



**Less-than-six-months contract periods:
IS THE RETAIL INDUSTRY CIRCUMVENTING THE LAW? THE PHILIPPINE
CASE**

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ABSTRACT

While the State has been steadfast in its cognizance on labor as the “primary social economic force,” some circumstances have casted some doubts over the State’s sincerity in upholding such public policy. One of this is the retail industry’s practice of subcontracting employees for less than six months. This paper explores the legal basis of such practice and proposes some policy recommendations and a research agenda in aid of legislation.

Keywords: subcontracting, contracting, contractualization, labor law, Philippines

1. RESEARCH BACKGROUND

The State has been steadfast in its cognizance on the importance and value of labor. In Article II, Section 18 of the 1987 Philippine Constitution, the State clearly “affirms labor as a primary social economic force” and that “it shall protect the rights of workers and promote their welfare.” This policy permeates in many other legislations and implementing rules passed down the hierarchy of laws of the State. For instance, Article 3 of the Presidential Decree (P.D.) No. 442, otherwise known as the Labor Code of the Philippines, highlights the State’s policy to “afford protection to labor” and to “promote full employment.” The same article manifests the State’s mandate to assure the rights of workers to security of tenure. These provisions emphasize that security of tenure is a worker’s constitutional right.

Security of tenure has been defined in Article 279 in P.D. No. 442 as, the non – termination of the services of an employee by the employer, in cases of regular employment, except for a just cause or authorized cause.

It was in the 1980s and 1990s that workers’ security of tenure was observed to erode very fast, particularly in industries which are export-oriented and those with foreign equity, as they employ workers under a contract even for work that is “desirable and necessary” or directly connected with the main business of the company (Center for Women Resources, 2003). According to the same report, “in many establishments, these temporary workers are not called “contractuals.” They are given a plethora of names: trainee, apprentice, helper, casual, and piece rater. But they have one thing in common - they are doing the work of regular workers but for a specified period of time usually less than six months.

In the Philippines, the combined share of casual, contractual and part-time workers in total enterprise-based employment was between 14-15% from 1990 to 1994. This went up to 18.1% between 1994 and 1995. In 1997, the figure was already 21.1% (Center for Women Resources, 2003).

In 2002, 20 branches of the biggest retail trade store in the country, had 92 % of the workers who are either direct hired or concessionaire hired contractuels; a plastic manufacturing firm in Southern Metro-Manila, employed 78% of its work force on contractual basis; a garments manufacturing firm also in Southern Metro-Manila, had contractuels composing 80% of its total workforce; and a tuna canning factory in southern Philippines, employed “contractuels” comprising 96% of its workers (Center for Women Resources, 2003).

In 2010, the Department of Labor and Employment reports that the number of establishments resorting to outsourcing or contracting out of job, work or service was placed at 2,471. This figure represents 10.4% of the estimated 23,723 establishments. This suggests that this type of working arrangement is not a common practice among establishments (Bureau of Labor and Employment Statistics, 2012).

The bulk of establishments resorting to this type of work arrangement were mainly in manufacturing (31.2%); wholesale and retail trade (19.9%); and real estate, renting and business activities (11.1%). Altogether, they comprised 62.2% of total establishments engaged in contracting out (Bureau of Labor and Employment Statistics, 2012).

Contracting out jobs/services emerged in the 1980s as a response of firms to deal with the increasing competitions brought about by trade globalization. This flexible measure allows establishments to cope with the fluctuating demands for their products in the market and reduce cost by concentrating on their core business and outsourcing non-core activities (e.g., back-office jobs, logistics and courier services, HR and training services, etc.) to other parties (Bureau of Labor and Employment Statistics, 2012).

It must be recalled that on February 21, 2002, Department of Labor and Employment (DOLE) promulgated Department Order (D.O.) No. 18 – 02 specifying the rules implementing Articles

106 to 109 of the Labor Code, as amended. D.O. No. 18 – 2 was criticized by labor – oriented groups as legitimizing contracting and subcontracting – which gravely undermine workers’ rights to security of tenure, self-organization, and collective bargaining; more inclined to protect principal employers rather than protect workers employed contracting and subcontracting arrangements; shifting accountability from principal (indirect employer) to contractors; and weakening the state’s capacity to monitor and regulate working conditions by promoting tripartite mechanisms and voluntary codes of good practices (EILER, 2012). Contractualization has eroded salary and wages, job security and the exercise of unionism (Natividad, 2008).

The changing labor law and movement toward contractualization poses questions as to whether labor law will be able to continue to play the role of protecting wage earners for which it was originally developed (Gilles, 2003).

Workers who do find jobs in the Philippines find that they face another big hurdle after being hired: contractualization. Big businesses, whether foreign or local, have long mastered the fine art of labor flexibilization in employment such that seven out of ten firms in the country practice contractualization. Some of the worst “contractualizers” among companies are also among the biggest. Such widespread destruction of the security of tenure of labor has had a profound impact on Philippine workers’ freedom to exercise their trade union and other democratic rights. Most of all, massive contractualization has greatly reduced the variable capital for wages, with the monopoly capitalists seeking ever-increasing super profits in the face of the current world capitalist crisis of overproduction (EILER, 2008).

2. RESEARCH PROBLEM

This paper generally aims to determine the legal basis or lack thereof of the practice of the retail industry to subcontract most of their employees for a period of less than six months.

Specifically, it aims to seek answers to the following:

- a. What are the laws that support the lack of legal basis of the practice to subcontract employees for a period of less than six months?

- b. What are the laws that provide the legal basis for the practice of subcontracting employees for a period of less than six months?
- c. What are the gaps and/or misalignments in legislations pertaining to subcontracting for a period of less than six months?
- d. What are some possible improvements in terms of policy making that could be instituted to bridge the gaps or to correct the misalignment in legislations pertaining to subcontracting for a period of less than six months?
- e. What are the potential research agenda pertaining to subcontracting for a period of less than six months that could be undertaken to aid legislation?

Inc. vs. Servana (2008) and South Davao Development Company, Inc. vs. Trade Union of the Phils., et. al. (2009). This withstanding, the parameters are very clear on the conditions that characterize subcontracted labor through an independent contractor and subcontracted labor who are directly hired.

3.1 Project – based Subcontracted Labor

As it is among the common arguments of parties in explaining why there is an engagement period specified in some contracts as in the case of Philex Mining Corp. vs. NLRC (1999), the elements of a project – based subcontracted labor is herein reviewed. Expounding on contractual employees being hired for projects, the Supreme Court, in Philex Mining Corp. vs. NLRC (1999), held:

“Project employees are those workers hired (1) for a specific project or undertaking, and (2) the completion or termination of such project has been determined at the time of the engagement of the employee. The principal test for determining whether particular employees as project employees as distinguished from regular employees, is whether or not the project employees were assigned to carry out a specific project or undertaking, the duration and scope of which were specified at the time the employees were engaged for that project (citing *Violeta vs. NLRC*, 1997).”

3. REVIEW OF RELATED LITERATURE

The Supreme Court has ruled a relatively substantial number of cases on contracting or subcontracting in the context of Articles 106 to 109 of P.D. No. 442 or the Labor Code of the Philippines, as amended.

It is once again emphasized that the issue at hand revolves around the legality of engaging a worker under a contract for a period lesser than six months. Hence, the following Supreme Court Rulings are cited.

The Supreme Court has recognized that private institutions, and even some government offices, are observing the general practice of employing the services of independent contractors. These independent contractors render services such as security, utility, and other specialized services which may be deemed directly related to the principal business of the indirect employer but are not necessary in the conduct of its operation as in the case of *Filipinas Synthetic Fiber Corporation (FILSYN) vs. NLRC*, et. al. (1996).

Meanwhile, jurisprudence has a generous number of cases to ascertain the existence of an employee – employer relationship, to wit: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employee’s conduct, or the so called “control test,” which is considered the most important element as in the cases of *TAPE*,

3.2 Regular and Project Employment Distinguished

To establish a clear definition of regular employment as against project employment, reference is made to Article 280, paragraph 1 of P.D. No. 442, to wit:

“ART. 280. Regular and Casual Employment.— The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the

completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.”

Henceforth, any employment that does not meet the aforementioned definition is considered a casual employee. However, if an employee has worked for at least one year, regardless if said work engagement is “continuous or broken,” the said employee shall be deemed a regular employee with due consideration to the work for which he has been employed and his employment shall remain to be so concurrent to the existence of such work.

In this explanation, the Supreme Court contemplates four (4) kinds of employees as enumerated in the case of *Leyte Geothermal Power Progressive Employees Union - ALU – TUCP vs. PNOC - Energy Development Corp.* (2011): (a) regular employees or those who have been "engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer"; (b) project employees or those "whose employment has been fixed for a specific project or undertaking[,] the completion or termination of which has been determined at the time of the engagement of the employee"; (c) seasonal employees or those who work or perform services which are seasonal in nature, and the employment is for the duration of the season;⁸ and (d) casual employees or those who are not regular, project, or seasonal employees. Jurisprudence has added a fifth kind— a fixed-term employee (*Asia World Recruitment Inc. v. NLRC*, 1999; *Palomares v. NLRC*, 1997).

3.3 On Fixed – term Employment

The Civil Code of the Philippines, which was approved on June 18, 1949 and subsequently enforced on August 30, 1950, contains specific provisions pertaining to “obligations with a period,” particularly in Section 2, Chapter 3, Title 1, Book IV. The same statute covers “contracts of labor and for a piece of work,” specifically found in Sections 2 and 3, Chapter 3, Title VIII, respectively, of Book IV. The Court, in *Brent School, Inc. & Dimache vs. Zamora & Alegre* (1990), firmly contended, with reference to P.D. No. 442, that there is “no prohibition against term-or fixed-period employment contained in any of its articles or is otherwise deducible therefrom.”

The Supreme Court further expounded, in the same case,

“It is plain then that when the employment contract was signed between Brent School and Alegre on July 18, 1971, it was perfectly legitimate for them to include in it a stipulation fixing the duration thereof. Stipulations for a term were explicitly recognized as valid by this Court, for instance, in *Biboso v. Victoria’s Milling Co., Inc.*, promulgated on March 31, 1977, and *J. Walter Thompson Co. (Phil.) v. NLRC*, promulgated on December 29, 1983. The *Thompson* case involved an executive who had been engaged for a fixed period of three (3) years. *Biboso* involved teachers in a private school as regards whom, the following pronouncement was made:

What is decisive is that petitioners (teachers) were well aware at the time that their tenure was for a limited duration. Upon its termination, both parties to the employment relationship were free to renew it or to let it lapse. (p. 254)

Under American law the principle is the same. "Where a contract specifies the period of its duration, it terminates on the expiration of such period." "A contract of employment for a definite period terminates by its own terms at the end of such period."

The status of legitimacy continued to be enjoyed by fixed-period employment contracts under the Labor Code (Presidential Decree No. 442), which went into effect on November 1, 1974. The Code contained explicit references to *fixed period employment, or employment with a fixed or definite period*. Nevertheless, obscuration of the principle of illicitness of term employment began to take place at about this time.”

Fixed – term employment is further cited in *Mercado, et. al. vs. AMA Computer College* (2010) as a valid employment mode under Philippine law and jurisprudence.

According to Abad (2001), a “stipulation in employment contracts providing for term

employment or fixed period employment are valid when the period was agreed upon knowingly, and voluntarily by the parties without force, duress or improper pressure exerted on the employee; and when such stipulations were not designed to circumvent the laws on security of tenure.” Hence, an agreement or contract of employment with a stipulated period of effectivity expires on the last day of such period. He further emphasized that “the decisive determinant in term employment should not be the activities that the employee is called upon to perform but the day certain agreed upon by the parties for the commencement and the termination of their employment relation.”

In the case of *Felix Buenaseda vs. NLRC* (1995), when an appointment is not renewed at a clearly stipulated date, it implies an expiration of term and not dismissal.

3.4 When Contract and Statutes are Misaligned

In the case of *Pakistan Airlines vs. Ople* (as cited in *Innodata Phils., Inc. vs. Quejada-Lopez & Natividad-Pascual*, 2006)

“Indeed, a contract of employment is impressed with public interest. For this reason, provisions of applicable statutes are deemed written into the contract. Hence, the "parties are not at liberty to insulate themselves and their relationships from the impact of labor laws and regulations by simply contracting with each other.”

It was also emphasized in *Phil. Federation of Credit Cooperative, Inc. vs. NLRC* (as cited in *Innodata Phils., Inc. vs. Quejada-Lopez & Natividad-Pascual*, 2006), “in case of doubt, the terms of a contract should be construed in favor of labor.”

4. THEORETICAL FRAMEWORK

This study is anchored on the hierarchy of Laws in the Philippines as its theoretical framework.

Furthermore, much of the issues raised by stakeholders led to the notion that there appears to be some misalignment in some laws of different levels in the hierarchy and even in laws within the same level of the hierarchy. These areas are

indicated by the broken lines in Figure 1 and herein constitute the subject of this research.

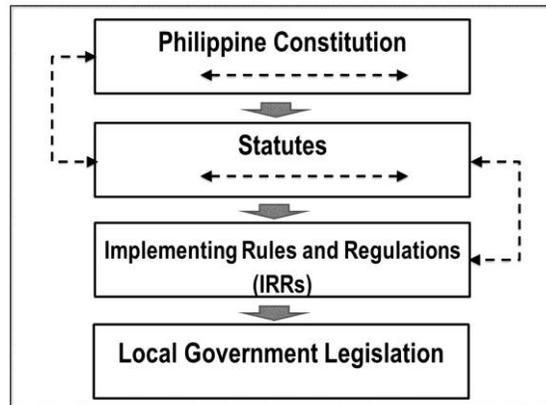


Figure 1. Hierarchy of Laws in the Philippines

5. DISCUSSION OF RESEARCH PROBLEM

5.1 The Philippine Constitution

It is indubitable that the State recognizes “labor as a primary social economic force” and that it shall protect the rights of workers and promote their welfare.” This has been clearly provided for in the Philippine Constitution as a policy of the State. In the same manner, the State also manifests, as a national policy, that the private sector has an indispensable role; that private enterprise is encouraged; and that incentives are provided to needed investments. This can easily be construed that the State equally favors both. In most situations, in fact, both labor and private enterprise have been regarded as having conflicting interests. Moreover, because subcontracting allows for flexible arrangements and lesser employee benefits costs, this has been the easy lure for investors.

While the constitution recognizes the indispensable role of the private sector (Section 20), the incentives for investments may not necessarily involve subcontracting.

It is in this light that the 1987 Philippine Constitution becomes vulnerable to differing interpretations.

5.2 The Statutes

The primary applicable statute in labor matters is P.D. No. 442 otherwise known as the Labor Code of the Philippines, as amended. Embodied in this law is a policy of the State to

promote labor's security of tenure, among others. Security of tenure has been defined as the non – termination of the services of an employee by the employer, in cases of regular employment, except for a just cause or authorized cause. The disconnect lies in the succeeding provisions concerning contracting and subcontracting, specifically covered by Articles 106 to 109 of the Labor Code. Labor has the impression that these provisions have legitimized subcontracting which, considering its temporary nature, deviates from the State's policy of promoting security of tenure and labor's welfare in general – both emphasized in Section 18 of the Philippine Constitution and Article 3 of the Labor Code of the Philippines.

In the practice of subcontracting majority of their employees by most retail establishments, particularly by, but not limited to, department stores, it appears that these establishments have observed a subcontracted employee engagement period of less than six months. This certainly elicited cynicism from among the labor advocates since six months is the maximum prescribed probationary period precluding a regular tenure.

It must be noted that once an eligible person enters in to an employment contract with a specified period of engagement, an obligation is imposed upon the person. Another statute supports this, particularly Article 1193 of Republic Act No. 386, otherwise known as the Civil Code of the Philippines which provides that “obligations for whose fulfillment a day certain has been fixed, shall be demandable only when that day comes.”

Considering that a subcontracted employee voluntarily enters into a contract with a principal with the knowledge of the employment period of less than six months, such contract is deemed valid and void.

Philippine jurisprudence have demonstrated that the State does not tolerate such practice if “it is apparent that periods have been imposed to preclude acquisition of tenurial security by the employees” as in the case of *Cielo vs. NLRC* (1991). However, *Abad* (2001) notes that “the critical consideration in determining its validity is the presence or absence of a substantial indication that the period specified in the employment agreement was designed to circumvent the security of tenure of regular employees. Hence, if the net effect of the agreement is to render the employment basically at the pleasure of the employer thus intended to prevent security of tenure from accruing in favor of the employees even during the specified period, then it is unlawful” as in the case of

Pakistan International Airlines Corp. vs. Ople (1990).

5.3 The Implementing Rules and Regulations (IRRs)

The Department of Labor and Employment (DOLE), being the implementing agency of the State in matters concerning labor, has issued IRRs pertinent to subcontracting. One of these IRRs is Department Order No. 3, Series of 2001, entitled: “Revoking Department Order No. 10 of 1997 and continuing to prohibit labor-only contracting” which was signed by DOLE Secretary Patricia A. Sto. Tomas on 08 May 2001, revoked the rules implementing Articles 106 to 109 of Book III of the Labor Code embodied in Department Order No. 10, series of 1997. In 2002, Department Order No. 18 – 02 was issued by DOLE, specifying the “Rules Implementing Articles 106 to 109 of the Labor Code, as Amended.” These IRRs have drawn more specific lines in the implementation of the subcontracting mode of employment. It must be noted that these IRRs does not in any way outlaw fixed – term employment. In this context, the employees are, once again, placed at the mercy of the conditions validating a fixed – term employment contract.

Although it has been emphasized that the State shall exercise its police powers if and when there is “substantial indication that the period specified in the employment agreement was designed to circumvent the security of tenure of regular employees,” the burden of proof lies with the employees. Given the economic constraints these employees have, the necessary trigger for investigation may not be undertaken.

6. CONCLUSION AND RECOMMENDATIONS

The Philippine Constitution clearly demonstrates its resolute thrust to support and protect labor and promote its welfare. This is further reflected in the policy declarations of succeeding statutes. Although subcontracting appears to contradict with this basic public policy, based on the pertinent statutes and implementing rules and regulations, contracting or subcontracting a worker, whether through an agency or directly hired, is well supported. Specifically, a fixed – term contract has a legal basis by virtue of Article 1193 of the Civil Code of the Philippines and as

well as Philippine jurisprudence with particular reference to *Brent School, Inc. vs. Zamora*, (1990).

However, these do not correct the misalignments between the Philippine Constitution and statutes and IRRs in the context of public policy and the ambiguity among statutes. The Philippine Constitution remains to be the supreme law of the land thus all other laws must mirror what the Constitution promulgates.

Anent to this, the following is hereby recommended:

- a. The Department of Labor and Employment (DOLE) must intensify its campaign for the compliance of labor standards as the law clearly provides that labor standards must be strictly observed even in subcontracted employment arrangements. Henceforth, probes and audits are highly desirable.
- b. The DOLE must enjoin organizations to use performance management systems to increase worker productivity. If performance standards are clearly made known prior to employee engagement and coaching and training is properly done and administered, employees are in a better position to positively contribute to business performance. Any persistent non – adherence to established and mutually agreed performance standards despite coaching and other performance improvement trainings may be just grounds for termination.
- c. In aid of legislation, the following research agenda is laid out:
 1. A comprehensive employment survey on subcontracted employees in department stores. The objective of this study is to capture a clear and updated picture of the employment practices of the retail industry. Though DOLE has conducted periodic studies on this aspect, it only limits its studies to the number of “contractuals” and does not include compensation and benefits, hiring, and security of tenure.
 2. An inquiry into the subcontracting practices of more advanced economies. The objective of this study is to benchmark best subcontracting practices and to initially establish the impact of subcontracting to business performance at the micro – level

and national economic performance at the macro – level.

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