workers' rights, campaign against precarious forms of work and to promote social justice, health and safety at work and equality for women in the workplace.

# Foreword

Precarious work in all its forms is undermining workers' rights, their pay and their working conditions throughout the world. But for workers trapped in triangular employment relationships, officially employed by an agency or contractor, but actually working for another company, there is often little chance to join a union and no chance to bargain collectively on their terms and conditions of employment. These workers are effectively trapped between the agency and the company they work for, with neither taking responsibility for their fundamental human rights.

Agency work results from deliberate decisions by employers to lastingly limit or reduce the permanent workforce in the name of 'flexibility'. The result is a shift of the risks of employment from companies onto workers. Identifying the real employer, and establishing under whose responsibility such issues as working conditions and benefits fall, is extremely difficult.

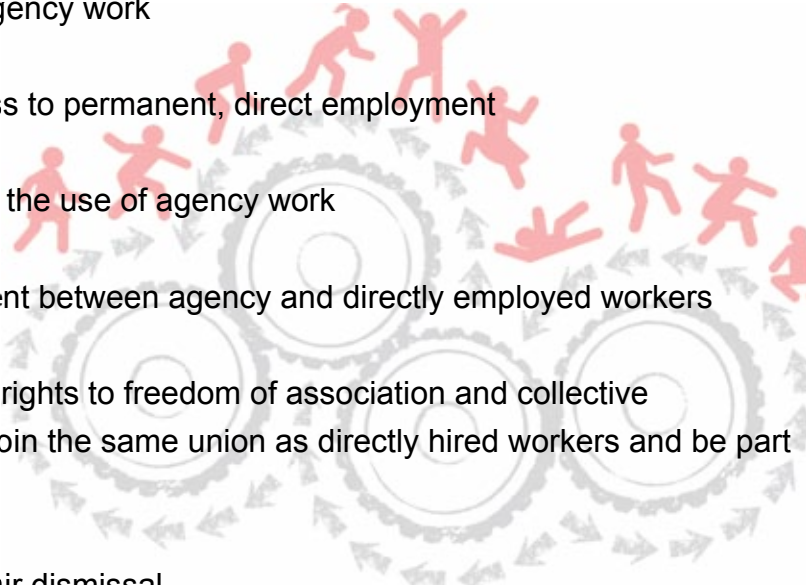
The increasingly widespread use of agency work is taking workers outside the scope of collective agreements and shrinking the bargaining unit so small that union capacity to bargain effectively is being significantly undermined, in some cases irretrievably.

This report focuses on the massive worldwide growth of agency work and other forms of triangular employment relationship and how it is undermining international labour standards. It exposes how private employment agencies are organizing globally to lobby governments to remove legislative barriers to their operation. I hope that it will assist trade unions in their dealings with employers and governments to oppose further expansion of employment agencies and the violations of workers' rights that arise from triangular employment relationships.

Jyrki Raina  
*General Secretary*

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## IndustriALL calls on all governments to:

- Stop the massive expansion of agency work
  - Guarantee agency workers access to permanent, direct employment
  - Require companies to bargain on the use of agency work
  - Provide for full equality of treatment between agency and directly employed workers
  - Assure agency workers' effective rights to freedom of association and collective bargaining, including the right to join the same union as directly hired workers and be part of the same bargaining unit
  - Protect agency workers from unfair dismissal
  - Ban disguised employment relationships, which hide the real employer
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- A decorative graphic in the background features several interlocking grey gears. Red stick figures are positioned around and between the gears, some appearing to be climbing or interacting with them, symbolizing the relationship between workers and the industrial system.

## What is agency work?

In this report, agency work refers to the supply to enterprises of workers who remain employees of the agency while performing work for the enterprise. Other terms used to describe it include contract work, dispatch work, personnel leasing and labour hire. Temporary work agencies are also referred to as labour brokers, labour suppliers or contractors.

The defining characteristic of all these forms of employment is that they create a triangular relationship between the user enterprise, the agency and the worker. This isolates the worker from the enterprise that effectively controls their work, their pay and their conditions so that the worker has no say in any of them and has no mechanism to negotiate improvements.

The enterprise benefits by passing on the risks of employment to the worker. An August 2009 survey by German union IG Metall<sup>1</sup> found that agency labour is increasingly being used more strategically by enterprises as a way of passing on the business risk of the cost of longer-term employment.

It is important to distinguish between two different functions performed by agencies. When agencies place a worker in a vacancy with a company with the effect that the worker is engaged by that company and becomes its direct employee, the problems of triangular relationships are avoided. The focus of this report is on the exploitation that results when an agency supplies a worker to a company and the worker is considered to be the employee of the agency, while performing work on behalf of the company.

### Explosion of agency work

Agency work has exploded way beyond any legitimate role in addressing short term labour shortages, due for example to production fluctuations or employee absences. Evidence from unions around the world shows that agency work is being used to replace

permanent jobs with agency jobs in order to reduce wage costs and evade legislative protections.

Recent growth of the agency work industry has been extremely rapid. According to the global agency industry body, the International Confederation of Private Employment Agencies (Ciett), the industry's global annual sales revenue increased from €83 billion in 1996 to €203 billion in 2009 and the number of agency workers has more than doubled over the same period.



*We understand that a casual part of the workforce is important for flexibility and for the peaks and troughs in the economic cycle. But when you look at the statistics that nobody disputes — 40% of workforce is now in some form of insecure work — you can't tell me that that is in response to the economic cycle.*

Ged Kearney, ACTU

A 2009 study reported that fully 10% of **Mexico's** workforce was employed by temporary agencies.<sup>2</sup> Approximately 60% of the 400,000 workers in Mexico's electronics industry work for temporary agencies, with some companies employing as much as 90% of their workforce through agencies.<sup>3</sup>

In **Russia** nearly 75% of foreign companies and 35-50% of Russian companies use agency labour. But many unregistered agencies exist and the real figures are much higher.<sup>4</sup> Agencies in Russia say that in 2010-2011, 70,000 workers were engaged by agencies, but there are at least another 70,000 to 100,000 more – no official government statistics are available. Generally there is a lack of reliable information on the spread of agency work.

In the **UK**, the estimated figure for agency workers varied from 270,000 to 1.4 million in 2008. In the **Czech Republic**, agencies are obliged to report data annually to the Ministry, or attract a fine but only a third of all agencies do so. The requirement is not enforced partly because the Ministry cannot cope with current levels of data given the large number of agencies now operating.

There are no precise figures on the total number of contract or agency workers in India, but a recent study<sup>5</sup> found that 30% of all workers in the private sector are employed via contractors, with levels in manufacturing up to 50%.

Available statistics for **Europe** point to rapid growth of agency work, dominated by large global players such as Manpower, Adecco, and Randstad. In **Spain**, temporary work constitutes 30.9% of all employment, and agency work accounts for 1 in 6 of all temporary contracts.

Over half of the approximately 500,000 workers in the electronics industry in **Thailand** are agency workers. In the **Philippines** in 2008, 10.8% of all workers were employed through agencies, rising to 15.6% of workers in manufacturing, accounting for 46.6% of all agency workers. 64% of all employers with more than 20 workers used temp agencies (67.5% in manufacturing).<sup>6</sup> These figures are despite significant legal restrictions which include prohibitions on labour-only contracting and contracting out of work which displaces directly hired employees from their jobs or reduces their regular work hours.

China has not been exempted from the massive worldwide growth in agency work. There are an estimated 60 million labour dispatch temporary workers in **China**, fully one fifth of China's urban employees. The number has more than doubled since the adoption of a law in 2008 which strengthened the protection of workers by requiring companies to buy workers' insurance, to pay double overtime wages and to pay severance based on an employee's years of service. Now employers, including multinationals with operations in China, are getting around these increased protections by hiring agency workers, despite provisions in the Labour Contract Law that stipulate that supply workers should only fill temporary or supporting positions. At Nokia, 30% of its China workforce is contract labour.<sup>7</sup>

## Effects of the Crisis

Agency workers are the first to be laid off in tough times and were the first victims of the 2008 economic crisis. Between mid 2008 and mid 2009, the number of workers with a temporary contract in the EU-27 zone dropped by 6.3% versus a drop of 1.3% for employees with a permanent contract.<sup>8</sup> The total hours worked by agency workers in 2009 reduced by 25% in the Netherlands and by 50% in the Czech Republic. The job losses were virtually immediate, with no safety nets or social plans for the workers concerned. These rapid dismissals of agency workers are likely to have accelerated the job losses provoked by the crisis.

But for global agency body Ciett, this is an advantage: *"The flexible component of a company's workforce thus serves as a buffer in times of crisis, softening the impact on permanent staff."*<sup>9</sup>

Once the first signs of a potential recovery were seen, Manpower urged companies in the US and France to use their services rather than taking on direct employees, just in case the recovery was not sustained. In Germany in June 2010, temporary employment accounted for 53% of all new job creation.<sup>10</sup> The ILO's World of Work report 2012 confirms that: *"The increase in involuntary part-time and temporary employment has been larger than the increase in unemployed and permanent jobs since the crisis. This clearly shows that during the crisis more precarious employment was created."*



“ Unequal treatment of agency workers has been widely documented and is witnessed every day by workers and their trade unions. ”

### What is agency work like?

Agency workers typically receive lower wages than directly hired workers performing the same work. They are excluded from numerous benefits and face higher health and safety risks. Unequal treatment of agency workers has been widely documented and is witnessed every day by workers and their trade unions.

Agency or outsourced workers in the chemical, energy and mining sectors in India receive an average wage of 4,000 to 6,000 Indian Rupees (72 to 108 USD), while directly employed permanent workers doing the same job receive 15,000 to 20,000 Indian Rupees (270 to 360 USD). In the garment industry, contract workers are paid less than half the amount paid to permanent workers, which is often below the legal minimum wage.

At Swiss cement multinational Holcim’s Indian operations, 80% of the workers are employed via labour contractors. Despite the protections of Indian law and a sectoral agreement that prohibits agency labour in core production work and mandates that all work be paid at the same rate, Holcim contract workers are paid one third of the salary of direct workers and are denied proper protective equipment.

According to unions in the **Philippines**, agency workers do not receive any medical benefits, employment

accident and disease benefits, maternity or paternity leave, transport allowance or meal allowance. Once their term of employment expires, they either stay on as agency workers or have their services terminated. Even where collective agreements stipulate that agency workers are to receive the wages and benefits that apply under national or sectoral agreements, the fact that they can be dismissed more easily and quickly than permanent employees violates the principle of equality of treatment.

At Nokia in **China**, agency workers are paid about three-quarters of the wage earned by direct Nokia hires doing the same work, can’t live in the Nokia dormitory or join the official union, and are regularly threatened with dismissal.

An explicit example of employers turning to agency work to reduce labour costs is seen in the creation of fake agencies, catering to only one company. At BMW Leipzig in **Germany** in 2011, workers were transferred to a “daughter company” with a drop in wages of 40%. To avoid this form of disguised employment relationship, in Belgium the law stipulates that temporary work agencies cannot procure more than 30% of their turnover from a single company.

The evidence<sup>11</sup> is growing that agency workers face a greater risk of injury. In **Belgium**, agency workers

## Lafarge Kuantan Cement Factory, Malaysia (2010)

REGULAR WORKERS	AGENCY WORKERS
116 permanent workers directly employed by Lafarge	Around 200 workers indirectly employed through 11 agencies
All union members	No one is a union member
Same jobs – same workplace	Same jobs – same workplace
Job order given by Lafarge managers	Job order given by Lafarge managers
Wages 500-750 USD monthly (2008)	Wages 270 USD monthly (2008)
8 hours work a day, overtime paid at premium rate	12 hours work a day with no premium rate
Some holidays, Sundays off	Almost no holidays, no Sundays off
Pension, health insurance, paid annual leave, paid sick leave, bonuses	No pension, no health insurance, no annual leave, no sick leave, no bonuses
Safety equipment provided	Have to buy their own safety equipment
Annual medical check-up	No medical check-ups

were twice as likely in 2009 to have an accident compared to permanent workers. Work-related deaths of agency workers are shockingly high. **Brazilian** IndustriALL affiliate FUP reports that 226 of the 280 Petrobras workers who died between 1995 and 2009 were contract workers. **Peruvian** affiliate FNTMMSP saw 49 miners die in the first 9 months of 2009 of whom 37 were engaged through intermediaries. Figures from the Brazilian electricity sector show that

13 times more agency workers died in 2009 than permanent workers in Brazilian electricity companies.

Part of the problem is that triangular relationships make it unclear precisely who is responsible for agency workers' health and safety. In many cases, agencies do not make provision to pay fines and compensation to injured workers and may simply close the business to avoid their obligations.



## The Global Agency Lobby

Despite the negative consequences of agency work, it is no accident that in many countries all over the world agency work is increasing while the obstacles to it are disappearing. Behind the growth in agency work there is a strong industry lobby, pressing governments to remove legislative restrictions to their operation.

Agency work as a percentage of all employment is still low, but agencies are organizing globally to increase their market share.



*The agencies make a lot of play with the idea that a temporary agency job is a stepping stone to a permanent job. But that only tends to be true for some highly qualified individuals.*

**Marcel Nuyten, Union Director Temporary Workers, FNV Bondgenoten, Netherlands**

The International Confederation of Private Employment Agencies (Ciett) has as its members 48 national federations of private employment agencies as well as some of the largest global agencies including Manpower, Adecco, Kelly and Randstad. It does not provide information on which agencies are members of the national federations that affiliate to it. Among its objectives, Ciett lists:

- Helping its members to conduct their businesses in a legal and regulatory environment that is positive and supportive,
- Promoting quality standards within the staffing industry,
- Improving the image of the industry and strengthening its representation, and
- Making an effective contribution to the successful use of the economic potential of agency work sector.

Ciett produces a range of publications that support these objectives and give insight to the arguments the industry uses to gloss over the negative consequences of agency work and to promote it to employers and governments. Ciett's characterization of the private employment industry falls far short of the reality experienced by millions of agency workers worldwide, and by the unions that try to improve their working conditions.

Ciett bases its claims on narrow surveys of companies almost entirely in the US and western Europe, yet generalizes the claims to encompass all agency work worldwide. Let's take a look at them.

## Ciett Myth Buster

### FICTION 1: Agencies create jobs without substituting permanent jobs<sup>12</sup>

It is nonsense to claim that agencies create jobs. Investment and the economy create jobs, not agencies. Many of the jobs supposedly created by agencies would be permanent jobs if such agencies did not exist.

Examples are numerous of employers systematically replacing permanent workers with agency workers, including to get rid of or prevent unions. Owens Illinois, a US-based glass packaging manufacturer set out in 2012 to destroy IndustriALL affiliate Sintravidricol at the Cogua Cundimarca plant in **Colombia** by systematically replacing Sintravidricol members in permanent jobs with agency workers. Many of the laid off workers had worked ten years at the company, and were only dismissed because of the company policy to get rid of the union.

Research conducted by the Center for Social and Labour Rights in Moscow showed that in **Russia** agency labour merely replaces stable permanent employment, despite the agencies' claims that it works as a bridge between unemployment and a stable job.

Similarly in **Turkey**, IndustriALL affiliate Petrol-Is has extensive experience of enterprises where agency work, once marginal, has displaced direct employment and become the norm.

In an increasing number of cases, the employment of existing employees is transferred by employers to agencies. The workers receive lower pay while continuing to do the same jobs and permanent jobs are converted to agency jobs.

### FICTION 2: Agency work is an effective way of finding permanent work<sup>13</sup>

This claim is based on an opinion poll of the general public in eight western European countries. There is currently no evidence that agency work is effective as a stepping stone to permanent employment. A 2010 study of the role of agencies in assisting transitions from welfare to stable employment<sup>14</sup> found that agency jobs do not improve and may even diminish workers' earnings and employment outcomes and that only direct hire placements substantially raise earnings and employment. Providing low skilled workers with a temporary agency job was found to be no more effective than providing no job placements at all.

A survey by the **Australian** National Union of Workers (NUW) of its members employed through labour hire agencies found that 54% had been in the same position for more than 2 years. According to the **Philippines** Labour Force Survey, only 11% of agency workers move to regular, permanent or full-time work, 36% are not rehired and less than 1% of employers intend to convert agency jobs into regular positions.

Ciett's own statistics show that in the **US**, 59% of temporary agency workers take an agency job in order to get a permanent position, whereas only 20% of them actually get one.

### FICTION 3: Private employment services only contribute to better labour markets when properly regulated<sup>15</sup>

On the face of it, this appears to be a reasonable claim. Unfortunately, Ciett is only interested in regulation which supports the '*acceptance and the sound development of the industry*', in other words which further opens up a country's economy to agency work. This claim is particularly dangerous as it does not acknowledge that labour rights abuses result directly from the triangular

relationship itself, no matter how well agencies function.

Effective regulation by government must be aimed at protecting the rights of workers. It must include restrictions on the scope of agency operations and the duration of agency contracts, and require equality of treatment. This is not the kind of regulation that Ciett supports.



“Our experience is that temporary employment agencies do not promote decent work, but rather undermine it by institutionalizing triangular employment, maintaining workers in a state of precariousness and weakening workers’ capacity to effectively exercise their rights to organize and bargain with those who determine the terms and conditions of their employment ... The explosion of precarious work in recent decades has been accompanied by the growth of poverty, inequality, insecurity and a decline in trade union membership and bargaining power.”

Petrol-Is, Turkey

#### FICTION 4: Private employment services deliver decent work<sup>16</sup>

Ciett has never been able to support this claim with any evidence, nor is it consistent with the experience of unions all over the world. It is irrefutable that most agency workers in the world receive lower pay and conditions than directly hired workers doing the same job – there are many examples in this report.

The net effect of lower pay and conditions for agency workers is the degradation of working conditions for all workers. As agency work replaces direct employment, the bargaining unit shrinks and with it bargaining strength. Far from contributing to decent work, agency work directly undermines it.

#### FICTION 5: In many countries agency work is being recognized as a lifestyle choice<sup>17</sup>

What do agency workers themselves want? According to Ciett, agency workers chose to be employed through an employment agency rather than directly as it allows them to gain experience and work in a flexible way, contributing to a better work-life balance. In fact most agency workers do not get to choose whether to work for an agency or to be directly hired, let alone have any say in the length or arrangement of their working hours.

When Dutch centre for research on multinational companies, SOMO asked agency workers in the electronics industry what would be the one thing that would improve their lives the most, they replied ‘to become a permanent worker directly hired by the company I work for.’<sup>18</sup>

Similarly, a 2010 enquiry by the UK Equality and Human Rights Commission into agency work in the

meat processing industry found that, almost without exception, workers would prefer permanent work due to the security and rights it offers. Only 4 of the 260 workers interviewed preferred agency work to direct employment, with only 2 of these seeing the flexibility of agency work as positive.<sup>19</sup>

In a submission to the 2012 Australian Inquiry into Insecure Work, the NUW cited its survey of members employed through labour hire agencies, which showed that their main concern was lack of job security and that 80% would convert to permanent employment if they were given the chance.

And in Russia, the Center for Social and Labour Rights found that far from choosing agency work, people only take it when there is no other option.

# The legislative battle for direct employment

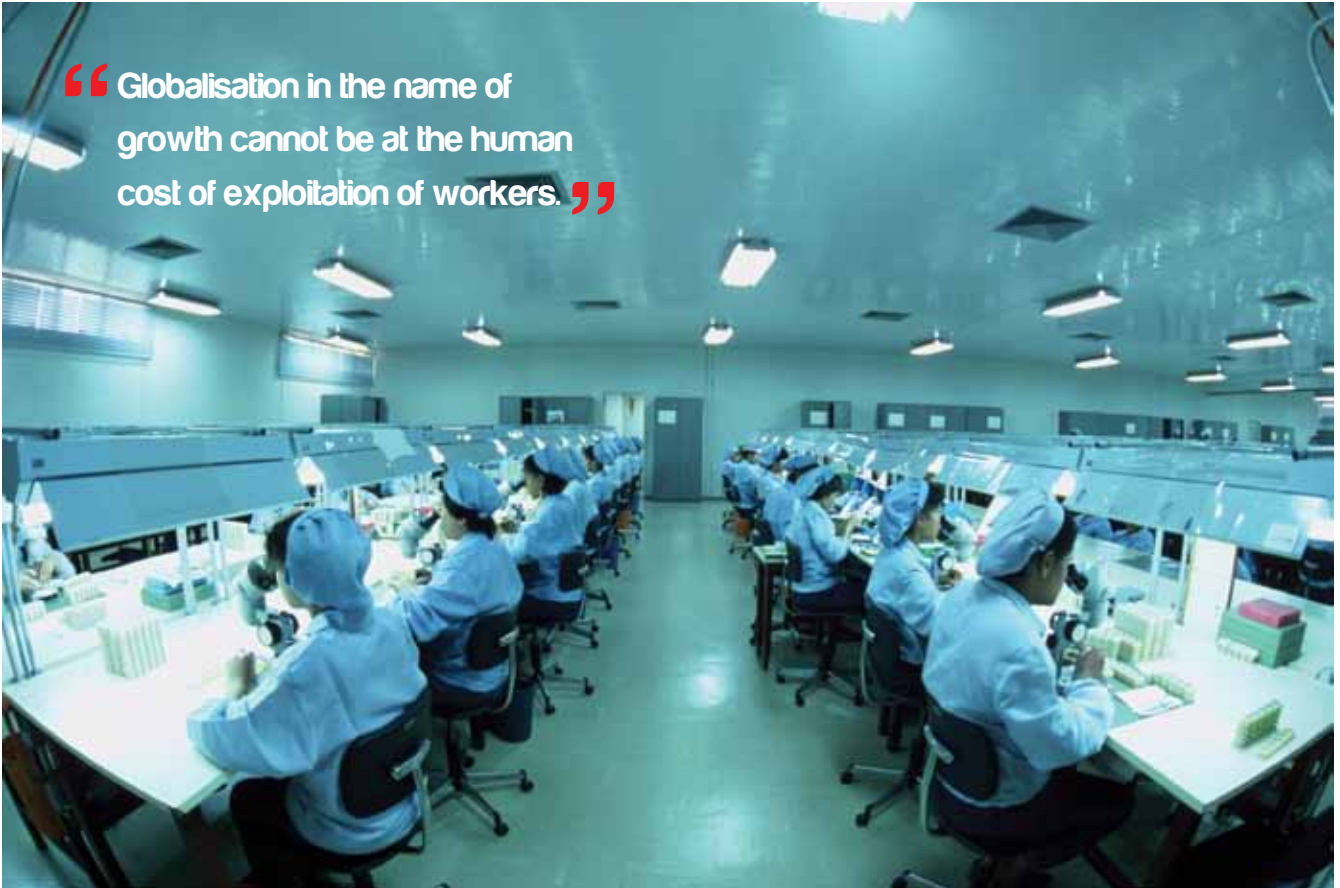
In countries all over the world, the battle against agency work is being played out in parliaments, where employer bodies including Ciett and the American Chamber of Commerce are lobbying fiercely for the removal of any legal restrictions on agency work.

Global institutions such as the World Bank, the International Monetary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD) are helping to create a favourable climate for agencies to push their legislative agenda by continuing to advocate flexibilization of labour markets as the route to economic growth, despite all evidence to the contrary.

Some examples:

- In **Malaysia** in 2010, the government proposed to amend the Employment Act to legalize labour suppliers as bona fide employers and to entrench the contract system, which was until then not provided for by law. The unions took action to strongly oppose the amendments and the government initially withdrew them, only to re-introduce them in 2011. This time the legislation was passed in March 2012, but continuing opposition by the trade union movement resulted in significant amendment, limiting the legalization of labour contractors to the plantation sector, with all other sectors exempted. Malaysian unions continue to see this as the slippery slope towards full legitimization of agency work.
  - Legislation has been proposed in **Turkey** to flexibilize employment and working conditions through, among other measures, legalizing subcontracting of core work and legalizing temp agencies.
  - The **Korean** government has long been proposing to amend its legislation to extend the period within which temporary workers must be made permanent from 2 years to 4 and to remove all restrictions on the categories of work in which dispatch, or agency, employment is allowed.
  - In **Europe**, the most common form of restriction on agency work is to prohibit its use to replace striking workers. Outright bans on agency work are rare, but while many countries put restrictions, these are progressively being undermined through lobbying by business and agencies.
- When governments introduce legislation aimed at protecting agency workers, business and agency lobby groups step in to oppose it.
- In 2012, when the **Austrian** government set out to legislate to protect agency workers in line with the EU Directive on temporary agency work, the business/agency lobby, which included Manpower, sprang into action. The bill proposed equal treatment between temporary and permanent workers as well as two-weeks notice and a €110 tax for the termination of employment contracts. Agencies responded by threatening to terminate the sectoral collective agreement or relocate their operations to other countries.<sup>20</sup>
  - In **Russia**, unions supported the introduction of a bill to the State Duma to effectively ban employers from transferring their workers to a third party when there is a reasonable basis for regular employment relations. Known as the 'agency labour banning bill', the proposed legislation included amendments to the Russian Labour Code to rule out triangular employment relationships. The bill successfully passed its first reading in the State Duma in May 2011, but was met by fierce opposition and lobbying by agency interests, including Ciett. The legislation is now unlikely to pass without significant amendment.
  - A law was adopted in **Namibia** in 2007 which banned all forms of labour hire. The law made it illegal for any entity to 'employ any person

“ Globalisation in the name of growth cannot be at the human cost of exploitation of workers. ”



*with a view to making that person available to a third party to perform work for the third party.’* Business and agencies challenged the law and exerted political pressure, to the extent that the law was ultimately overturned by the High Court. Subsequently, trade unions have proposed to ban triangular agency relationships while allowing agencies to recruit and dispatch workers.

- In **South Africa**, unions had closely followed the developments in neighbouring Namibia and also pushed for legislation that would ban agency employment. Unable to succeed through legislative means, South African unions took their struggle against labour brokers to the bargaining table. After 4 months of negotiations and a 2 week nationwide strike, motor industry workers, represented by the National Union of Metalworkers of South Africa (Numsa), achieved an agreement to phase out labour brokers in the industry. The union is now spreading the agreement to other sectors.

Public support for more protective legislation is high. According to a 2012 poll conducted by the ITUC of 13,000 people in G20 countries, 71% of people do not believe that labour laws provide adequate job security.<sup>21</sup>

## Court decisions

Meanwhile, courts around the world are becoming more involved in regulating agency work, in some cases handing down decisions that protect workers.

In January 2012, the **Finnish** High Court ruled that if there is no justified and objective reason for a job to be temporary, it is permanent. The fact that an agency assignment is time-limited is not a sufficient justification. In 2006, a shop assistant lost her job when the contract between the agency that employed her and the client company expired. However, the company’s need for shop assistants was permanent and it immediately started looking for replacements. After a succession of appeals in lower courts, the High Court concluded that a job is not temporary just because an employer uses work agencies.

In a landmark decision in January 2012, the **Indonesian** Constitutional Court ruled that contract-based work is unconstitutional and against workers’ rights as enshrined in the Indonesian Constitution. The ruling means that millions of contract-based workers will gain equal rights to monthly salaries, allowances, severance pay and social security benefits. The Court ruled unanimously to strike down all chapters

on contract workers and outsourcing in the labour law since these contravened the Constitution, which assures the protection of workers and their rights.<sup>22</sup>

In June 2012, the **South African** Labour Court upheld the rights of a worker who was dismissed in 2009. Five years previously his employment had been transferred by his employer, Mondi Packaging, to an agency, Adecco. His wages were cut while he continued to perform exactly the same job he had always done. The court upheld his dismissal rights, finding that he had continued to be employed by Mondi and that Adecco had never become his employer.

In September 2011, the Supreme Court of **India** used strong language to condemn the widespread practice by employers of declaring their employees to be employees of a contractor. This is used to get around labour regulation and pay lower wages. In the case concerned, the contractors were paid 56 Indian rupees (1 USD) per day while directly hired workers were paid 70 rupees (1.26 USD). The Court declared that ‘...this new technique of subterfuge has been adopted by some employers in recent years in order to deny the rights of the workmen under various labour statutes by showing that the workmen concerned are not their employees but are the employees of a contractor, or that they are merely daily wage or

*short-term or casual employees when in fact they are doing the work of regular employees. ... Globalisation in the name of growth cannot be at the human cost of exploitation of workers.*<sup>23</sup>

## Getting around the law

Even when laws in theory offer some protection against exploitation of agency workers, employers are finding creative ways of getting round them or are simply flouting them.

The **Indian** Contract Labour (Regulation and Abolition) Act stipulates that contract workers who perform the same or similar work as permanent workers will be entitled to the same wages and conditions. Under this Act, contract labour should not be used for permanent or core functions. However, the Act is extensively violated and contract workers in India habitually receive inferior terms and conditions of employment despite performing core tasks.

Similarly in **China**, the Labour Contract Law specifies that companies can only use dispatch labour to fill “temporary, auxiliary, or substitute job positions” but the requirement is widely flouted, with agency workers making up the majority of the workforce in many factories and engaged for extended periods of time. Social welfare insurance, which can account for up to 40% of labour costs, is often not provided by labour dispatchers, despite them being legally required to pay it.<sup>24</sup>

**German** union IG Metall reports that agency workers are engaged for such short periods of time that they have no chance to get unemployment benefit payments when they lose their jobs. There are instances of agencies not giving agency workers the correct number of days of leave or not paying them money for sick-leave that they are required by law to pay.

Workers in **Sweden** are entitled by law to get their jobs back if their position is eliminated then reinstated within 9 months. Many employers get around this by waiting 9 months, then hiring an agency worker.

## Exploiting loopholes

Since its introduction in 2008, employers have been finding ways to get around the worker protections contained in the EU Directive on temporary agency work.



*“The irony is that the regulation on agency work that we all looked forward to as a vehicle for improving the lot of precarious workers has in fact entrenched low pay and minimum conditions.”*

Jennie Formby, Unite, UK

The Directive aims to provide a protective framework for agency workers, in particular to ensure that the basic working and employment conditions of agency workers are at least those which would apply if they were directly employed by the user enterprise.

However, the Directive contains a couple of loopholes which employers and agencies have been exploiting to the maximum. For example, it allows derogation from the equal treatment principle when unions and employers have agreed to it. In the **UK**, agency workers are only entitled to equal treatment after they have been engaged for 12 weeks, rather than immediately. In practice, this means that more and more agency contracts have a duration of less than 12 weeks and in 2011 this already affected 50 to 60% of all agency workers.

But the biggest loophole being exploited by employers and agencies is the so-called '*Swedish derogation*'. This escape clause ensures that temporary agency workers who are permanently employed by the agency and are paid between assignments do not have to be paid equal wages. It is now in widespread use across several EU countries including the **UK**, **Sweden**, **Italy**, **Germany** and **Austria**. Payments between assignments do not have to be at 100% of wages and the rates paid vary between countries. Permanent agency workers in Sweden are paid 80%

of their last assignment between jobs, while in the UK they are paid 50% and in Italy it is €700.

These payments effectively allow agencies to buy their way out of the equal treatment requirement. The system also ensures that the link between the salaries of agency workers and those of comparable workers at the user enterprise is broken, opening the door for further widening of the wage gap.

Abuses resulting from the derogation are increasingly being reported. In the **UK**, one agency moved 8,000 of its 25,000 temporary workers on to permanent agency contracts (including all those working at a DHL operation supplying parts to a Jaguar Land Rover car assembly factory). Members of affiliate Unite the Union were pressured to sign contracts paying them up to GBP 200 (320 USD) less per week.<sup>25</sup>

In some countries, including the **Netherlands**, bogus or yellow trade unions are colluding with agencies by signing agreements that allow agency workers to be paid at much lower rates than direct workers.

In Ireland, the **Irish** Congress of Trade Unions has demanded that legislation not include the Swedish derogation, but include anti-abuse safeguards that guarantee agency workers at least 90% of pay between assignments.

## Hard to join a union; impossible to bargain

The obstacles to agency workers joining trade unions are numerous and substantial. Labour regulations often deny agency workers the opportunity to join a union, or to join the union at the place where they work. In many countries there are legal barriers that prevent agency workers from joining the same unions and being party to the same collective agreements as permanent workers. In **Bangladesh**, agency workers are not allowed to join the same union as the directly employed workers next to them. In **Thailand**, agency workers are classed as service sector workers even when they are dispatched to work in manufacturing, and thus are not entitled to join any manufacturing unions.

For an individual agency worker, there is often no motivation to join the union or get involved in bargaining when their connection to the workplace is weak, their employment is short term or sporadic, and there is no guarantee of continuing with the same company (although many end up doing the same job for years).

But without a doubt, the most important reason why agency workers do not join trade unions is a legitimate fear of losing their job. Many employers use agency work to resist unionization. Summary dismissal or threats of dismissal of agency workers for attempting to form or join a union are pervasive forms of control.

In the Special Economic Zones of the **Philippines**, employment through private agencies is systematically used as a mechanism to prevent workers from organizing into trade unions.

When it comes to bargaining, agency workers are in an impossible situation. The triangular employment relationship means that although their rights to bargain collectively may exist on paper (and are contained in the ILO Conventions), typically there is no practical way to exercise those rights. The user company where they work controls their day-to-day conditions of work and in most cases sets the wage rates

### Global Union Principles on Temporary Work Agencies

The Global Unions have agreed a set of joint principles on the use of temporary work agencies. The first principle is that the primary form of employment shall be permanent and direct. Other principles include:

- Agency workers must be guaranteed the right to join a union and be covered under the same collective bargaining agreements as other workers in the user enterprise,
- Agency workers must receive equal treatment in all respects,
- Agencies must not be used to eliminate permanent and direct employment, nor to undermine organizing or collective bargaining rights,
- Agency workers must never be used to replace striking workers or undermine industrial action,
- Where governments permit agencies to operate, they must set strict regulations and licensing conditions on their operations, and
- Governments must take concrete measures to guarantee agency workers' rights to join trade unions.

For the full principles, go to <http://www.global-unions.org/statement-global-union-principles.html>.



for the job, yet it is not technically their employer. Nor does it make sense for them to bargain with the agency as their legally recognized employer, since the agency has no actual control over their work.

The situation is complicated further when multiple agencies are present in the workplace. In the **Korean** automotive sector it is commonplace for dispatched workers from a number of different agencies to be working on production lines alongside directly employed workers, distinguishable only by the different coloured jackets they wear, and equally excluded from bargaining collectively with the company they work for.

Collective bargaining is one of the most important mechanisms for regulating usage of agency work and the pay and conditions of agency workers. Yet for most agency workers, collective bargaining remains out of their reach. How can collective bargaining be effectively carried out in triangular employment relationships? How can collective agreements be used to restrict agency work? In both cases, union strength is critical.

## Bargaining with user companies

Where unions have sufficient strength in user enterprises or user industries, they have been able to negotiate agreements that set limits on agency work. Such limits include the percentage of agency work allowed and the functions agency workers can perform, equality of treatment for agency workers, and permissible time periods before temporary agency workers must be given permanent, direct jobs. Limits on agency work are crucial, since the more agency work takes over, the smaller and weaker the bargaining unit becomes, making such agreements impossible.

At the end of 2010, **South African** affiliate Numsa agreed with the Tyre Employers' Federation and the Automobile Employers' Federation to phase out labour brokers and ultimately to ban them from the industry. In 2011, Numsa reached agreement with the Steel and Engineering Federation of South Africa, the main metal employer's federation, that workers can not be employed through labour brokers for longer than 4 months, after which a worker must be made permanent.

In **Argentina**, AOMA has signed a National Framework Agreement for the cement sector that equalizes wages and benefits for all workers doing essentially the same work, regardless of their



employment status. A similar agreement has been reached by the FASPyG.P union in the oilfields, oil refineries and gas sectors with the result that, even though 60% of work is outsourced, all workers receive the same salaries and the same benefits for equal work of equal value

Yet bargaining with user enterprises over agency work is not always possible. **Australian** unions have been demanding a reform of the Australian labour law to allow bargaining over the control of contract work and contracting out of work. Currently, bargaining over these issues is not permitted.

FNV Bondgenoten in the **Netherlands** focuses on trying to obtain better wages, pension rights and training opportunities for agency workers, rather than on job security. This is because they have found that putting the right to a permanent job after a shorter period into a collective labour agreement has the opposite effect, with employers firing agency workers earlier in order to avoid such provisions.

Through its strong focus on improving conditions for agency workers, IG-Metall in **Germany** has gained 38,000 new members among temporary staff. In May 2012 the union achieved two significant wins. First, it reached an agreement with metal industry employers that gives works councils the right to object to the use of agency labour. If the employer still wants to go ahead, they must either go to court or negotiate an agreement with the works council over the number of agency workers engaged, the time period they are

employed for and wages. The expectation is that most employers will choose the agreement route, giving works councils a real right to restrict agency work and to guarantee equal pay. The agreement also obliges employers to offer permanent employment to temporary workers after they have been employed for 24 months at the latest.

## Bargaining with agencies

The second part of the IG Metall strategy was to reach an agreement with temporary work agencies, committing them to paying additional bonuses for temporary workers employed in the metal sector, reflecting the higher salaries paid in that industry. These '*sectoral bonuses*' go a long way towards closing the pay gap between agency workers and direct employees, in line with IG Metall's goal of '*equal pay for equal work*'.

While negotiating with agencies has delivered some important outcomes for agency workers, this has largely been restricted to unions in western Europe. Such agreements are only possible where there is significant union strength among agency workers and therefore cannot be a model for most agency work situations in the world. But there are other drawbacks to this approach as well.

Within many triangular relationships, the real bargaining takes place between the user enterprise and the agency when the terms of the contract between them are fixed. Workers and their trade unions have no say in these

terms, and no knowledge of them, yet it is precisely these terms which set the boundaries of what it is possible for workers to negotiate with agencies. It is also not possible for agreements with agencies to set limits on the use of agency workers, which is why successful agreements with agencies are made in conjunction with industry agreements, as in the case of IG Metall.

## Global bargaining

Genuine collective bargaining at global level has not yet been achieved, but there are important signs that agreements can be made at global level between multinational companies and global union federations (GUFs) that restrict the use of agency work in companies and their supply chains.

In 2010, three GUFs signed a Global Framework Agreement with GDF Suez which states that the company '*recognizes the importance of secure employment for both the individual and for society through a preference for permanent, open-ended and direct employment. GDF SUEZ and all sub-contractors shall take full responsibility for all work being performed under the appropriate legal framework and, in particular, shall not seek to avoid obligations of the employer to dependent workers by disguising what would otherwise be an employment relationship or through the excessive use of temporary or agency labour.*'<sup>26</sup> Certainly there is more scope for exploring how Global Framework Agreements can be effectively used to regulate the use of agency work in multinational companies and their supply chains.

## Take action and mobilize!

### Unions take to the streets

Increased employer reliance on an agency workforce is fast reaching a crisis point in many countries. Workers see the balance of power in the employment relationship shifting massively in favour of employers, while the risks of employment are increasingly being shouldered by workers. Unions are responding by taking to the streets.

Employers in **India** have been systematically using contract labour to get around labour laws. In February 2012, millions of workers took to the streets in support of a general strike called by all central labour unions. A key demand of the action was for contract workers to receive the same rights and protections as permanent workers.



*Decent work is a right. Labour brokering is just like slavery and is causing major problems for the working class. We must take a firm stand and see them banned for good.*

Irvin Jim, NUMSA, South Africa

In March 2012, more than 200,000 workers took to the streets in 32 city centres in **South Africa** in an extraordinary show of worker power against labour brokers. According to Ciett statistics, around 1,000,000 workers in South Africa are employed by labour brokers.

150,000 **Norwegian** workers took part in a national strike in January 2012 to protest against the government's plan to adopt the EU Directive on agency work. Workers rallied in towns across Norway, fearing that adoption of the Directive would effectively promote the use of contract workers, forcing out permanent employees and weakening union rights and collective agreements.

February 2011 saw 10,000 workers in **Indonesia** and over 210,000 workers in **Germany** taking to the streets to protest against the growing threat of precarious employment.

### Union tools

Unions all over the world are flexing their industrial muscles and fighting against the spread of agency work. They are negotiating collective agreements that limit agency work and guarantee equal treatment. They are resisting legislative reforms that expand agency work and are pushing for legal restrictions on agency work. Union members in their millions are taking to the streets to demand an end to the exploitation that comes with agency work.

Beyond these traditional union tools, mechanisms exist at global level that can be used by unions to support their actions against agency work. Global Framework Agreements are starting to address precarious employment and there is plenty of scope to extend their terms to cover agency work throughout the global operations of multinational companies.

A number of ILO Conventions relate directly to agency work.

- **ILO Convention 181 on private employment agencies** requires governments to take measures to ensure that *'workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively'*. It also allows for governments to prohibit private employment agencies from operating in respect of certain categories of workers or branches of economic activity. These two provisions alone give plenty of scope for governments to control the spread of agency employment and ensure that agency workers are able to exercise their fundamental labour rights.
- **ILO Convention 96 on Fee-Charging Employment Agencies** deals with the progressive abolition of profit-making agencies.
- **ILO Recommendation 198 on the Employment Relationship** calls on governments to monitor developments in the labour market and the organization of work, and to formulate advice on the

adoption and implementation of measures concerning the employment relationship. Governments are supposed to collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, although little has been done to date. It also addresses disguised employment relationships, which agency employment may involve.

- **ILO Recommendation 91 on Collective Agreements** can be used to extend collective agreements to cover entire industries and promote industry bargaining to deal with agency work.

As is the case with many national labour laws, international labour standards date from an era prior to the explosion of agency work and are based on a model of permanent, direct employment that is rapidly being undermined. Action is urgently needed to clarify how current standards relate to agency work and triangular relationships in general and to ensure



## LO Korea complaint

In 2006, the **Korean Metalworkers' Union (KMWU)** and the International Metalworkers' Federation lodged a complaint with the ILO Committee on Freedom of Association against the Korean government for neglecting to protect and facilitating violations by companies of subcontracted workers' rights to freedom of association and collective bargaining.

Dispatch (agency) workers at a number of metal plants had not been regularized as required by the law after two years of continuous service. When these workers tried to form a union to assert their rights, they were dismissed by the company they worked for, either through the non-renewal of their contracts or through the non-renewal of the company's own contract with the labour dispatcher. The workers were put in a catch 22: the principal employer refused to negotiate, claiming there was no employment relationship; the dispatch company refused to negotiate, claiming it had no control over the terms and conditions of employment. The only place where the workers were able to take industrial action in support of their claims was at the principal employer's plant (where they worked). However, when they did take action, they were penalized for taking illegal action against a third party.

The ILO Committee on Freedom of Association issued recommendations to the Korean government that it should develop mechanisms to strengthen the protection of dispatch workers' rights to freedom of association and collective bargaining, but these have not been acted on.

that all workers benefit from the protections they provide. Testing the standards through complaint mechanisms plays an important role in establishing their scope as well as dealing with specific abuses. Unions can help strengthen the application of standards by campaigning for their implementation and bringing cases at the global level.

**Complaints to the ILO Committee on Freedom of Association** can be used to complain against a government for failing to protect agency workers' rights to join a union and bargain collectively.

**The OECD Guidelines for Multinational Enterprises** apply to all workers in an employment relationship with the enterprise, including agency or other forms of triangular employment. The Guidelines contain a complaint mechanism which allows unions to raise issues relating to the conduct of multinational companies, including their use of agency work.

Agency work is not inevitable. The many examples in this report show that when unions take a stand and use their collective power, agency work can be restricted at local, national and global level. Exposing the dangers of excessive and abusive use of agency labour is a key element of IndustriALL's global campaign against precarious work.

This is how agency work will be driven out of industry, by unions mobilizing their members in protest, negotiating conditions of agency work, putting pressure on governments to set clear and enforceable legislative boundaries and uniting together in global campaigns.



### Using the OECD Guidelines

In 2009, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) successfully used the complaint mechanism under the Guidelines to reach a settlement with Unilever over the level of indirect employment at its Lipton tea factory in Khanewal, Pakistan. The factory employed only 22 workers directly and 723 agency workers who were legally excluded from joining the same union as Unilever workers and reaching a collective agreement with Unilever. A concerted global corporate campaign gave the IUF the upper hand in mediation under the OECD Guidelines which resulted in Unilever agreeing to create an additional 200 permanent, direct jobs.

## ACT NOW

- Tell your government what the costs of agency work are to workers and communities
- Demand legislation to restrict agency work and protect workers
- Negotiate collective agreements that set limits on agency work
- Organize agency workers and fight for their rights
- Call on companies to employ agency workers directly
- Take action against agency and other forms of triangular employment
- Join IndustriALL's global campaign to **STOP Precarious Work**

# Endnotes

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- <sup>4</sup> Association of European Business
- <sup>5</sup> By VV Giri National Labour Institute
- <sup>6</sup> Bureau of Labor and Employment Statistics, 2007/2008 BLES Integrated Survey
- <sup>7</sup> <http://www.businessweek.com/printer/articles/12340-why-chinas-factories-are-turning-to-temp-workers>
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- <sup>10</sup> Bundesagentur für Arbeit, 2011
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## Head Office

### IndustriALL Global Union

54 bis, route des Acacias  
Case Postale 1516  
1227 Geneva Switzerland  
Tel: +41 22 308 5050  
Email: [info@industriall-union.org](mailto:info@industriall-union.org)

## Regional Offices

### Africa Office

156 Gerard Seketo, Newtown  
Johannesburg 2001 South Africa  
Tel: +27 11 492 0301  
Email: [africa@industriall-union.org](mailto:africa@industriall-union.org)

### South Asia Office

Linz House, 159-A, Gutam Nagar  
New Delhi, 100 049 India  
Tel: +91 11 2653 7125  
Email: [sao@industriall-union.org](mailto:sao@industriall-union.org)

### South East Asia Office

252 Tembeling Road  
03-07 Tembeling Centre  
423731 Singapore  
Tel: + 65 6440 2338  
Email: [seao@industriall-union.org](mailto:seao@industriall-union.org)

### CIS Office

Str. 2, d 13, Grokholsky per., Room 203.  
12090 Moscow Russia  
Tel: + 7 495 974 6111  
Email: [cis@industriall-union.org](mailto:cis@industriall-union.org)

### Latin America and the Caribbean Office

Avenida 18 de Julio No 1528  
Piso 12 unidad 1202  
Montevideo Uruguay  
Tel: +59 82 408 0813  
Email: [alc@industriall-union.org](mailto:alc@industriall-union.org)