A COMPARATIVE ANALYSIS OF LABOR OUTSOURCING

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TABLE OF CONTENTS

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I. INTRODUCTION

A LAWASIA Employment Law conference in Siem Reap, Cambodia in May 2013 inspired a vigorous discussion of labor outsourcing. It quickly became apparent that the term meant very different things to conference participants from different countries, and that the differing legal rules regulating employment relationships in each country often created different types of employer incentives to outsource labor, different means of labor outsourcing, and different legal rules regulating outsourcing.

Labor outsourcing is a hot topic as globalization spurs the mobility of labor and production. Market forces in turn have created political pressures in many countries to impose legal regulations on outsourcing. The regulatory structures, however, vary considerably by country.

This article compares the laws and the practice of labor outsourcing in five countries: Australia, China, Indonesia, Turkey, and the United States. Although these five countries are not necessarily representative of all the worldwide approaches to labor outsourcing, they do illustrate the disparate nature of the practice. Collectively, they indicate that a thorough understanding of labor outsourcing can be achieved only from considering the different perspectives and legal regimes in which it operates.

Parts II-VI of this article examine the law and practice of labor outsourcing in each of the five countries. Part VII analyzes labor outsourcing

from a global perspective, comparing and contrasting the labor outsourcing law and practice in the five countries studied. It finds both significant similarities and differences among the countries. For example, labor outsourcing is globally prolific and seems to be increasing. However, the general legal approach to regulating it varies considerably, with some countries adopting a regulatory model, others a hybrid regulatory-contractual model, and others not regulating it at all. Finally, the scope of legal regulations also varies considerably by country: some focus on protecting existing employees, others focus on curbing exploitation of workers performing outsourced work; some countries regulate the types of work that can be outsourced or subcontracted, and others regulate the firms that can provide labor outsourcing services. None of these types of regulations are necessarily mutually exclusive.

II. LABOR OUTSOURCING IN AUSTRALIA

A. The Fair Work Act

In Australia, 44-59% of Australian organizations outsource some business processes.[1] The practice is widespread in many industries but the full extent is unknown. The proportion of onshore outsourcing is also unknown.

Outsourcing is often perceived as a means for an employer to escape the constraints of an existing legal framework governing its workforce by contracting its work to another entity not so constrained. An employer may foresee advantages, such as cost savings and flexibility.

An employer may seek to do this either by entering into arrangements with another entity that employs persons without the same constraints or by engaging persons under temporary contracts for services. An example of the latter is contracting with independent contractors to perform the work that would be performed by employees, but without the statutory or legal framework constraints that apply to employees.

This section discusses the extent to which onshore outsourcing is affected by the legal framework in Australia, and whether an employer is likely to achieve cost savings by outsourcing if that is the objective.

1. Legal Framework

The national industrial relations system in Australia is regulated by *The Fair Work Act 2009* (the Act).[2] Under the Act, the terms and conditions of

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[1] THE SAUCE, THE AUSTRALIAN BPO REPORT, (Mar. 2012), *available at* http://www.fujixerox.com.au/doc/1187407/.

[2] *Fair Work Act 2009* (Cth) (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/.

employment are underpinned by the National Employment Standards (NES),[3] which prescribe maximum hours and minimum conditions, such as parental leave, annual leave, personal leave (including sick leave), notice of termination of employment and redundancy pay, and public holidays. The NES constitutes a safety net, and it is unlawful for employers to contravene the NES by providing terms and conditions below the thresholds provided by the NES.[4]

The Act empowers the Fair Work Commission to make "modern awards"[5] or workplace determinations,[6] and to approve enterprise agreements[7] that prescribe minimum wages and conditions of employment. Awards and enterprise agreements cannot exclude the NES.[8]

Awards, workplace determinations, and enterprise agreements made under the Act have the force of statutory instruments and can be enforced in the courts.[9] An employer and employee cannot contract out of the provisions of the NES, awards, workplace determinations, or enterprise agreements. Employers generally are bound to provide the terms and conditions in a modern award or an enterprise agreement to their employees.

Outsourcing focuses attention on the industrial instruments that will apply to employees of the entity taking on the outsourced work, and the entitlements of employees who lose their jobs as a result. In a practical sense, this can affect the wages and conditions of employees and the labor costs of the employer.

2. Transfer of Business

In some circumstances of outsourcing, the transfer of business provisions of the Act[10] will operate so that the entity will be bound by the terms and conditions of an enterprise agreement or workplace determination that applies to the outsourcing entity.

For a transfer of business to occur within the meaning of the Act, the following requirements[11] must be satisfied:

(a) the employment of an employee of the old employer has terminated;

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3 *Id.* at pt 2-2.

4 *Id.* at pt 2-1, § 44.

5 *Id.* at pt 2-3 (modern awards usually apply to all employers in an industry or specified part of an industry except to each employer covered by an enterprise agreement).

6 *Id.* at pt 2-5.

7 *Fair Work Act*, pt 2-4.

8 *Id.* at pt 2-1, § 55(1).

9 *Id.* at pts 2-1, 4-1, §§ 45, 50, 545.

10 *Id.* at pt 2-8.

11 *Id.* at pt 2-8, § 311.

(b) within 3 months after the termination, the employee becomes employed by the new employer;
(c) the work (the transferring work) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer; and
(d) there is a connection between the old employer and the new employer.[12]

If the entity that takes on the outsourced work does not employ any of the employees of the old employer, then there will be no transfer of business under the Act. This will have the practical effect of freeing that entity from any obligations under the industrial instrument that applies to the outsourcing employer.

There is a connection between the old employer and the new employer for the purposes of section 311(1)(d) of the Act where

(a) there is an arrangement for the transfer of assets from the old employer to the new employer and those assets are used in connection with transferring work;
(b) the old employer outsources work to the new employer;
(c) the new employer ceased to outsource to the old employer; and
(d) the new employer is an associated entity of the old employer.[13]

A recent Full Bench of the Fair Work Commission held that an arrangement can be less than a contract or agreement, and that "for an '*arrangement*' to exist, one party must have assumed at least a moral obligation or given an '*assurance*' or '*undertaking*' that it will act in a certain way."[14]

Under section 313,[15] if there is an award or enterprise agreement covering the old employer immediately before the transfer, then that industrial instrument (the transferable instrument) will apply to new employees of the new employer, but only in respect to a transferring employee. If the new employer has existing employees doing the same sort of work as the transferring employee, those employees will not be covered by the transferable instrument: the relevant industrial instrument that already applied to them continues to apply. However, a new employee of the new employer who is not a transferring employee will be covered by the transferable instrument if the new non-transferring employee performs the transferring work.[16]

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12 *Fair Work Act*, pt 2-8, § 311.
13 *Id.* at pt 2-8, § 311(3)-(6).
14 *John Lucas Hotel Mgmt. Servs. v Hillie* [2013] FWCFB 1198, para. 20 (Austl.).
15 *Fair Work Act*, pt 2-8, § 313.
16 *Id.* § 314.

Under section 318,[17] the Fair Work Commission can make orders that a transferable instrument does not cover a transferring employee or that an industrial instrument applying to the new employer applies to transferring employees. In doing so, it must consider the factors specified in section 318(3), which include whether an employee would be disadvantaged and any whether there would be negative impacts on the employer.

The Fair Work Commission can also make certain orders modifying or negating the operation of sections 313 and 314 in specified circumstances and with regard to matters specified in section 319.[18]

If there is no enterprise agreement or workplace determination or enterprise award, then the modern award applying to the industry of the new employer will apply.[19] If it is the same industry as the old employer, there will be no change to industrial coverage. Conversely, if the new employer is covered by a different industry modern award, then that award will continue to apply to transferring employees.

If an employee is a transferred employee,[20] his or her service will be regarded as continuous for the purposes of calculating entitlements under industrial instruments and the NES.[21]

3. Redundancy Pay

If the employment of an employee is terminated because the work of that employee has been outsourced, the employee is entitled prima facie to redundancy pay from the employer under the Act.[22] The entitlements are specified in the table of section 119(2) and provide for payments based on years of service ranging from four weeks of pay—for more than one but less than two years of service—to twelve weeks of pay—for ten years of service. Many enterprise agreements have more generous redundancy entitlements than those under the Act.

In most outsourcing instances, the employees of the old employer will technically have their employment terminated prior to taking up offers of employment from the new employer (or will not be offered employment or will decline such an offer). In those circumstances, the employee is also redundant. However, if an employee resigns to take up employment with a new employer,

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17 *Id.* § 318.

18 *Id.* § 319.

19 *Id.* at pt 2-8, § 312.

20 *Fair Work Act,* pt 1-2, § 22(7).

21 *Id.* § 22(5).

22 *Id.* at pt 2-2, § 119; *but cf.* § 121 (exempting employers with less than 15 employees form liability).

even if the new employer is taking up the outsourced work, that employee will not be entitled to redundancy pay.[23]

If an employee who is redundant because of outsourcing is offered and rejects employment with the entity taking on the outsourced work, and if the offered employment is substantially similar—on overall no less favorable terms and conditions—and recognises the employee's seniority, then the employee will not be entitled to redundancy pay.[24] The Commission has stated that the factors in section 120 are appropriately used in considering the comparability of the terms and conditions of offered positions.[25] Those factors include the nature of the work, pay, hours, skills, duties, seniority, and location.[26]

4. Independent Contractors

An independent contractor is not covered by industrial instruments made under the *Fair Work Act*; hence, it may be attractive to an employer seeking to escape that framework to engage workers as contractors rather than as employees.[27] However, Australian courts have increasingly been willing to conclude that the relationship is one of employment, notwithstanding the parties' describing it as one of independent contracting.

The courts will no longer give primacy to the degree of control exercised over the "contractor," but will adopt a multi-factorial approach.[28] The High Court has described this as a consideration of "the totality of the relationship."[29]

In the *On Call Interpreters* case,[30] the Court considered whether interpreters and translators were casual employees or independent contractors, and held that the workers were employees. Judge Bromberg posed the test as follows:

> Viewed as a "practical matter":
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,

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[23] *Id.* § 119. Under that section, the employee must have had his or her employment terminated at the initiative of the employer in order to be entitled to redundancy pay.

[24] *Id.* at pt 2-2, § 122(3).

[25] *Mantra Hospitality (Admin) Pty. Ltd.* [2013] FWC 1063 (Austl.).

[26] *Central Norseman Gold Corp. Ltd. v Kempton* [2010] FWA 5316 (Austl.).

[27] *Fair Work Act,* pt 1-3, § 13, pt 2-1, § 42 (defining "employee" and "national system employee").

[28] *On Call Interpreters and Translators Agency Pty. Ltd. v Comm'r of Taxation (No. 3)* (2011) 279 ALR 341 (Austl.).

[29] *Hollis v Vabu Pty. Ltd.* (2001) 207 CLR 21, 24 (Austl.).

[30] *On Call Interpreters and Translators,* 279 ALR 341 at para 208.

> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.[31]

Judge Bromberg considered a number of indicia in relation to the two parts of the question.[32] Following this case, it appears that in Australia it will be more difficult to characterise a worker as an independent contractor than as an employee.

5. Sham Contractors

The Act has penalty provisions regarding sham contracting.[33] Inspectors from the Office of the Fair Work Ombudsman enforce these provisions.

It is unlawful for an employer to

(a) misrepresent to a person that the engagement is as an independent contractor when the person is really an employee;[34]
(b) dismiss an employee in order to engage that employee as an independent contractor to perform substantially the same work;[35] or
(c) make a false statement to an employee to induce the employee to enter into a contract for services under which the employee will perform as an independent contractor the same or substantially the same work.[36]

6. Conclusion

The opportunity to achieve cost savings by onshore outsourcing in Australia is considerably limited by the Fair Work Act and instruments made under it, and by the courts' changing approach to the question of whether a worker is an independent contractor or an employee. This is particularly true where the outsourced work is done by the same worker.

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31 *Id.*
32 *Id.* paras 217-18.
33 *Fair Work Act,* pt. 3-1, §§ 357-359.
34 *Id.* § 357.
35 *Id.* § 358.
36 *Id.* § 359.

B. Subclass 457 and Overseas Workers

1. The Australian Experience with Overseas Workers

a. Prevalence

The Temporary Work (Skilled) visa (Subclass 457) program aims to meet Australia's short and medium skill shortages while ensuring that the terms and conditions of the employment accord with Australian standards and that overseas workers sponsored under the program are not exploited. Under the 457 Standard Business Sponsorship (SBS) visa arrangements, generally, a company that is lawfully operating a business in Australia sponsors the overseas worker[37] so that the sponsored person is engaged only as an employee of the company or an employee of an associated entity of that company.[38]

Labor agreements[39] provide a pathway to recruit overseas skilled workers where the standard 457 visa program arrangements do not meet industry needs and where access to overseas skilled workers is demonstrably in Australia's best interests. The standard labor agreement provides that the primary sponsored person is engaged only as an employee of the company or an employee of an associated entity of the company. Regulation 2.57 of the *Migration Regulations 1994* defines "associated entity" to have the same meaning as in section 50AAA of the *Corporations Act 2001*.[40] As such, the company must demonstrate that a

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[37] *Migration Regulations 1994* (Cth) reg 1.03 (Austl.) defines Standard Business Sponsor as a person who

> (a) is an approved sponsor; and
> (b) is approved as a sponsor in relation to the standard business sponsor class by the Minister under subsection 140E(1) of the Act.

[38] *See id.* at sub-reg 2.86(2A).

[39] Regulation 1.03 defines "labour agreement" as

> . . . a formal agreement entered into between:
> (a) the Minister, or the Employment Minister; and
> (b) a person or organisation in Australia;
> under which an employer is authorised to recruit persons to be employed by that employer in Australia.

[40] *Corporations Act 2001* (Cth) s 50AAA (Austl.) defines associated entities as follows:

> (1) One entity (the associate) is an associated entity of another entity (the principal) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.
> (2) This subsection is satisfied if the associate and the principal are related bodies corporate.
> (3) This subsection is satisfied if the principal controls the associate.
> (4) This subsection is satisfied if:
> (a) the associate controls the principal; and

direct employer-employee relationship is available. Businesses whose activities include the recruitment and/or hire of labor for supply to other unrelated businesses do not come within the employer-employee relationship requirements.

The On-Hire Labour Agreement caters to the needs of the labor hire industry, which includes:

> (a) recruitment firms who recruit overseas personnel for a client (the client is the employee/sponsor of the worker);
> (b) on-hire firms that sponsor overseas personnel using 457 visas and then place workers with clients (the on-hire firm is the employer/sponsor of the worker); and
> (c) contract management companies that recruit overseas personnel on behalf of a client and then manage the contractor relationship and the contract between the employee and the client.[41]

b. Industry Access

Labor agreements cover a variety of industries, including agriculture, food processing, meat processing, transport, specialist construction, and

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(b) the operations, resources or affairs of the principal are material to the associate.
(5) This subsection is satisfied if:
(a) the associate has a qualifying investment (see subsection (8)) in the principal; and
(b) the associate has significant influence over the principal; and
(c) the interest is material to the associate.
(6) This subsection is satisfied if:
(a) the principal has a qualifying investment (see subsection (8)) in the associate; and
(b) the principal has significant influence over the associate; and
(c) the interest is material to the principal.
(7) This subsection is satisfied if:
(a) an entity (the third entity) controls both the principal and the associate; and
(b) the operations, resources or affairs of the principal and the associate are both material to the third entity.
(8) For the purposes of this section, one entity (the first entity) has a qualifying investment in another entity (the second entity) if the first entity:
(a) has an asset that is an investment in the second entity; or
(b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.

[41] *See* JOINT STANDING COMM. ON MIGRATION, TEMPORARY VISAS ... PERMANENT BENEFITS: ENSURING THE EFFECTIVENESS, FAIRNESS AND INTEGRITY OF THE TEMPORARY BUSINESS VISA PROGRAM 94, para 2.186 (Austl. 2007).

engineering recruitment. As of September 16, 2013, there are sixty-three On-Hire Labor Agreements in effect and twenty-five under active negotiation.[42]

c. Incentives to Outsource

Labor outsourcing for these companies allows them to maintain a lean workforce and to have available the right amount of labor without the ongoing cost of salaried employees. These employers get access to skilled workers on a temporary and ad-hoc basis to meet business needs.

d. The Labor Response

The Department of Immigration and Border Protection (the Department) rigorously vets applications by companies to sponsor overseas workers under on-hire arrangements to ensure that on-hired workers are not exploited and that Australian standards and conditions of employment are not undermined. It requires that primary responsibility for the welfare of overseas workers rests with the on-hire company rather than the client firm. Only occupations that are on the Consolidated Sponsored Occupations List (CSOL) can be subject to an on-hire labor agreement.[43]

The employment must be on a full-time ongoing basis; the overseas skilled worker must be paid at the market salary rates (which must be more than the Temporary Skilled Migration Income Threshold (TSMIT));[44] the sponsored overseas worker cannot be charged for securing the employment, and cannot be benched (namely, not being fully employed and not getting paid for periods of inactivity in between assignments).

Over the life of the labor agreement, the on-hire company must continue to provide training and career opportunities for Australian workers in accordance with the prescribed training benchmark requirements so as to reduce the level of reliance on overseas workers.

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[42] Email from Elizabeth Anderson, Assistant Dir., Meet and On-Hire Labour Agreements, Dep't of Immigration and Citizenship, to author (Sept. 17, 2013) (on file with author).

[43] As part of the Employer Nominated Scheme and the Regional Sponsored Migration Scheme review process in July 2012 the Australian Government announced the implementation of a single list of occupations to provide a simpler and more consistent approach to sponsorship across the skill stream of visas without restricting the flexibility of programs such as the Labour Agreement and Regional Sponsored Migration Scheme categories. The Consolidated Sponsored Occupation List (CSOL) is a single list of occupations to determine occupations that applicants can nominate under these programs.

[44] *Migration Regulations 1994* (Cth) regs 2.72(10)(cc), 2.79(1A)(b), 2.72(10AB); *Specification of Income Threshold and Annual Earnings 2013* (Cth) (Austl.).

Before an on-hire labor agreement is approved, the employer must consult with organizations that best represent the interests of both the employer and the employees. The Department also seeks direct comment on the proposal from the Department of Education, Employment and Workplace Relations.

On approval of the on-hire labor agreement, the employer is subject to rigorous annual reporting requirements and to targeted monitoring to ensure the welfare of the overseas workers and compliance with the terms of the agreement.[45]

e. Outsourcing and Politics

There has been considerable controversy about the 457 visa program and on-hire arrangements because of the desire to protect local jobs, the standards and conditions of employment, and efforts to prevent the exploitation of overseas workers.

Effective October 1, 2007, the Section 457 visa program was amended to exclude on-hire firms from accessing the SBS visa arrangements unless the nominated position is to be directly employed in the on-hire firm's own business operations.[46] It provided for the On-Hire Labour Agreement, which allows a pathway to recruit overseas skilled workers where the SBS visa arrangements do not meet the needs of the industry and where it is in the interests of Australia to allow on-hire of overseas skilled workers to fill gaps in other businesses where there is a skill shortage.

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[45] The On-Hire Labour Agreement Business Case Pro-forma requires the employer to provide

(a) extensive information about the business (which must be an Australian entity and the direct employer of the workers proposed);
(b) the reasons for requesting access to the agreement;
(c) the occupations to be filled under the agreement (which must be specialised and skilled);
(d) demonstrable evidence that such skills cannot be accessed from the Australian workforce;
(e) that the remuneration is at market salary rates that the employer has an ongoing commitment to meeting the training benchmark requirements,
(f) that it is not subject to adverse information; and
(g) that it has undertaken mandatory stakeholder consultation (including with industry groups, unions and others) that may be impacted by the proposed labour agreement.

[46] *See Amendment to Sponsorship & Nomination Criteria & Temporary Business (Long Stay) Subclass 457 Visa Time of Decision Criteria 2007* (Cth), *available at* http://www.immi.gov.au/legislation/amendments/2007/071001/lc01102007-03.htm; *Labour Agreements Now Compulsory for On-hire Industry to Access to 457 Visa Program*, DEP'T OF IMMIGRATION & CITIZENSHIP (Oct. 1, 2007, 13:31), http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/2007/ka07102.html.

2. Rules and Regulations Affecting Overseas Workers[47]

a. The Direct Employer Requirement

SBS visa arrangements under Regulation 2.72(10)(d)(ii) and 2.72(10)(e)(ii) of the *Migration Regulations 1994* (the Regulations) provide that if the sponsor is lawfully operating a business outside of Australia (but does not operate a business in Australia), the nominated occupation must be a position in the business, or an occupation that is exempt from this requirement. The sponsor must be the direct employer of the sponsored overseas worker.

Under Regulation 2.72(10)(d)(iii), if the sponsor is lawfully operating a business in Australia, then the nominated occupation must be a position in the business or a position in an "associated entity"[48] of the business unless the occupation is exempt from this requirement.[49]

Under 457.223(4)(ba), unless the occupation is exempt, the 457 visa cannot be granted if the visa applicant will be employed in a position that would be located in an unrelated business. Labor hire companies seeking to recruit and supply 457 visa holders to unrelated businesses cannot access the standard 457 visa program and instead must apply under the labor agreement requirements.

b. Characteristics of a Direct Employer-Employee Relationship

The Department's policy guidelines provide that the characteristics of a direct employer include

(a) engaging the employee in a contractual relationship;
(b) being able to appoint or dismiss the employee;
(c) providing the work environment, including:
    (1) the place of work;
    (2) tools, materials, and equipment for work
(d) setting work parameters, including:

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[47] This part of the text closely follows the Department's policy guidelines, which are referred to as "PAM3."

[48] "Associated entity" has the same meaning as provided in section 50AAA of the *Corporations Act 2001* (Cth). *See supra* note 40.

[49] *See Migration Regulations 1994* (Cth) regs 2.72(10)(d)(ii)(B)-(iii)(B), (e)(ii)(B)-(e)(iii)(B). If an occupation is specified in a legislative instrument under those regulations, the primary 457 visa holder may be engaged as an independent contractor by the sponsor or an associated entity of the sponsor, and may work for other employers, either simultaneously or consecutively. However, the 457 visa holders must currently and continue to work in the approved nominated occupations in respect of which their visas were granted. Only senior general managers and medical professionals fall within the Legislative Instrument IMMI 13/067, which specifies the exempt occupations.

(1) allocating tasks to the employee;
(2) supervising the work of the employee;
(3) assessing and determining the output of the employee;
(4) providing the salary/remuneration to the employee;

(e) complying with all relevant taxation obligations regarding the employee, such as withholding PAYG[50] taxation and paying to the ATO[51] in accordance with relevant legislation;
(f) providing conditions of service for the employee, including:
(1) leave provisions;
(2) OH&S[52] responsibilities;[53]
(3) other workplace relations obligations such as sexual harassment provisions;
(g) contributing to superannuation for the employee in accordance with the relevant legislation;
(h) liability for WorkCover[54] payments for the employee;
(i) liabilities for the work conducted by the employee, including visa insurance and other coverage."[55]

The approved sponsor or an associated entity must carry out the direct employer responsibilities in respect of the sponsored 457 visa holder.

c. Exemptions to the Direct Employer-Employee Relationship

Departmental policy recognizes that the sponsored 457 visa holder, in working for her or his direct sponsoring employer, may be required to undertake short-term work on the premises of or with the tools of another business in carrying out the work.[56] Departmental policy provides the example where the sponsoring firm is an accounting firm performing a "business service," such as an

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[50] Withholding Pay as You Go (PAYG) taxation is a system for withholding amounts from payments an employer is required to make to employees and businesses so they can meet their end-of-year tax liabilities.

[51] ATO refers to the Australian Taxation Office.

[52] OH&S refers to Occupational Health and Safety.

[53] In Victoria, workplace health and safety is governed by a system of laws, regulations, and compliance codes which set out the responsibilities of employers and workers to ensure that safety is maintained at work.

[54] If an employee is injured at work an employer may be liable to pay certain entitlements to an employee. These benefits are paid by WorkCover insurers, and may include payment of medical expenses, income loss payments if an employee is unable to work due to their injury, and a lump sum for any permanent injury.

[55] *See* DEP'T OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS, PROCEDURES ADVICE MANUAL 3, *Schedules: The UC-457 Categories* [hereinafter PAM3].

[56] *See id.*

external audit to another unrelated entity's accounts.[57] In this example, the accounting firm would render an invoice to the unrelated entity for its auditing services and the 457 visa holder would remain in a direct employment relationship with the sponsor while providing a "business service" to the sponsor.

d. Labor Agreements

A labor agreement enables a company to recruit overseas skilled workers either where a direct employer-employee relationship is available or where labor is recruited by one business for hire by unrelated businesses. The labor agreement specifies the occupations, number of visa holders, terms of employment, and other relevant matters under which the employer who is a party to the labor agreement can sponsor overseas workers.[58]

e. On-Hire Labour Agreement

The On-Hire Labour Agreement applies to unrelated corporations and is a formal agreement between the Minister for Immigration and Border Protection and a person or organization in Australia under which an employer is authorized to recruit persons to be employed in Australia.[59] The On-Hire Labour Agreement provides a pathway to recruit overseas skilled workers where the standard 457 visa program arrangements do not meet the needs of industry and where it is to the benefit of Australia for overseas skilled workers to fill skill shortage gaps in businesses.

f. Labor Hire and Contract Staff Workers[60]

Businesses engaged in supplying workers to an end-user on a fee-for-service or contract basis must

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57 *See id.* paras 103-105.

58 *See* PAM3, *supra* note 55, div 1.2, reg 1.03.

59 *Migration Regulations 1994* (Cth) reg 2.76 and *Migration Act 1958* (Cth) s 140GC (Austl.) set out the requirements for a work agreement. Regulation 2.76(2) mandates that a work agreement

> (b) must be a labour agreement that authorises the recruitment, employment, or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 457 (Temporary Work (Skilled)) visa; and
> (c) must be in effect.

60 *See* PAM3, *supra* note 55.

(a) Recruit labor for clients who are not related to the employer; or
(b) Hire labor for clients who are not related to the employer; and
(c) Supply "the services" of the sponsored visa holder to businesses that are not related to the employer.[61]

g. Contract Staff Services

Under Departmental policy, the employer is not considered to be providing a business service to a client if the employer and the client share responsibility for some of the characteristics that indicate a direct employer-employee relationship.[62] An example of a labor hire arrangement is where the business is engaged in labor hire contracts with a third party to provide labor on a contractual basis. Generally, the labor hire company will enter into an employment contract with the sponsored overseas worker on the basis that the person's services may be with one or more end-users. The labor hire business (the approved sponsor or nominator) would be the employer. The end-user would generally control the duration of the contract between the end-user and the labor hire business, the location where the work is undertaken, and the performance of the work, including assigning, supervising, and assessing the work.

In a labor hire business, the subclass 457 visa holder fills the position of the operations of one or more end-users and not in the labor hire business.

3. The Effect of Australia's Laws on On-Hire Arrangements Relating to Overseas Workers

a. Efficacy

The 457 program (including the on-hire agreements) has recently received increased public and regulatory scrutiny. Such scrutiny has precipitated various reviews of the regulatory scheme which have then incorporated more stringent checks, monitoring, and compliance measures to limit abuses and non-compliance with the 457 visa and industrial relations laws.

For example, on July 1, 2013, the requirements that the employment must be a "direct employee-employer" relationship and the prohibition of on-hire unless under an approved labor agreement were further tightened.[63] Now, signed copies of the contract of employment must be lodged with the 457 nomination

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[61] *Id.*

[62] *See id.* ¶ 105 (stating that, "[i]f the sponsor shares, with another business, control of some or all of the aspects of a direct employer-employee relationship described in Direct employer or associated entity, they would be considered to be supplying labour to an unrelated business and would not be able to satisfy 457.223(4)(ba)").

[63] *See Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth).

application, and the sponsor must keep a record of the written contract of employment.[64] At the same time, the sponsorship obligations that apply to all approved sponsors and former approved sponsors were enhanced to

(a) ensure non-discriminatory employment practices (Regulation 2.59(f)(ii));
(b) ensure equivalent terms and conditions of employment (namely at the relevant market salary rate) for primary 457 visa holders (Regulation 2.79);
(c) cooperate with monitoring inspectors (Regulation 2.78);
(d) require an approved sponsor or former approved sponsor to meet prescribed training requirements (Regulation 2.87B); and
(e) notify the Department of prescribed changes in circumstances (Regulation 2.84).[65]

The obligation to ensure that the primary 457 visa holder works or participates in an occupation, program, or activity nominated by an approved sponsor (including by preventing the on-hire of a visa holder) that is not associated with the sponsor (Regulation 2.86) aims to prevent sham contracting arrangements.

To ensure the effectiveness of these laws, the Department has significant monitoring, enforcement, and sanctions powers. It undertakes targeted risk-based monitoring and compliance operations. Its approach includes education, warnings, administrative penalties, infringement notices, and civil and criminal sanctions and fines.[66] It relies heavily on third-party information and information sharing and collaboration across Commonwealth, State, and Territory governments. Sponsors must cooperate fully with the Department, including by providing monitoring reports as required.[67]

b. Enforcement

Responding to concerns the 457 visa program was being exploited, on July 1, 2013 the Australian Government, through its agency Fair Work Australia, appointed 300 monitoring inspectors to work with the Department to monitor and investigate compliance with sponsorship obligations. In particular, the monitoring inspectors were appointed to ensure that sponsored workers are working in the

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64 *See* PAM3, *supra* note 55, *Divisions: Obligations to Keep Records.*

65 *See Migration Amendment Act 2013.*

66 A failure to satisfy a 457 sponsorship obligation such as for example non-compliance with a monitoring inspector carries a fine of $10,200 for an individual and $51,000 for a body corporate (currently) in respect of each failure.

67 *See Migration Act 1958*, pt 2, div 3A; *Migration Regulations 1994* div 2.19 (Cth).

nominated position, are being paid market salary rates, and that sponsors are complying with Australia's industrial relations and related laws.[68]

c. Looking Forward

The Department will continue to review the regulatory scheme and implement measures to strengthen the integrity of the 457 visa program (including in regard to labor hire) to protect Australian jobs and conditions of employment and to ensure the welfare of visa holders, including under the on-hire labor agreement arrangements. The 457 Visa Program and related laws are significant and extensive. The writer's concern is not whether the laws, rules, and regulations are adequate. Rather, the question is whether they effectively are enforced. The Department continues to suffer from significant resource constraints, as a result of which, it is questionable whether the Department's significant monitoring, enforcement, and sanctions powers are given adequate effect.

In the writer's view, if the Department were to allocate adequate resources for monitoring, enforcement, and sanctions powers, then it would be most unlikely that these laws would be ignored. Thus, the issue is not whether the laws, rules and regulations should be changed, but rather, the concern that the Department should give proper effect to these significant laws, rules and regulations, and so as to best address any concerns that workers under the 457 visa program may be exploited.

III. LABOR OUTSOURCING AND LABOR DISPATCH IN CHINA

Outsourcing and labor dispatch are two different matters in China and are regulated by different laws and regulations. This part will first give an overview of both matters and then focus on labor dispatch, which is currently a hot topic in the field of human resources management and employment laws in China due to a major recent change of legislation.

A. Overview of Outsourcing and Labor Dispatch

1. Outsourcing

In China, it is common that when a company needs human services such as human resources management, IT support, security, cleaning, and logistics, it turns to a specialized service-providing company with professional employees to provide workers. Such an arrangement is generally called outsourcing. However,

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[68] *Id.*, pt 2, div F.

the Peoples Republic of China (PRC) employment laws do not have specific rules on outsourcing arrangements; furthermore, the laws do not define such a concept. This kind of arrangement was only mentioned in the *Interim Regulation on Labor Dispatch* effective as of March 1, 2014 (Interim Regulation). The Interim Regulation provides that the employer should comply with the rules regarding labor dispatch stipulated in this law if the employer is using employees by way of labor dispatch in the name of outsourcing.[69] However, this regulation does not provide any definition of so-called "outsourcing" either. So generally, as long as the relevant parties are not engaging outsourcing service being recognized as "labor dispatch under outsourcing's cover," the rights and obligations of the service-providing company and the service-accepting company are subject to civil law and the service agreement between them.[70]

For example, if a company needs to outsource part or all of its human resources management to an external company, the primary company will need to enter into an outsourcing agreement and pay service fees to the external company. In return for the fees, the external company will provide the primary company's human resources management functions; including paying salaries and social insurance, personnel records management, training, etc.

The general requirements for providing or accepting outsourcing services are as follows. First, to legally render the specialized services, the service-providing company must have the service specified in the scope of business shown in its business license, and must obtain the relevant permits/qualifications required by law.[71] For example, a construction engineering service company must obtain qualification in construction engineering. Second, the service-accepting company and the service-providing company must execute a service outsourcing agreement, under which the main obligation for the service-providing company is

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[69] Interim Provision on Labor Dispatch (promulgated by the Ministry of Hum. Res. & Soc. Sec., Jan. 24, 2014, effective Mar. 1, 2014) art. 27.

[70] Since current PRC laws have not provided any general rules or specific rules regulating the legal relation of outsourcing, in practice, what we can refer to is some relevant law indicating certain features of the outsourcing arrangement. *See, e.g.*, General Principles of the Civil Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987); Contract Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999). Thus, most rights and obligations under outsourcing provided in this Article are concluded by practice and laws which apply to all legal relationships between equal parties such as China's General Principles of Civil Law and Contract Law.

[71] *Provisions on the Administration of Registration of the Business Scope of Enterprises* art. 3, STATE ADMIN. FOR INDUS. & COMMERCE, http://english.wzj.saic.gov.cn/nd/nd_2004070501.html (last visited Oct. 18, 2014); Companies Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006, art. 12, para. 2, *available at* http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898292.htm.

to provide the required services, and the main obligation of the service-accepting company is to pay a service fee to the service-providing company.[72]

The service outsourcing agreement typically does not specify, and the service-accepting company is not concerned with, how many workers will be assigned by the service-providing company to complete the service project.[73] Instead, the primary concern of the service-accepting company is whether the services are completed as required. The workers are employees of the service-providing company, and the service-providing company bears all the employer's obligations towards them, such as paying salaries and benefits.[74] The service-accepting company does not exercise any control, management, or supervision over the workers, except for requesting the workers to obey some of its basic rules such as safety rules.

2. Labor Dispatch

A second way that a company in China can obtain personnel, other than by obtaining personnel directly by hiring them as employees, is by turning to a staffing firm (e.g. Beijing Foreign Enterprise Service Co., Ltd., also known as FESCO) to ask it to dispatch employees to the site of the company. Such an arrangement is known as labor dispatch, and is subject to the restrictions and requirements as provided by the *PRC Employment Contract Law* effective as of January 1, 2008 and amended on December 28, 2012 (Employment Contract Law (2012 Amendment)) and the Interim Regulation.[75]

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[72] Subject to contractual obligation.

[73] This character is due to the nature of outsourcing, whose arrangement is about one party providing service, rather than labor, and another party paying compensation for the service. Specifically, what the service-accepting company pays for is the service, and the service-providing company uses its own employees to provide service to the service-accepting company.

[74] Labor Contract Law of the People's Republic of China (2012 Amendment) (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective July 1, 2013) art. 4.

[75] Although China's Labor Contract Law does not give a definition of labor dispatch, this is generally agreed how labor dispatch works in practice. Furthermore, the Ministry of Human Resources and Social Security has tried to provide a clear definition of labor dispatch by providing that "labor dispatch refers to the employing method under which the employer hires employees and dispatch the employees to the accepting entities in the form of business operation. And the accepting entities will exercise direct management over these employees." Laowu Paiqian Ruogan Guiding (劳务派遣若干规定) [Notice on Certain Provisions of Labor Dispatch (Draft for Public Comments)] (promulgated by the PRC Ministry of Human Res. & Soc. Sec., Aug. 7, 2013), art. 2, http://www.mohrss.gov.cn/SYrlzyhshbzb/zxhd/SYzhengqiuyijian/201308/t20130807_109508.htm [hereinafter Labor Dispatch Notice].

Labor dispatch has been increasingly used by companies in China since the law permitting it first came into effect on January 1, 2008. According to statistics released by the PRC government, there were 37 million dispatched employees in China as of 2011.[76]

The major distinction between outsourcing and labor dispatch is that, with labor dispatch, the accepting company actually consuming the labor has no employment relationship with the dispatched employees; instead, the staffing firm becomes the legal employer of the dispatched employees.[77] Specifically, the staffing firm signs employment contracts with the dispatched employees, and undertakes obligations as an employer in accordance with PRC laws, including paying salaries, contributing social insurance for the employees, etc.[78] In practice, most of the monetary obligations of the staffing firm, such as the salaries and social insurance of the dispatched employees, are normally transferred to and essentially undertaken by the accepting company as it is the entity which actually receives and benefits from the labor provided by the dispatched employees. This transfer is generally stipulated in the dispatch agreement between the staffing firm and the receiving company. On the other hand, although the dispatched employees are employees of the staffing firm, they work directly under the supervision of the accepting company.[79] For such an arrangement, the accepting company pays service fees to the staffing firm, generally on a monthly basis. The service fees normally include the dispatched employees' salaries and benefits as well as fees for the staffing firm's service (generally charged by headcount).

Compared with outsourcing, the accepting company in a labor-dispatch arrangement bears more legal and contractual obligations towards the dispatched employees, such as paying the manpower costs by actually paying salaries and benefits to the staffing firm, bearing joint and several liability with the staffing firm for work-related injuries etc., and the dispatched employees are subject to the management and supervision of both the staffing firm and the accepting company.[80] The following sections will discuss in detail labor dispatch under PRC labor law.

B. Labor Dispatch Under PRC Labor Law

Regulation of labor dispatch is mainly stipulated by the *Employment Contract Law* (2012 Amendment), the *Interim Regulation*, and the *Implementation Measures for the Administrative Approval of Labor Dispatch* (effective on July 1, 2013) (Implementation Measures).

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[76] 严格规范劳务派遣 保障劳动者合法权益 [*Labor Contract Law to Modify, Strictly Regulate the Dispatch to Protect Workers' Rights*], XINHUA (Dec. 28, 2012), http://www.gov.cn/jrzg/2012-12/28/content_2301515.htm.

[77] Labor Contract Law of the People's Republic of China art. 58.

[78] *Id.*

[79] Labor Dispatch Notice, *supra* note 75.

[80] Labor Contract Law of the People's Republic of China arts. 58, 59, 62, 92.

1. The Tripartite Relationship Under Labor Dispatch

Article 58 of the *Employment Contract Law* (2012 Amendment) provides that the staffing firm is the employer and should perform an employer's obligations for its employees. This requires the staffing firm to enter into written employment contracts with a dispatched employee. Article 58 also provides that the dispatch agreement should specify the accepting company to which the employee will be dispatched, the term of dispatch, the employee's position, and the like.

2. The Principle of Equal Pay for Equal Work

The *Employment Contract Law* (2012 Amendment) emphasizes that dispatched employees are entitled to receive the same pay as the accepting company's directly hired employees for the same work.[81] The accepting company should adopt the same methods for the distribution of labor remuneration for the dispatched workers and its own employees in the same positions. This is known as the principle of "same pay for same work."

The principle of "same pay for same work" is emphasized and elaborated on by the *Employment Contract Law* (2012 Amendment) with the intent to protect the lawful interest of dispatched employees.[82] Traditionally in China, labor-dispatched employees were generally characterized as "temporary workers," meaning they were treated differently from direct hires and often received less pay.[83] Although the *Employment Contract Law* (2012 Amendment) entitles dispatched employees to the same pay as direct hires in the same position, it is still uncertain whether this can be realized in practice considering the opposition from some powerful state-owned enterprises. These state-owned enterprises have a relatively large number of dispatched employees and would face heavy economic pressure if required to provide the same pay for their dispatched employees as they currently provide for their direct hires.[84]

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[81] *Id.* art. 63.

[82] The principle of "equal pay for equal work" is a basic principle of PRC labor law and also applies to dispatched employees.

[83] According to the survey of All China Federation of Trade Unions, it is very common that dispatched employees are treated differently from direct hires and receive less pay. 兑现同工同酬关键在法律落地 [*The Key Legal Ground in Equal Pay*], ALL CHINA FEDERATION OF TRADE UNIONS (July 4, 2013), http://www.acftu.org/template/10001/file.jsp?cid=194&aid=87979.

[84] 完善劳动合同法规范劳务派遣用工 [*The Improved Labor Contract Law Regulates Labor Dispatch*], CHINESE NPC NETWORK (July 9, 2012), http://www.npc.gov.cn/npc/zgrdzz/2012-07/09/content_1729315.htm.

3. Applicable Scope of Labor Dispatch

Article 66 of the *Employment Contract Law* (2012 Amendment) stipulates that labor dispatch is a supplementary form of employment and should exclusively apply to temporary, auxiliary, or substitute positions.[85] The amended Article 66 of the *Employment Contract Law* (2012 Amendment) provides that

(a) a "temporary" position means a position existing for no more than six months;
(b) an "auxiliary" position means a position which relates to a non-essential business and provides certain services to the essential business positions; and
(c) a "substitute" position means a position which can be performed by another employee when one employee cannot perform his/her duties for a certain period of time due to absence as a result of full-time study, leave, or other reason.[86]

The Interim Regulation specifies that the auxiliary positions which the company determines to use for dispatched employees should be discussed, proposed, and commented on by the employee representative congress; or all employees consulted and determined with the company's trade union or employee representatives on an equal basis, and publicized within the company.[87]

A company using dispatch services must also strictly control the number of personnel obtained through labor dispatch. Article 4 of the Interim Regulation provides that the number of dispatched employees should not exceed ten percent of the total number of the company's employees. Here the "total number of the company's employees" is the sum of directly-hired employees plus dispatched employees.

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85 Labor Contract Law of the People's Republic of China art. 66.

86 *Id.*

87 Interim Provisions on Labor Dispatch (promulgated by the Ministry of Human Res. & Soc. Sec., Jan. 24, 2014, effective Mar. 1, 2014), art. 3.

4. Qualifications Required for a Staffing Firm

Pursuant to Article 57 of the *Employment Contract Law* (2012 Amendment), a labor staffing firm must satisfy the following conditions to engage in labor dispatch business:

(a) its registered capital must be not less than two million Yuan;
(b) it must have fixed business premises and facilities suitable for businesses;
(c) it must have labor dispatch management rules in compliance with applicable laws and administrative regulations; and
(d) it must satisfy other conditions prescribed by laws and administrative regulations.[88]

To engage in the labor dispatch business, an entity should apply to the labor administrative department for administrative licensing in accordance with the *Implementation Measures*.[89] This is a new rule effective as of July 1, 2013. Compared with the original rule, which only required registered capital no less than RMB 500,000, this new rule increases the requirements for an entity intending to operate labor dispatch business by asking for registered capital of no less than RMB 2,000,000 and administrative licensing from the labor bureau, etc. Hopefully this will help regulate the dispatch companies in the market.

To dispatch employees, the staffing firm should enter into a dispatch agreement with the accepting company. The dispatch agreement should "stipulate the positions to which the employees will be dispatched, the number of persons to be dispatched, the term of dispatch, [and] the amounts and terms of payment of remunerations and social insurance premiums."[90] Furthermore, the accepting company must not establish any staffing firms to dispatch employees to itself and its subsidiaries.[91]

C. The Effect of PRC Labor Law on Labor Dispatch

For the accepting company, labor dispatch is more flexible and cost-efficient than directly hiring employees, and is therefore very popular in China. Furthermore, certain types of entities in China, such as representative offices of foreign enterprises, must hire employees from staffing firms because they are not

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[88] Labor Contract Law of the People's Republic of China art. 57. This is a general provision and the laws and administrative regulation here may include the Company Law, the Regulations on the Registration of Companies and any other laws or regulations that might be applicable.

[89] *Id.*

[90] *Id.* art. 59.

[91] *Id.* art. 62.

legal employers under PRC labor law and are forbidden from directly hiring employees.[92]

Judging from the current legislation, labor dispatch in China is facing stricter regulation. Companies will have to adjust or reconsider their employment models in response to the latest legislation. The staffing firms will need to take measures to satisfy the requirements set forth in the *Employment Contract Law* (2012 Amendment), while the accepting companies will need to consider turning those dispatched employees into directly hired employees in order to meet the regulations regarding "temporary, auxiliary or substitute positions." Dispatched employees will be entitled to more favorable treatment, enjoying the benefits brought by the new legislation. Relationships among the three parties must change to be compliant.

IV. LABOR OUTSOURCING IN INDONESIA

A. The Legal Development of Outsourcing in Indonesia

Outsourcing has become a major political and legal issue in Indonesia since the issuance of Law No. 13/2003. Based on research and surveys conducted by management experts over the past twelve years on more than 1,200 companies, companies use outsourcing because they expect to derive significant business benefits from doing so.[93] These expected benefits include

(a) enhancing the focus of the company;
(b) the world-class expertise of some of the workers to whom work is outsourced;
(c) the ability to re-engineer the workplace;
(d) enhancing labor productivity and flexibility;
(e) spreading various risks, such as the risk of a market downturn;
(f) re-allocating the company's capital and human resources; and
(g) decreased labor costs.[94]

Outsourcing in Indonesian labor law is defined as the chartering and supplying of worker services. In general, outsourcing-related matters in Indonesia are regulated by Law No. 13 of 2003 concerning Manpower (Law No. 13/2003), in particular Articles 64, 65, and 66, as well as Minister of Manpower and Transmigration Regulation No. 19 of 2012 concerning Terms of Partial

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[92] Interim Provisions of the People's Republic of China on the Administration of Resident Representative Offices of Foreign Enterprises (promulgated by the St. Council, Oct. 30, 1980), art. 11.

[93] RICHARDUS EKO INDRAJIT & RICHARDUS DJOKOPRANOTO, PROSES BISNIS OUTSOURCING, 4-5 (2003).

[94] *Id.*

Assignment of Work to Third Party Companies (MOMT Regulation No. 19/2012).

Article 64 stipulates that a company may subcontract part of its work to another company under a written agreement of contract of work or a written agreement for the provision of work/labor.

1. Contract of Work

The employment relationship is created by a written employment agreement between the employer and the employee. This requirement of a written employment agreement also applies when a company subcontracts work to another party. Work that may be subcontracted must fulfill the following requirements:

(a) the work can be done separately from the main activity;
(b) the work is to be undertaken under either a direct or an indirect order from the party commissioning the work;
(c) the work is an entirely auxiliary activity of the enterprise; and
(d) the work does not directly inhibit the production process.[95]

In addition, Article 12 of MOMT Regulation No. 19/2012 stipulates that labor providers must fulfill the following requirements:

(a) take the form of a legally recognized entity;
(b) have a company registration certificate;
(c) have a business license; and
(d) have evidence of having filed its mandatory manpower reports.[96]

If the above requirements are not met, the enterprise that contracts the work to the contractor will be held responsible by law to be the employer of the worker/laborer employed by the contractor.

According to Articles 5, 6, 7, and 8 of MOMT Regulation No. 19/2012, any supporting work that is subcontracted must be reported by the employer to the government agency responsible for manpower in the district/city where the work is being conducted. The government agency must then issue the proof of report within one week of the submission.

An employer is not allowed to subcontract any part of work unless it has the proof of a report from the government agency. The absence of such a report will legally cause the employee's relationship to no longer be with the subcontractor but rather with the employer.

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95 Manpower Act (Law No. 13/2003), art. 64 (Indon.).
96 MOMT Regulation (No. 19/2012), art. 12 (Indon.).

In addition to the above requirement, according to Articles 10 and 11 of MOMT Regulation No. 19/2012, the contractor must also register the contract of work with the government agency within thirty working days as of the commencement of the work. Subsequently, the government agency must issue the proof of registration within five days of receiving this registration.

2. The Provision of Labor

Article 66 of Law No. 13/2003 stipulates that employers may not use outsourced labor to carry out main activities or activities that directly relate to the production process. The work must be limited to auxiliary service activities or activities that are indirectly related to the production process. Those providing labor for auxiliary service activities must fulfill the following requirements:

(a) there must be an employment relationship between the employee and the labor provider;
(b) the employment agreement in that employment relationship must be in writing and signed by the parties, and must specify whether it is for a specified or indefinite duration; and
(c) the labor provider must be responsible for wages, welfare protection, the provision of good working conditions, and dispute resolution.[97]

A labor provider must be in the form of a legal entity and licensed by a government agency responsible for manpower affairs. If the conditions in Article 66 regarding employees from the labor provider are not fulfilled, then the employees provided by the labor provider will be deemed to be the employees of the primary employer, not the labor provider.

Article 17, Paragraph (3) of MOMT Regulation No. 19/2012 provides that the following are "auxiliary services" that may be outsourced:

(a) cleaning services;
(b) catering for employees;
(c) security;
(d) support services in the mining and oil sectors; and
(e) employee transportation services.[98]

Article 24 of MOMT Regulation No. 19/2012 requires that labor providers must

(a) be established in the form of a limited liability company;

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97 Manpower Act art. 66.
98 MOMT Regulation art. 17, para. 3.

(b) hold a company registration certificate;
(c) hold a proper business license;
(d) hold a proper receipts for mandatory employment reports;
(e) hold an operating license;
(f) have a permanent office and address; and
(g) have a taxpayer registration number.[99]

Further, Article 20 of MOMT Regulation No. 19/2012 requires the labor services agreement being entered into between the employer and labor provider to be registered with the government agency responsible for manpower matters in the district or city in which the work is being conducted within thirty days after it is signed.

B. The Opportunity to Be Appointed a "Permanent" Employee

Article 28 of the MOMT Regulation No. 19 of 2012 stipulates that every outsourcing employment contract must include provisions guaranteeing the legal rights of employees/workers.

The following chart compares outsourced workers to permanent employees based on the new Minister of Manpower and Transmigration Regulation No. 19 of 2012 concerning Terms of Partial Assignment of Work to Third Party Companies[100]:

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[99] *Id.* art. 24.

[100] *See* Regulation of the Minister of Labour and Transmigration of the Republic of Indonesia, Concerning Conditions for Handover of Part of Work Performance to Another Company (No. 19/2012).

RIGHTS OF EMPLOYEE	PERMANENT	OUTSOURCED
Basic Wage	• Minimum wage • Specified duration of work	• Minimum wage • Specified duration of work
Premium Presence	Yes	No
Insurance for Working Accident, and Health, Death	Yes	Yes
Payment for food and Transportation	Yes	No
Right for Rest and Leave	Yes	Yes
Holidays	Yes	Yes
Severance	Yes	Yes
Social security for Employees (Jamsostek)	Yes	Yes

Recently, labor unions are increasingly demanding that outsourced employees be converted to permanent employees. This is illustrated by one of the recent protests by hundreds of workers performing outsourced work for PT PLN (Persero). These workers demanded to be appointed as permanent employees because their legal employer—a labor provider—was deducting a substantial percentage of their wages.[101]

Indonesian laws and regulations do not restrict the ability of an outsourced employee to transition to permanent status. A restriction may, however, be imposed by the labor-outsourcing contract between the employer-contractor and the labor provider; such a restriction is permitted by the freedom of contract principle in Article 1338 of the Indonesian Civil Code. Absent such a contractual restriction, an employee of the labor provider may concurrently work as a permanent employee of the primary employer.

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[101] Pebrianto Eko Wicaksono, *Angkat Buruh Outsourcing Jadi Pegawai Ibarat Dahlan Jadi Bos PLN*, LIPUTAN6 (Apr. 25, 2013, 12:07 PM), http://bisnis.liputan6.com/read/570596/angkatburuh-outsourcing-jadi-pegawai-ibarat-dahlan-jadi-bos-pln.

V. LABOR OUTSOURCING IN TURKEY

A. Introduction

Outsourcing is widespread in Turkey. According to recent statistics derived from The Ministry of Labour and Social Security, as of January 11, 2012, 585,788 public sector jobs and 419,466 private sector employees have been recruited by sub-employers.[102] In other words, there are 1,005,254 registered employees who have been outsourced in business. Outsourcing is most common in the construction and cleaning industries.[103]

Companies understand that labor outsourcing provides them considerable advantages. The outsourced worker is registered to the subcontractor, not to the principal for whom the job is performed. This dramatically decreases the principal's personnel costs. It also relieves the principal of responsibility for payroll and compensation issues.

The subcontractor—not the principal—is responsible for keeping track of working hours and leaves of absence. The subcontractor is also responsible for handling employment benefits. In sum, while the principal is responsible for providing a safe work environment and appropriate working conditions, the subcontractor is usually responsible for all the financial issues.

Employers often abuse outsourcing in both the public and private sectors. Some outsourced employees are employed without legally required job-security and flexibility. Many employees are outsourced for the purpose of avoiding employment laws that otherwise would apply to a directly-employed employee; there is significant caselaw from the Court of Appeal (Yargitay) on this issue.[104] Outsourcing has become a political issue, but the political system has not resolved it.

B. Regulations Related to Outsourcing

Two regulations govern outsourcing under Turkish law: 4857 Labour Law[105] and 27010 Subcontractor Regulation.[106] Article 2/6 of 4857 Labour Law provides

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[102] T.C. ÇALIŞMA VE SOSYAL GÜVENLIK BAKANLIĞI, http://www.csgb.gov.tr/csgbPortal/csgb.portal?page=haber&id=basin491 (last visited Sept. 24, 2014).

[103] *Id.*

[104] For example, Yargitay has ruled that being a public agency as an employer is not important for conditions of collusion, which is often acted for the purpose of avoiding employment laws that otherwise would apply to a directly-employed employee. YARGITAY [Supreme Court of Appeals] Apr. 4, 2013, 9. HD E.2012/31079 K. 2013/11184.

[105] The purpose of 4857 Labor Law is to "regulate the working conditions and work-related rights and obligations of employers and employees working under an employment contract." Labour Act of Turkey, Law No. 4857, May 22, 2003, art. 1.

> The connection between the subcontractor who undertakes to carry out work in auxiliary tasks related to the production of goods and services or in a certain section of the main activity due to operational requirements or for reasons of technological expertise in the establishment of the main employer (the principal employer) and who engages employees recruited for this purpose exclusively in the establishment of the main employer is called "the principal employer-subcontractor relationship." The principal employer shall be jointly liable with the subcontractor for the obligations ensuing from this Labour Act, from employment contracts of subcontractor's employees or from the collective agreement to which the subcontractor has been signatory.
>
> The rights of the principal employer's employees shall not be restricted by way of their engagement by the subcontractor, and no principal employer-subcontractor relationship may be established between an employer and his ex-employee. Otherwise, based on the notion that the principal employer-subcontractor relationship was fraught with a simulated act, the employees of the subcontractor shall be treated as employees of the principal employer. The main activity shall not be divided and assigned to subcontractors, except for operational and work-related requirements or in jobs requiring expertise for technological reasons.[107]

Article 4 of 27010 Subcontractor Regulation regulates how a subcontractor relationship is established. The regulation requires that the principal employer must have its own employees in the work place. The subject of subcontracting must be one of secondary jobs of the main service. If a primary job is divided and part of it assigned to a subcontractor, the assigned job must require specialized technological expertise. The subcontractor must employ its employees only for the job taken at this work place. The subcontracted job must be dependent on the primary job, and it must be able to continue as long as the primary job continues. The subcontractor cannot be a former employee of the principal employer, but a former employee of the principal employer may be a shareholder of the subcontractor.

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[106] This regulation was published in Official Gazette on September 27, 2008. It mainly includes the terms relating to establishment of relations between a subcontractor and a principal employer, registration and notification of a subcontractor's place of business, and conditions which must be included in the subcontract agreement. Subcontractor Employers' Regulation, Law No. 27010, Sept. 27, 2008, art. 9.

[107] Labour Act of Turkey, art. 2.

Article 9 of 27010 Subcontractor Regulation specifies that subcontracts must be in writing and must contain certain terms. A subcontract must include the address and title of parties and in some cases of the vice principals. A subcontract must describe

(a) the main job conducted in the work place;
(b) the job assigned to the subcontractor;
(c) the beginning and end date of the job if those dates have been set; and
(d) the place in the workplace where subcontractor will conduct the job.

A subcontract must contain

(a) an explicit clause establishing joint liability of the parties for the rights of employees;
(b) a clause retaining the employment rights of any employee previously employed by the primary employer who now will be employed by the subcontractor;
(c) if the main job is divided and part of the job is subcontracted out, a technical statement describing why the assigned job requires specialized technologcal expertise;
(d) an equipment list, certificate of completion, and a list of technical staff and operators;
(e) the terms and conditions of the subcontractor performance of job; and
(f) the signatures of parties.[108]

Article 9 of 27010 Subcontractor Regulation contains a clause protecting employees from collusive subcontracting transactions. Workplaces containing outsourced work are subject to audits by labor inspectors appointed by The Ministry of Labour and Social Security. These inspectors focus on issues such as whether

(a) the assigned job is a secondary job or a job requiring specialty for technological requirements;
(b) the subcontractor has worked for the principal employer before;
(c) the subcontractor has the sufficient equipment and experience;
(d) the features of employed employees are appropriate for the assigned job;
(e) any employee of the principal employer works on the subcontracted job, except for employees appointed for coordination and audit; or

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[108] Subcontractor Employers' Regulation, art. 9.

(f) the purpose of the subcontractor agreement is to avoid legal obligations or to interfere with the employment rights or collective rights of employees.[109]

If the labor inspectors determine that there has been an infringement, the employer will be required to pay a penalty. The employer may appeal this determination to the Labour Court.

Both the principal employer and the subcontractor are jointly liable for any employment-related liabilities.[110] Both the 4857 Labour law and 27010 Subcontractor Regulation provide that a principal employer is liable for the payment of wages if the subcontractor fails to pay its sub-employees. Joint liability also applies to

(a) various kinds of receivables such as notifications and seniority indemnities;
(b) yearly leave fees and overtime fees;
(c) social security obligations such as premium debts;
(d) compensation arising from occupational accidents and professional diseases; and
(e) damages incurred by third parties.[111]

The joint liability of the principal employer is further established by 6098 Code of Obligations article 66.[112]

C. Caselaw

The Turkish labor system strictly protects employees. Although employers often infringe employee rights, employees can prevail in the phase of judgment. Recent caselaw provides further insight on outsourcing in Turkey.

For example, in a case where the defendant and primary employer was the Chamber of Commerce of Ankara (ATO), the Court of Appeals held that a primary employer is jointly liable for the emotional distress of employees arising from work accidents.[113]

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[109] *Id.*

[110] CEVDET ILHAN GÜNAY, IŞ HUKUKU VE SOSYAL GÜVENLIK HUKUKU: YENI İŞ VE SOSYAL GÜVENLIK YASALARI [Business Law & Social Security Law: New Labour and Social Security Laws], 97 (2d ed. 2010).

[111] NAHIT GÜRHAN AYDIN, TÜRK IŞ HUKUKUNDA ASIL IŞVEREN- ALT IŞVEREN ILIŞKISI [Employer-Subcontractor Relationship in Turkish Labor Law] 87-96 (2006) (Master thesis, Selçuk Üniversitesi) (on file with author).

[112] Code of Obligations, 6098, art. 66.

[113] YARGITAY HUKUK GENEL KURULU [Supreme Court Plenary], Feb. 2, 2011, docket no. 2010/21-739 E. 2011/5 K., *available at* http://www.turkhukuksitesi.com/

In another case, the principal business changed locations and subcontractors. Yargitay was called upon to apportion liabilities between the old and the new subcontractors. Yargitay found that the old subcontractor would be liable only for liabilities that accrued during the term of its subcontract; however, the new subcontractor would be liable for liabilities accrued during the term of its contract as well as the terms of the contracts of previous subcontractors.[114]

Yargitay often accepts claims of collusion between principal employer and subcontractor. However, Yargitay has ruled that collusion is not established by merely demonstrating that the subcontractor has changed many times for an employee working for the same principal employer.[115]

As discussed above, one of the most significant requirements for establishing a subcontract relationship is that the employer has specific operational requirements or needs specialized technological expertise. Several Yargitay decisions discuss this issue. For example, Yargitay found that a workplace doctor job could not be subcontracted because the employer is legally required to maintain this position for social security reasons and this job position is not a part of the main or secondary job of an employer.[116]

D. Conclusion

Outsourcing is a popular practice for employers in Turkey. Even though infringements occur, employees are protected by the judiciary. Outsourcing is available only under limited circumstances. If there is a finding of collusion between principal employer and subcontractor, employers are fined. A principal employer and its subcontractor are jointly liable for the rights and receivables of subcontracted employees. Outsourcing has become a political issue, but the political system has not resolved the issue.

VI. LABOR OUTSOURCING IN THE UNITED STATES

A. Outsourcing v. Offshoring

In the United States, the term outsourcing is often used interchangeably with offshoring. Outsourcing is the contracting-out of an internal business

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[114] YARGITAY 9. HUKUK DAIRESI KURULU [Court of Appeal 9th Div.], Feb. 27, 2012, docket no. 2012/6938 E. 2012/5905 K.

[115] YARGITAY 9. HUKUK DAIRESI KURULU [Court of Appeal 9th Div.], Mar. 1, 2010, docket no. 2009/48077 E. 2010/5206 K.

[116] YARGITAY 9. HUKUK DAIRESI KURULU [Court of Appeal 9th Div.], Jun. 5, 2006, docket no. 2006/12876 E. 2006/16262 K.

practice from one firm to another.[117] An example is when manufacturing company A contracts with cleaning services company B to provide janitorial services on the manufacturing floor and executive offices. The janitors are employed, paid, and receive their job instructions from the cleaning services company, but the work they do is for the benefit of the manufacturing company.

Offshoring, on the other hand, is the relocation of a business practice from one country to another.[118] An example is when a computer company contracts with a foreign company to manufacture goods that previously had been manufactured in the United States. The purpose of offshoring usually is to take advantage of lower wage rates in the foreign country.[119] Although the offshoring of manufacturing jobs has received most of the media attention, companies also frequently outsource support processes (such as IT, accounting, and call centers)[120] and professional services (such as legal services).[121] There appears to be a modest, recent trend toward re-shoring[122] some of the more highly skilled work that previously had been outsourced, in large part due to falling real wage rates in the United States, rising wage rates in China and some other traditionally low-wage countries, just-in-time delivery needs, and the desire to reduce transportation costs.[123]

The distinction between outsourcing and offshoring sometimes can be blurred. For example, many U.S. companies have relocated some of their business practices from relatively high-wage parts of the United States (particularly in the large cities on the East and West Coasts) to relatively low-wage parts of the United States (particularly in the Midwest and South).[124] Sometimes the companies do so by creating a branch office or manufacturing facility, and sometimes they do so by outsourcing the work to a different company.

Outsourcing in the United States shares some commonalities with outsourcing in other countries, but is different in some ways. It is worth noting at

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[117] ILAN OSHRI ET AL., THE HANDBOOK OF GLOBAL OUTSOURCING AND OFFSHORING 4 (2d ed. 2011).

[118] *Id.* at 4-5.

[119] Wendy Tate et al., *Global Competitive Conditions Driving the Manufacturing Location Decision*, 57 BUS. HORIZONS 381, 382 (2014).

[120] Lisa M. Ellram et al., *Offshore Outsourcing of Professional Services: A Transaction Cost Economics Perspective*, 26 J. OPERATIONS MGMT. 148, 149 (2008).

[121] *See, e.g.*, PANGEA3, http://www.pangea3.com/ (last visited Feb. 7, 2014) (described as a legal outsourcing company offering "legal outsourcing solutions to Fortune 1000 companies and Am Law 200 law firms").

[122] There appears to be a trend toward using the term "homeshoring" to refer to reshoring to the country of origin, while "nearshoring" refers to moving offshored processes closer to the home country. Both of these fall under the umbrella of "reshoring." *See* Tate, *supra* note 119, at 382.

[123] *See generally id.*

[124] Mary Lacity et al., *Rural Outsourcing: Delivering ITO and BPO Services from Remote Domestic Locations*, 12 COMPUTING PRACTICES 55, 57 (2011).

the outset some of the things for which outsourcing is *not* used in the United States. Outsourcing is not used to avoid paying the federal minimum wage because a worker is owed the minimum wage regardless of who employs her.[125] Outsourcing is not used to make it easier for employers to discharge workers because, as discussed below, at-will employment already makes discharging workers exceptionally easy. Outsourcing has not been used to avoid paying government-required health benefits because, as discussed below, the government until recently has not required employers to provide such benefits.

B. At-Will Employment

In many, if not most, countries around the world, one of the prime benefits of outsourcing is that it gives the company purchasing the outsourced labor the maximum flexibility to respond to market conditions by quickly, and at relatively low cost, increasing or decreasing the supply of labor it purchases. This is not easily accomplished in countries that make it difficult or costly to discharge regular employees.

In the United States, however, it is exceptionally easy to discharge regular employees. This is because of the common-law rule of at-will employment,[126] which provides that either party to an employment relationship may end that relationship at any time, without notice, for any reason so long as terminating the relationship is not discriminatory,[127] tortious,[128] in breach of contract,[129] or otherwise illegal.[130]

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[125] Fair Labor Standards Act, 29 U.S.C. § 206(a)(1) (2012). However, because the federal minimum wage is a floor but not a ceiling, many states and local governments have established minimum wages higher than the federal minimum wage. It is possible in the United States for a company to outsource work for the purpose of taking advantage of a lower minimum wage rate in another state or local jurisdiction.

[126] *See generally* RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 25 (2d ed. 2013).

[127] Federal law prohibits discrimination on the basis of race, sex, color, religion, national origin, age, and disability. 42 U.S.C. § 2000ee-2 (2012); 29 U.S.C. §§ 621-34 (2012); 42 U.S.C. §§12101-213 (2012). State and local laws often add other bases on which an employer may not discriminate, such as sexual orientation. *See, e.g.*, KY. REV. STAT. ANN. § 344.040 (2010) (forbidding discrimination against smokers).

[128] *See, e.g.*, Petermann v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 396, 344 P.2d 25 (Cal. Ct. App. 1959) (recognizing tort of wrongful discharge in violation of public policy against employer who discharged employee for refusing the employer's request to commit perjury in testifying before the legislature).

[129] *See, e.g.*, Chiodo v. General Waterworks Corp., 413 P.2d 891 (Utah 1966) (finding breach of a definite-term employment contract).

[130] *See, e.g.*, TEX. LAB. CODE ANN. § 451.001 (forbidding employers from retaliating against employees who file workers' compensation claims).

From an employer's perspective, at-will employment means that employers

(a) have maximum flexibility in discharging employees;
(b) owe no severance pay for discharging an at-will employee, even for a long-term employee; though many employers provide this as a gesture of good-will or in return for a discharged employee's release of possible claims against the employer;
(c) have no incentive to outsource labor to gain additional flexibility in the ability to discharge workers because they already have that flexibility as a matter of law; and
(d) are quick to fire (and hire) in response to changing business conditions.

From an employee's perspective, at-will employment means the following:

(a) Employment for low-skilled workers is precarious. Employees legally can be fired for bizarre or idiosyncratic reasons.[131] Hard work and good performance do not guarantee future employment. Organizing into a union can result in just-cause protection from discharge, but relatively few private-sector U.S. workers are unionized.
(b) High-skilled workers (generally executive-level employees) must negotiate individual employment contracts that give them a contractual right to future employment.
(c) In a positive economic climate, U.S. employers are much quicker to hire than employers in the rest of the world because U.S. employers know that if the economic climate deteriorates, they can quickly shed their labor obligations. This shifts more of the burden of economic fluctuations from companies to workers, but also makes

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[131] *See, e.g.*, Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365 (Wis. 2002) (woman fired for being married to the police officer who arrested her boss's wife for drunk driving); Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64 (Iowa 2013) (woman fired for being too attractive); *Beer Choice Costs Man Job,* FOX NEWS (Feb. 14, 2005), http://www.foxnews.com/story/2005/02/14/beer-choice-costs-man-job/ (employee of Miller beer distributor fired for being seen off the job drinking a beer made by a rival beermaker); *Chicago Man Wears Packers Tie to Work, Is Promptly Fired,* YAHOO SPORTS (Jan. 25, 2011), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/Chicago-man-wears-Packers-tie-to-work-is-prompt?urn=nfl-311976 (Chicago man fired for wearing to work a tie of football-rival Green Bay Packers); Jonathan Allen, *New York Woman Fired After Donating Kidney to Help Boss,* REUTERS (Apr. 24, 2012), http://www.reuters.com/article/2012/04/24/us-usa-kidney-donor-idUSBRE83N1G020120424 (woman fired after complications arose when she donated a kidney, which she donated to help move her boss up in priority on the donation list).

U.S. companies more nimble in responding to global economic conditions.

C. Employer-Provided Health Care

Unlike much of the developed (and developing) world, the United States does not provide its citizens with universal, government-provided healthcare. Instead, some Americans have health insurance for themselves and their immediate families paid for by their employer,[132] some low-income Americans qualify for government-provided healthcare, and some Americans lack any form of health insurance and must pay for medical care themselves.

Until very recently, American employers were not required to offer health insurance to their employees. However, many employers provide health benefits voluntarily because the tax subsidies they receive for doing so have the effect of subsidizing a worker's pay.[133] Under the Affordable Care Act,[134] employers with fifty or more full-time employees who do not provide health coverage will be penalized. This may be leading some employers to outsource some of their work to drop the number of their employees to below the fifty-employee threshold.[135]

Healthcare has also had a second effect on U.S. outsourcing. Healthcare costs in the United States have risen over the last twenty-five years, and despite a recent reduction in the rate of that increase, the rate of increase of average annual healthcare costs has far exceeded inflation.[136] Many employers faced with these rising costs have sought to eliminate healthcare benefits for their employees.[137]

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[132] This was an historical accident—employers during World War II were forbidden by price control laws from raising wages to attract workers, so instead employers attracted workers by providing benefits such as health insurance.

[133] Marco A. Castaneda & James Marton, *Employer-Provided Health Insurance and the Adverse Selection Problem*, 41 PUB. FIN. REV. 3, 7 (2013).

[134] Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) (codified as amended in 25 U.S.C. and 42 U.S.C.) (commonly called the Affordable Care Act (ACA) or "Obamacare").

[135] *See, e.g.*, Peter T. Calcagno & Russell S. Sobel, *Regulatory Costs on Entrepreneurship and Establishment Employment Size*, 42 SMALL BUS. ECON. 3, (2013) (noting that economists have tended to view regulations as a fixed cost favoring larger firms due to economies of scale. However, some have come to view small business exemptions such as those in the Affordable Care Act as deterrents to the growth of some small businesses.).

[136] EXEC. OFFICE OF THE PRESIDENT, TRENDS IN HEALTH CARE COST GROWTH AND THE ROLE OF THE AFFORDABLE CARE ACT, 5 (Nov. 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/healthcostreport_final_noembargo_v2.pdf#page=25.

[137] Katherine Levit et al., *Health Spending Rebound Continues in 2002*, 23 HEALTH AFF. 147, 154 (2004).

However, eliminating such benefits for all employees, or even only certain employees, is likely to be unpopular with many of the affected ones.[138] Some employers may seek to accomplish the same result by outsourcing the work to a company that does not provide health care benefits.

D. The Contingent Workforce[139]

In contrast to the long-term, relatively stable employment relationships that characterized the manufacturing-based economy of most of the twentieth century, an increasing proportion of workers in the United States today are "contingent."[140] Contingent workers are either at-will or have short-term contracts, and they have no expectation of continued employment. These workers include independent contractors, temporary and leased workers, part-time and job-sharing workers, adjunct professors, and employees of temporary staffing agencies. Contingent workers receive few if any health care or retirement benefits, little or no training, and zero job security.

Though some highly-skilled members of the workforce might benefit from contingent employment, the majority of contingent workers do not.[141] Companies, however, often profit from hiring contingent workers because it is even easier to dismiss them than it is to dismiss at-will employees, and easy dismissal gives companies maximum flexibility in responding to changes in demand for the company's products or services.[142]

Although there is widespread consensus that the share of contingent workers as a percentage of the American workforce is growing significantly, there is little agreement on how contingent workers should be counted.[143] Two categories of contingent workers are particularly relevant to outsourcing: leased workers and independent contractors.

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[138] Linda J. Blumberg et al., *Why Employers Will Continue to Provide Health Insurance: The Impact of the Affordable Care Act*, 49 INQUIRY 116, 120 (2012).

[139] *See* BALES ET AL., *supra* note 126, ch. 2.

[140] KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67 (2004).

[141] *See* Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 172-78 (2006).

[142] Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 97 (1998).

[143] *See, e.g.*, KATHLEEN BARKER & KATHLEEN CHRISTENSEN, CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 306, 307 (1998).

1. Leased Workers

In employee leasing, a lessor company hires workers and leases them to a lessee company. The lessee pays the lessor while the lessor pays the workers' wages, benefits, and payroll taxes. Some employers, especially small employers, may prefer this arrangement to direct employment because leased employment permits economies of scale: a lessor providing workers to many small employers can more efficiently handle payroll, employment taxes, and retirement plans, and is in a better position to negotiate with health insurance companies for better (or less expensive) health insurance for workers.

This arrangement generally does not allow the lessee company to avoid employment laws. The Internal Revenue Service (IRS), for example, considers leased workers to be employees of the lessee if the lessee directs the workers as to the work to be done and how to do it.[144] Similarly, regulations of the Equal Employment Opportunity Commission provide that for federal employment discrimination purposes, leased workers generally are employees of the lessee.[145]

2. Independent Contractors

Converting an employee to an independent contractor has much of the same effect as outsourcing an employee—except that the worker, instead of being employed by a third-party company, now is essentially his or her own "company" of one employee.

American employment law protects employees, aspiring employees, and former employees.[146] Employers, therefore, have a strong incentive to classify workers as something other than employees to avoid application of the laws regulating the employment relationship. One such classification is that of independent contractor.

There are two different tests for distinguishing independent contractors from employees. One is the "control" test. The IRS uses this test when it determines whether an employer must pay employment taxes (federal unemployment insurance, Social Security, and Medicare) for, and withhold taxes (income, Social Security, and Medicare) from, a worker.[147] Although the IRS articulation of the test is not controlling in other employment-related contexts, it provides a useful list of the common-law factors that are considered by courts that use the control test.

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[144] *See* 26 C.F.R. §§31.3401(c)-1(b), 31.3121(d)-1(c)(2), 31.3306(i)-1(b).

[145] EEOC Notice No. 915.002 (Dec. 3, 1997).

[146] *Contracts—Independent Contractor Agreements—Ninth Circuit Finds that Misclassified Employees Are Eligible for Federally Regulated Employee Benefits*, 111 HARV. L. REV. 609, 609 (1997).

[147] 29 C.F.R. § 31.3121(d)-1(c)(2); Rev. Rul. 87-41, 1987-1 C.B. 296.

The IRS divides the common-law "control" factors into three categories.[148] The first category is behavioral control. These factors focus on whether the employer has the right to direct and control the work, primarily by instructing the worker about how to do the work. The second category is financial control. These factors include focus on the extent of the worker's investment (independent contractors are presumed to invest more than employees in tools or other implements of the trade) and how the company pays the worker (independent contractors usually are paid a flat fee per job whereas employees usually are paid an hourly, weekly, or annual wage). The third category is the type of relationship and includes factors such as whether the parties have a written contract describing the relationship, and whether the business provides the worker with employment-like benefits, such as insurance, a pension, vacation pay, and sick pay.

The control test has been justifiably criticized on two grounds. First, the test yields indeterminate results. The factors are unweighted and nondispositive, and not every factor will apply to every case. In many cases, some factors will lean toward employment status while other factors will lead toward independent contractor status. Second, the test is rigid and formalistic—it is a one-size-fits-all test used without due regard to the many different contexts to which it is applied. There might, for example, be good reasons to classify a given worker as an employee for purposes of obtaining employment law protections, and also good reasons to classify that same worker as an independent contractor for purposes of taxes and employer vicarious liability.[149]

The second test for distinguishing independent contractors from employees is the "economic realities" test. This test is designed specifically for the employment law context - not the tax or vicarious liability tort context - and it attempts to resolve the issue consistently with the purpose of the employment statute, which is to protect and benefit certain types of workers.[150]

The economic realities test ideally should correct the formalism and indeterminacy of the control test in two ways. First, this purposive approach can account for the fact that employer control is often absent from situations that otherwise should be clearly defined as employment relationships, such as when the worker is a specialized professional, when the work requires the use of discretion, or when the work is performed outside the employer's premises.[151] Second, the economic realities test focuses on economic dependency.

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[148] INTERNAL REVENUE SERVICES, U.S. DEP'T OF THE TREASURY, PUBLICATION 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE (2014).

[149] Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL'Y J. 7, 18 (1999).

[150] Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 460 (1999).

[151] Langille & Davidov, *supra* note 149, at 19.

In practice, however, the economic realities test often has proven as formalistic and indeterminate as the control test. Both tests use similar factors, and in both tests the factors are unweighted and nondispositive.[152]

Worse still, both the control and the economic realities tests are subject to employer manipulation.[153] Consider, for example, any company that sends its employees to customers' homes to provide services, such as a residential carpet-cleaner or utility meter-reader. Even when the carpet-cleaners are technically employees, the company seldom directly supervises them because work is done away from company headquarters. However, consider what the company can do if it wants to avoid the application of employment laws to these carpet-cleaners. The company can fire them, terminate their retirement and health plans, eliminate sick and vacation pay, sell the trucks and other equipment to these now former employees, and then begin paying them a percentage of the revenue they bring in or by the amount of work performed rather than an hourly rate or salary. Presto! The former employees are now independent contractors, and the company no longer needs to worry about employment discrimination laws, wage and hour laws, retirement and benefit laws, and the like. Yet, these independent contractors are in far more need of legal protection than they were when they were legally classified as employees.

Converting workers from employees to independent contractors is even worse for workers than outsourcing. An outsourced worker is at least employed by some entity and because of that, he or she receives the protection of various employment laws and perhaps even some employee benefits, such as retirement or health care. Independent contractors, on the other hand, are "companies of one" that receive none of these protections.

E. Summary

Outsourcing in the United States is not generally used by employers to obtain flexibility in the hiring and firing of workers; the at-will rule gives American employers that flexibility as a matter of law. Instead, outsourcing in the United States is used most often to obtain economies of scale or as a mechanism for reducing or eliminating health benefits. One particularly pernicious form of outsourcing is converting an employee into an independent contractor.

VII. ANALYSIS

Labor outsourcing is prolific and seems to be increasing, often significantly, in all five countries examined. It has become a major political issue

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[152] *Id.* at 22.

[153] *Id.* at 20-23.

within the last couple of years in Turkey and Indonesia. China and Indonesia have recently enacted significant new laws or regulations restricting outsourcing.

The five countries have very different approaches to legal regulation of labor outsourcing. Australia, for example, has adopted a regulatory approach with the explicit goal of ensuring that domestic employees are not harmed and foreign workers are not exploited by the outsourcing. China, Indonesia, and Turkey have all adopted a hybrid regulatory and contractual approach where the relationship between the labor-providing firm and the labor-consuming firm is essentially contractual, but the law both prescribes and proscribes many of the contractual terms. The United States has very little regulation of labor outsourcing.

The purpose of labor outsourcing laws differs somewhat by country. Protecting existing employees from the effects of outsourcing and preventing the exploitation of workers providing the outsourced work is a goal of all the laws regulating outsourcing. In both Indonesia and Australia, an additional explicit goal is to recruit skilled workers from overseas. In Australia, this is because the demand for labor generally exceeds supply in the current economy. In Indonesia, although the supply of *unskilled* labor exceeds demand, the undersupply of *skilled* labor significantly impedes the country's goals of developing domestic industries for refining its extracted commodities.

In most countries, the incentives for companies to outsource labor are similar: the flexibility to respond to market conditions by rapidly adding or shedding labor (Australia, China, Indonesia, Turkey); the ability to pay lower wages (Indonesia, Turkey, China in practice though not in law); and the potential to achieve efficiencies of scale (such as when a small firm contracts out for an outsourcing firm to provide human resource functions). The United States is a bit of an outlier in this regard because its at-will employment rule already gives companies nearly all the flexibility they could ask for in shedding labor. American companies are more likely to turn to outsourcing to achieve economies of scale or to avoid paying employee health insurance costs.

The ways that the various countries' laws regulate labor outsourcing vary considerably. Australia's laws attempt to ensure that workers performing outsourced work are paid a competitive wage; in China, dispatched workers are entitled by law to receive the same pay as the accepting company's directly hired employees for the same work, though in practice these workers often receive much less. Indonesia and Turkey both regulate the types of work that can be outsourced or subcontracted. Indonesia and China both regulate (and require registration of) the firms that can provide labor outsourcing services.

Both Australian and American law distinguish between employees and independent contractors; this should not be surprising since both countries inherited this common-law dichotomy from English law. However, it is much easier under American law to classify a worker as an independent contractor, and thereby avoid the application of many employment laws, than it is under Australian law. Similarly, it is illegal in Australia, but perfectly legal in the United States, to discharge an employee for the purpose of converting the employee into an independent contractor. Moreover, Australian employees who

lose their job to outsourcing are entitled to redundancy pay; American employees are not, and essentially have no rights against outsourcing at all.

VIII. CONCLUSION

This article examines the law and practice of labor outsourcing in five countries: Australia, China, Indonesia, Turkey, and the United States. It finds that labor outsourcing is globally prolific and appears to be increasing. Companies in nearly all of the studied countries were motivated to outsource labor by similar factors, including the flexibility to respond to market conditions by rapidly adding or shedding labor, the ability to pay lower wages, achieving efficiencies of scale, and in some countries, attracting skilled labor. However, the general legal approach to regulating labor outsourcing varies considerably with some countries adopting a regulatory model, others a hybrid regulatory-contractual model, and others not regulating it at all. Finally, the scope of legal regulations also varies considerably by country: some focus on protecting existing employees, while others focus on curbing exploitation of workers performing outsourced work; some countries regulate the types of work that can be outsourced or subcontracted, and others regulate the firms that can provide labor outsourcing services.