Key contacts

Inam Wilson, SAN
Partner and Head,
Labour, Employment and Transportation
inam.wilson@templars-law.com

Oghomwen Akpaibor
Senior Associate,
oghomwen.akpaibor@templars-law.com

Mariam Mamman-Odey
Associate,
mariam.mamman-odey@templars-law.com

Guidelines on Labour Outsourcing: A Guide to Best Practices in Nigeria?

Introduction

The legal regime for labour outsourcing and contract staffing in Nigeria is in a flux, if not in crisis, due mainly to misalignment between extant regulations and judicial pronouncements on the classification of the employment relationship among the parties.

The Federal Ministry of Labour, as regulator, has issued sector specific guidelines clearly spelling out the status of the outsourced employee and contract staff. These guidelines have inexplicably not been given sufficient judicial consideration, if at all, by the National Industrial Court ("NICN"), with the implication that the employment relationship has been classified differently by the NICN.

Classification of the Employment Relationship in Outsourcing Arrangements

In a typical outsourcing arrangement, the end user treats the intermediary company as the employer of the employee. However, for obvious reasons, the labour unions and indeed the employees prefer to see the end user as their employer.

To resolve this impasse the Minister of Labour and Employment has so far issued two sectoral guidelines on administration of contract staffing and outsourcing, one in the oil

and gas sector[1] and the second in the financial sector[2] (together the "**Guidelines**").[3]

The key features of the Guidelines include the validation of the practice of contract staffing and outsourcing in the oil and gas sector as well as the financial sector in Nigeria, permits employers to outsource their non-core business and classifies the outsourced employees as employees of the intermediary contractors. To be clear, the Guidelines classify the outsourced employees as employees of the intermediary company that employed them and not the end users.

Judicial pronouncements from the NICN however takes a contrary position. The NICN applying international best practices pursuant to the National Industrial Court Act 2006[4] and the Third Alteration to the 1999 Constitution[5] treats outsourcing as a tripartite arrangement that yields to what is termed "triangular employment"[6] by the ILO[7] and in a number of cases[8] have treated the end user as the employer or co-employer of the employee.[9]

The National Industrial Court has justified its reliance on international best practices in the classification of the employment relationship in an outsourcing arrangement to the absence of legislation governing outsourcing in Nigeria.[10] This judicial thinking overlooks the Guidelines, which has the status of a subsidiary legislation,[11] which the ILO enjoins the courts to apply[12] and which incidentally, substantially seek to protect the basic employment rights of the employees which the National Industrial Court also seek to protect. Here lies the problem.

Key Highlights of Employment Rights Protected Under the Guidelines

Minimum Wage

The Guidelines mandate the establishment of a minimum wage pay for employees in the financial sector. The minimum pay is to be collectively determined by the Stakeholders and is subject to an annual renewal.[13]

Entry Requirements and Career Progression

In comparison with other permanent employees[14], it is typical to find Non-permanent Workers[15] who work for years without any promotion or entitlement to ancillary employment benefits. In what appears to be a departure from the common practice where Non-permanent Workers remain casual employees for extensive periods with no prospects of having their engagement converted to full employment or becoming entitled to those ancillary employee benefits enjoyed by permanent employees, the Guidelines seek to establish a more direct and clear path to career progression for Non-Permanent Workers by introducing clear measures that could facilitate job stability for Non-Permanent Workers as well as sustain opportunities for self-development. The measures introduced by the Guidelines to achieve this include setting obligations for Principal Companies[16] to:

- Employ Non-permanent Workers who meet company recruitment standards where vacancies exist to become permanent workers[17];
- Implement annual salary increments for all categories of employees;
- Create opportunities for Non-permanent Workers to advance in their careers within 2-3 years of employment.

[1] The first was the Guidelines on Labour Administration Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector (the **"Oil Sector Guidelines"**) issued by the Federal Ministry of Labour and Productivity in May 2011.

[2] The second is the Guidelines on Labour Administration Issues in Contract Staffing/Outsourcing, Non-permanent Workers in Banks, Insurance and Financial Institutions (the "**Financial Sector Guidelines**") issued on 8 September 2022 by the Hon. Minister of Labour and Employment, Dr. Chris Ngige (the "**Minister**").

[3] Both Guidelines were issued pursuant to the powers conferred on the Minister by section 88 of the Labour Act (the "**Act**") which amongst other things, empowers the Minister to make regulations that contain ancillary provisions deemed necessary or facilitate the operations of the Act. The *Guidelines* are subsidiary legislation and have the same force and effect as the principal legislation. See ***Trade Bank Ltd v. LILGC*** (2003) 2 NWLR (Pt. 806) 11.

[4] section 7(6) of the NICN Act 2006 empowers the NICN to have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practice in labour or industrial relations shall be a question of fact.

[5] section 254C(1)(f)(h), and (2) of the 1999 Constitution (as amended by the Third Alteration Act 2010) provides to the effect that:- the National Industrial Court shall have and exercise jurisdiction relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation; or pertaining to the application or interpretation of international labour standards; or any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations.

[6] An employment relationship normally involves two parties: the employer and the employee. The International Labour Organisation (ILO) has acknowledged that there are, however, more complex situations in which one or more third parties are involved, in what might be termed a "triangular" employment relationship or a *disguised* or *objectively ambiguous* "triangular" employment relationships. "Triangular" employment relationships occur when employees of an enterprise (the "provider") perform work for a third party (the "user enterprise") to whom their employer provides labour or services. A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form in which the worker enjoys less protection. Disguised employment relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers. *See The* ILO Report titled, "*The Scope of the Employment" (ILO Office: Geneva), 2003 at pages 25, 37-39* sourced at http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf.

[7] *See The* ILO Report titled, "*The Scope of the Employment" (ILO Office: Geneva), 2003 at pages 25, 37-39* sourced at http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf. ***Stephen Ayaogo v. M.P.N. Unltd.*** [2013] 30 NLLR (Pt. 85) 95. Hon. Justice B.B. Kanyip, PhD in ***PENGASSAN v. M.P.N. Unltd.*** [2013] 32 NLR (Pt. 92) 243 (NIC) at 327C – D stated: "*One vital point must be noted here. **The ILO does not brand as invalid or unlawful or as wrong the triangular employment relationship; neither had it even branded the practice of outsourcing or contracting out as unfair labour practice** as the appellant made it out in some of its communications with the Ministry of Labour regarding this matter. **All the ILO enjoins is that the respective laws of member States on the issue should be respected and applied**.*" (Emphasis supplied)

[8] The NICN successfully invoked the co-employer principle in the following cases ***Oyewumi Oyetayo v. Zenith Bank Plc*** [2012] 29 NLLR (Pt. 84) 370 (NIC); ***Ejieke Maduka v. Microsoft Nigeria Ltd*** Suit No. NICN/LA/492/2012 unreported judgment of Hon. Justice O. A. OBASEKI-OSAGHAE, J., delivered on December 19, 2013; ***Olalekan Kehinde & Anor v. Airtel Nigeria Ltd & Anor*** Suit No: NICN/LA/453/2012; unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered December 13, 2016-12-13; ***Mr. Morrison Owupele Inimgba v. Integrated Corporate Services Ltd & Anor.*** [2015] 57 NLLR (Part 195) 268 (NIC).

[9] Hon. Justice B.B. Kanyip, PhD opines that the spirit and letter of section 7(6) of the National Industrial Court Act 2006 and section 254C(1)(f) and (h), and (2) of the 1999 Constitution (as amended by the Third Alteration) as well as the intendment of same, is that they operate to create and set a standard as a benchmark against which labour and industrial relations in Nigeria are to be measured. This is because international best practices in labour or industrial relations are almost always mirrored in the light of the conduct of the employer. See *The Changing Face of Nigerian Labour Law Jurisprudence and What Employers Need to Know op.cit*

[10] "*Developing Trends in Labour Outsourcing and Triangular Employment: The issues*" by Hon. Justice Benedict Bakwaph KANYIP, PhD, FNIALS, PNICN (supra) justified the intervention of the NICN in the current outsourcing regime thus: "*the lack of legislation on the issue of outsourcing and the like means that the courts in Nigeria will be called upon to determine the protection in terms of rights and privileges of this category of work organization, a category of work that inherently challenges some of the basic assumptions of labour law.*"

[11] See ***Trade Bank Ltd v. LILGC*** (2003) 2 NWLR (Pt. 806) 11.

[12] *The* ILO Report titled, "*The Scope of the Employment" (ILO Office: Geneva), 2003 at pages 25, 37-39* sourced at http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf which has been quoted copiously in a number of judgments of the NICN including, ***Stephen Ayaogo v. M.P.N. Unltd.*** [2013] 30 NLLR (Pt. 85) 95 and ***PENGASSAN v. M.P.N. Unltd.*** [2013] 32 NLR (Pt. 92) 243 (NIC) at 327C – D states in part ***that the respective laws of member States on the issue should be respected and applied***." (Emphasis supplied)

[13] Section 2.2 of the Financial Sector Guidelines.

[14] **Permanent Workers** means all employees who are directly employed and remunerated by the Principal Company.

[15] **Non-permanent Workers** means any employee that is supplied or outsourced by a labour recruiter or a third party to the Principal Company. Thus, under the Guidelines both contract staff and non-permanent employees are used interchangeably.

[16] **Principal Company under** the Finance Sector Guidelines means all Nigerian employers in banks, insurance and allied institutions.

[17] These are all employees who ae directly employed and remunerated by Banks, Insurance and Allied Institutions.

Unionization and Collective Bargaining

It is an unspoken rule that has been practiced for decades that Non-permanent Workers are prevented from taking up union membership. However, under the Guidelines, the rights of workers to unionize under section 12 of the Trade Unions Act and Section 40 of the Constitution have been reinforced and no employer, be it the Principal Company or the Labour Recruiter is empowered to restrict the right that all Permanent and Non-permanent Workers have to be unionized.[18] The Guidelines also emphasize that this right to unionize also extends to workers in the Free Trade Zones and Export Promotion Zones. [19]

In addition to the right to be unionized, the Guidelines further mandate the following:

- biennial collective bargaining between the Trade Unions and the Labour Recruiters;[20]
- execution of contract agreement between the Principal Company and Labour Recruiters. The contract must include a clause recognizing collective bargaining and redundancy agreements in the Sector;[21]
- collective bargaining between contractors and their employees and inclusion of a provision to this effect in the scope of the contract agreement between a Principal Company the Labour Recruiter;[22]
- the exit procedure and benefits for Non-permanent Workers recruited by Labour Recruiters within the Sector, are required to be in alignment with the provisions of extant collective agreement between the Unions and Principal Companies.[23]

Dispute Resolution

The Guidelines seek to reinforce the use alternative dispute resolution mechanisms provided for under extant laws. It provides that all parties governed by the Guidelines are to comply with the dispute resolution provisions of the Trade Dispute Act of 2004 and exhaust all measures to resolve disputes in the Act before seeking to take industrial actions.[24] Likewise, before a dispute is reported to the Ministry of Labour and Employment, all internal dispute resolutions mechanisms must be exhausted.[25]

Any decision reached by the various statutory dispute resolution bodies such as the Ministry of Labour and Employment, Industrial Arbitration Panel and the National Industrial Court are to be respected. Although it is not clear from the Guidelines what "respect" of decisions entails.

Trade Dispute Act of 2004

It provides that all parties governed by the Guidelines are to comply with the dispute resolution provisions of the Trade Dispute Act of 2004 and exhaust all measures to resolve disputes in the Act before seeking to take industrial actions.

[18] Section 4.1 and 4.2 of the Finance Sector Guidelines and Section 3.1 and 3.2 of the Oil Sector Guidelines. Also, all Non-permanent Workers in the Finance Sector are to be unionized under the National Union of Banks, Insurance and Financial Institutions Employees (NUBIFIE) or Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI) as maybe appropriate and all Non-Permanent Workers in the Oil Sector are to be unionized under the National Union of Petroleum & Natural Gas Workers (NUPENG) or Petroleum & Natural Gas Senior Staff Association of Nigeria (PENGASSAN) as appropriate.
[19] Section 4.6 of the Finance Sector Guidelines and Section 3.13 of the Oil Sector Guidelines.
[20] Section 5.1 of the Finance Sector Guidelines.
[21] Section 5.2 of the Finance Sector Guidelines.
[22] Section 5.4 of the Finance Sector Guidelines and Section 4.4 of the Oil Sector Guidelines.
[23] Section 9 of the Finance Sector Guidelines.
[24] Section 6.1 of the Finance Sector Guidelines and Section 5.1 of the Oil Sector Guidelines.
[25] Section 6.2 of the Finance Sector Guidelines and Section 5.2 of the Oil Sector Guidelines. This is without prejudice to the statutory powers of the Minister to intervene and apprehend a trade dispute where necessary.

Disciplinary Procedures

Fair hearing is also reinforced under the Guidelines. An interesting provision in the Guidelines is the requirement for Non-permanent Workers to be subjected to their Labour Recruiter's disciplinary committee with a Union representative in attendance.[26] This means every Labour Recruiter must now set up a disciplinary committee to deal with disciplinary issues. In any event, it is also possible for the Non-permanent Worker to be subject to the Principal Company's disciplinary committee either as a witness or a suspect. In such an instance, a representative of the Labour Recruiter and the Trade Union must be present to ensure fair hearing.[27]

Compliance With International Labour Standards Requirements

The Guidelines prohibit Principal Companies from doing business with an unlicensed contractor[28]. A company in contravention of this requirement has committed an offence.[29]

In addition, in their relationship with employees, Labour Recruiters must comply with all relevant labour laws as well as the International Labour Organizations standards and failure to comply with Labour legislations and other national laws will be sufficient ground for termination of contracts by the Principal Companies.[30]

Job Security and Capacity Building for Contract Staff

The Guidelines also make provisions for job security and capacity development for contract staff working in the oil and gas sector[31]. The Guidelines provide that National Petroleum Investment Management Services (*NAPIMS*) and other relevant agencies shall grant contractors in the upstream sector 3 years plus one year contract. This is to ensure some form of stability and job security for the contract staff. Also, where there is a change of contractor, the new contractor shall be encouraged to absorb the employees of the former contractor subject to satisfactory performance of such employees. Where a contractor is appraised to have performed credibly by both the client and the regulatory body, the client and the regulatory body shall explore the possibility of a renewal of the contract for another term. Contractors are also obliged to submit details of remuneration, training and development plan for their employee during prequalification for contracts.

3 years plus one year contract

The Guidelines provide that National Petroleum Investment Management Services (NAPIMS) and other relevant agencies shall grant contractors in the upstream sector 3 years plus one year contract.

[26] Section 7.2 of the Finance Sector Guidelines.
[27] Section 7.3 of the Finance Sector Guidelines.
[28] Seeing as the Finance Sector Guidelines differentiate between a Labour Recruiter and contractor (which it alludes to be a third-party contractor), it is not clear if this provision relates to Labour Recruiters. We are of the opinion that this is a drafting error, and it would be applicable to Labour Recruiters as well.
[29] Section 8.4 of the Finance Sector Guidelines and Section 6.6 of the Oil Sector Guidelines.
[30] Section 8.3 and 8.5 of the Guidelines and Section 6.5 and 6.7 of the Oil Sector Guidelines.
[31] Section 6 of the Oil Sector Guidelines.

Conclusion

To the extent that the NICN has acknowledged that the ILO did not brand the practice of labour outsourcing or contract staffing as unfair labour practices and to the further extent that *all the ILO enjoins is that the respective laws of member States on the issue should be respected and applied,* [32] we are minded to state that the Guidelines represents the law in Nigeria governing outsourcing in the oil and gas as well as the financial sectors and should serve as the benchmark for determining best practices in labour outsourcing in Nigeria. The reason is that the basic employment rights of the employees which the National Industrial Court seek to protect are substantially protected in the Guidelines.

[32] ***Stephen Ayaogo v. M.P.N. Unltd.*** [2013] 30 NLLR (Pt. 85) 95. Hon. Justice B.B. Kanyip, PhD in ***PENGASSAN v. M.P.N. Unltd.*** [2013] 32 NLR (Pt. 92) 243 (NIC) at 327C – D stated: "*One vital point must be noted here.* ***The ILO does not brand as invalid or unlawful or as wrong the triangular employment relationship; neither had it even branded the practice of outsourcing or contracting out as unfair labour practice*** *as the appellant made it out in some of its communications with the Ministry of Labour regarding this matter.* ***All the ILO enjoins is that the respective laws of member States on the issue should be respected and applied***." (Emphasis supplied)