# Contingent Employment Practices in the Philippines: Diversity and Policy Options

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The employment relationship has social, cultural and institutional aspects, aside from the market one. Kochan (1997) and Kochan and Osterman (1994) articulate reminders about the implicit social contract behind the employment relationship. Civilized society expects that pay, and income in general, should rise with productivity. Hard work, good performance, and loyalty are to be rewarded with job security, fair treatment, dignity and status. Loyalty to a firm comes with increasing tenure and "property rights" to a job. In the Philippines, the Constitution and the related labor laws provide the norms governing employment, including the contingent categories.

A prime motive behind most contingent employment practices is to be outside the scope of this social contract, to minimize labor costs. To legalize these flexible labor practices, however, would require a change in the relevant Constitutional and legislative provisions to do away with the protective labor laws—a highly objectionable, backward step in Philippine industrial relations, contrary to international labor conventions to which the country committed itself a long time ago.

The employment relationship is also a social relationship. Employment and work reflects social values and implicit mutual expectations about each other at the workplace. These include honesty at work, delivery of what is expected, exerting one's best efforts, fairness, justice, equity, as well as democracy. It is expected that hard work and good performance will be rewarded with a sense of security ('tenure') and stability, fair treatment, dignity, and status. Loyalty to one's tasks or set of duties in the work organization is expected to be rewarded with "property rights" to the job.

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The origin, nature and scope of job subcontracting and other forms of contingent employment in the Philippines vary, but have a common environmental context: deregulation policies to promote competitiveness in the product and labor markets.

Contingent employment practices include the following: casual, contractual or agency hiring, temporary/substitute, project, seasonal, and workpool employment. Exploitative and abusive practices are widespread among firms which engage in contingent employment, but there are also best practices, are found mainly in the "golden collar" professions and the sunrise, emerging high technology-based industries.

Contingent or flexible employment is an important policy challenge in the Philippines. While public policy aims to protect workers' rights through fair employment and pay standards, the diversity in contingent work practices makes the enforcement of such standards difficult. "Labor only contracting" as a form of contingent employment is considered illegal, but it is widespread. There is a thin line which separates what is considered as "labor only contracting" and legitimate job subcontracting. ***Box 1*** shows how Philippine labor laws distinguish between regular and contingent employment. Evidence from recent court cases (reviewed in the next section) concerning the dismissal of contingent employees shows that protection from exploitative and unfair employment practices due to labor market flexibility is possible under current Philippine labor laws. However, for those who are marginalized and with no adequate access to correct information about their rights, contingent employment will remain to be synonymous to exploitation.

Macaraya (1999) and McKay (1999) affirm the findings of Soriano (1993) that Philippine labor laws have limited influence on how employers resort to various forms of contingent, flexible employment unless employees file a complaint in the National Labor Relations Commission (NLRC). The same type of laws exists in many other countries similar to the Philippines, especially in Asia. Industry practices worldwide point to a trend towards deregulatory labor market policies. How will public policy in the Philippines deal with this global trend? There are valid concerns about the prevention and punishment of exploitative employment practices associated with job subcontracting. More research is needed to verify whether or not employers recognize the negative aspects of hiring workers on a short term or contingent basis (pointed out by the case studies of Ofreneo, 1997).

***Box 1***

**How Philippine labor laws distinguish regular versus contingent employment**

*Regular and casual employment.* 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 services to be performed is seasonal in nature and the employment is for the duration of the season. *(emphasis supplied by the author)*

An employment shall be deemed casual if it is not covered by the preceding paragraph; provided that any employee who has rendered at least one year of service whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed, and his employment shall continue while such activity exists." *(Article 280, amended Philippine Labor Code).*

*Probationary employment.* "Probationary employment shall not exceed six (6) months from the date the employee started working, unless it is covered by an apprenticeship agreement stipulating a longer period. The services of an employee who has been engaged on a probationary basis maybe terminated for a just cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. An employeee who is allowed to work after a probationary period shall be considered a regular employee." *(Article 281, amended Philippine Labor Code).*

Prohibition of labor only contracting. "Whenever an employer enters into a contract with another person for the performance of the former's work, the employees of the contractor and of the latter's subcontractor, if any, shall be paid in accordance with the provisions of this Code." ...xxx... The Secretary of Labor may, by appropriate regulations, restrict or prohibit the contracting out of labor to protect the rights of workers established under this code. There is "labor only" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such persons are performing activities which are directly related to the principal business of such employer. xxx..." *(Article 106, amended Philippine Labor Code).*

Costs include the development of firm-specific skills, and internal labor markets through commitment and loyalty.

## Globalization and contingent employment: going beyond the market relationship

Flexibility in employment and pay is a global trend. Ozaki's work (1999) is a state of the art document on flexibility practices worldwide. This landmark study identifies the links between global competition and labor flexibility, and the need to negotiate employment arrangements in both the workplace and in national policy.

Wickery and Wurzburg (1997) identify functional and numerical forms of flexibility. Functional flexibility practices include the following: broadening of job designs; mobility across tasks; deepening the depth and enlarging the scope of individual skills; and extensive training and retraining programs. Autonomous, self-managed and multifunctional work teams are the manifestation of functional flexibility. Numerical flexibility involves changing the quantity of labor input. Quantitative changes include "rightsizing" the number of employees, changing work hours, use of part time employees, and the use of temporary employees with fixed periods of employment. It is noteworthy that enterprises often resort to the simpler forms of numerical flexibility measures, instead of the more sophisticated functional flexibility which involves high skills and a collective approach to work.

Labor market practices abroad influence and spill over into the Philippines. Contingent employment is widely practiced by both local and multinational enterprises. The practice has become widespread, as a consequence of the globally competitive environment. Throughout the world touched by global competition, there is always the phenomenon of what is referred to as "flexible", "contingent", or "short term" employment. The contingent form of employment is in contrast to the traditional, long term employer-employee relationship which is a consequence of the social contract. Oftentimes, the traditional Japanese model of long term employer-employee relations stands in stark contrast to contingent employment. Recent works such as that of Sano (1995); Sano, Morishima and Seike (1997) and Sako and Sato (1999) on the Japanese model of long term employment increasingly challenge this usual view, however.

Throughout the competitive world, the growth of contingent employment has been associated with the desire by employers to be

more "flexible" in terms of both the number and types of workers, in order to be more responsive to the needs of the product market in both the home and global fronts. While recognizing business strategies, the growth of "contingent" or "fixed term" contracts is also attributed to government's labor policies. Governments recognize the need to exercise influence to provide competitive policies for doing business, such as market-baesd wages. The projected high cost of retaining and terminating workers under "regular" or long term employment contracts discourages prospective investors.

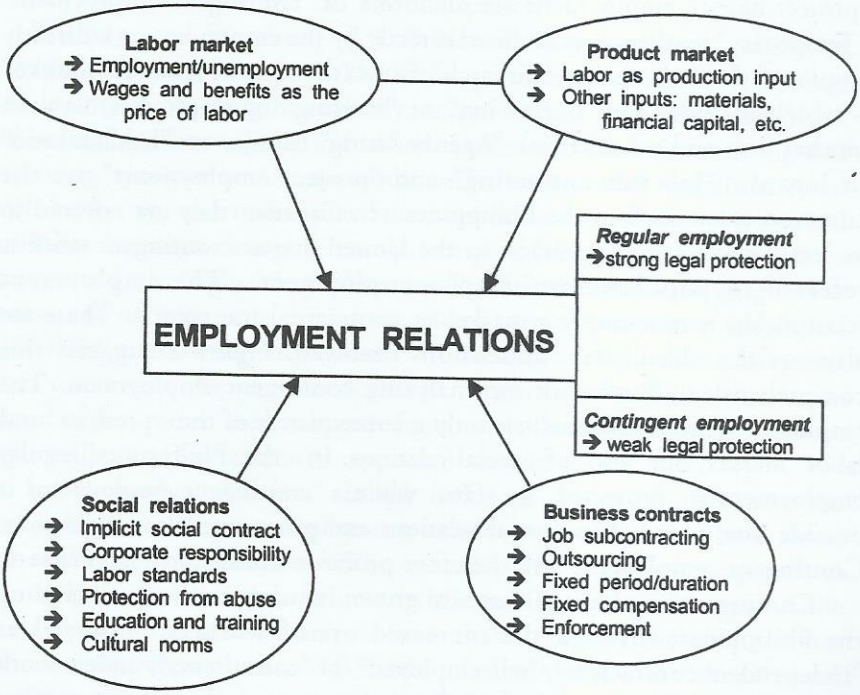
Job contracting, casual, temporary, seasonal, probationary and "project-based" employment are all forms of contingent employment. "Temporary" workers may be hired directly by the employer, or indirectly employed through worker "dispatch" firms (the term in Japan is "shukko" – which includes the "borrowing" or "lending" of employees between mother firm and subsidiaries). "Agency hiring" (similar to "hakken rodo" in Japan), "job subcontracting" and "project employment" are the common terms used in the Philippines. In Canada, they are referred to as "employee leasing" agencies. In the United States, contingent work is referred to popularly as "temp" employment. The employment relationship is not simply a market or contractual transaction. There are also social and cultural dimensions involved. ***Figure 1*** suggests this comprehensive framework for analyzing contingent employment. The employment relationship is not only a consequence of the product and labor market, but also of social relations. In the Philippines, regular employment is protected by law, while contingent employment is outside the scope of industrial relations and protective labor legislation. Contingent employees are therefore prone to abuse and exploitation.

Contingent employment has also grown in many countries, including the Philippines, through the increased use of workers employed as "independent contractors", "self-employed", or "consultants", under work contracts which are either of fixed duration or based on project completion dates. In all of the above forms of contingent employment, there exists an explicit understanding between the employer and the worker that there is no commitment to a long term employment contract. In all these practices, the common goal of the employers is to reduce the size of the more traditional or "core" workforce by increasing the share of the "peripheral" or "marginal" workers in the workforce.

Why do workers enter into "contingent" or fixed term employment contracts? One view holds that such workers have only unemployment as their alternative. This view considers contingent employees as victims of

the ups and downs of the free market. The alternative view is that there are workers who wish to be mobile, among them the young, and who seek alternative forms of contingent employment for a variety of work experiences and to maximize income opportunities.

*Figure 1.*
**ANALYTICAL FRAMEWORK FOR CONTINGENT EMPLOYMENT IN THE PHILIPPINES**




## Diversity of contingent employment in the Philippines

Available official labor statistics (Bureau of Labor and Employment Statistics-DOLE, 1999) do not provide a good estimate of the extent of the contingent workers in relation to total employment. It is fair to say, however, that contingent workers should not be less than *35 percent of the employed workforce.* This is estimated from the 10 million part time workers who work less than the regular 40 hour

work week, out of the total 28.4 million employed Filipinos. Since there are more diverse forms of contingent employment other than part time work, flexible workers indeed are a significant component of the Philippine workforce. Official statistics must still capture the extent of each form of contingent employment in the Philippines, in terms of the actual category that they are utilized. Due to fears of legal sanctions, however, employers may not wish to disclose the truthful number of contingent employees hired.

Soriano (1993) identified the following forms of "external flexibility", in contingent employment in the Philippines: (a) temporary; (b) casual; (c) part time; (d) contract employees; and (e) contracting out or outsourcing of work. Macaraya (1999) is a landmark study on the diverse forms of contingent employment in the Philippines. He emphasizes the contingent, trilateral relationship between employers, workers and intermediaries, with the last being either: (a)job or service contractors, who hire employees after concluding a job or service contract with an enterprise or the pure labor contractors. The most common types of job or service contracting are those engaged in by janitorial and security agencies. In 1997, the Department of Labor and Employment issued a policy guideline declaring that contingent employment arising from "contracting and subcontracting arrangements are expressly allowed by law" (DOLE, 1997). Contingent employment, however, "is subject to regulations consistent with the promotion of employment, protection of workers' welfare, enhancement of industrial peace, and the right of workers to self-organization and collective bargaining". The government's policy recognizes "flexibility for the purpose of increasing efficiency and streamlining operations [as] essential for every business to grow in an atmosphere of free competition". The policy expressly condemns any form of flexibility intended to circumvent or evade workers' rights.

Beyond the regular employer-employee relationships, the diversity in contingent employment in the Philippines associated with bad working conditions includes the following: (1) casual; (2) temporary or substitute; (3) contractual project hirees; (4) agency; (5) part-time; (6) seasonal; and (7) work-pool workers. There are also the (8) homeworkers and (9) trainees, apprentices, learners and working students. At the high end of contingent employment, associated with good pay and working conditions, are the (10) retained professionals and consultants. They include accountants,

lawyers, computer programmers, health professionals, management consultants, and similar highly skilled and highly paid people.

"Labor –only contracting" refers to a situation where the principal employer concludes an agreement with a manpower agency for the supply of workers. Under Article 106 of the Philippine labor code, "labor-only contracting" is illegal.

To have a valid contract, the labor contractor must be registered as an enterprise engaged in such services, with claims of a substantial capital. In 1997, the Secretary of Labor exercised the authority provided by law by specifying the list of legitimate and non-legitimate areas of flexible, contingent employment *(please see Box 2)*. The law also requires that the term or duration of contractual employment shall be coextensive with the term or duration of the contract between the principal and the contractor or subcontractor. It is possible to have shorter work contracts when the project could be divided into several phases, such that substantially different skills are required for each phase, term or duration of the contractual employment.

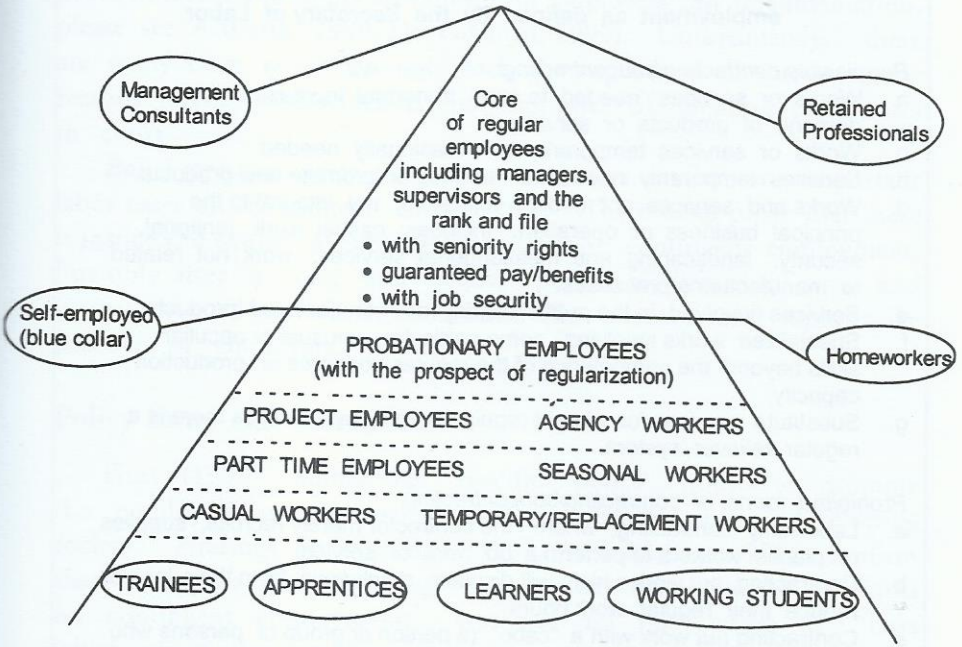
***Figure 2*** shows the hierarchy of contingent workers in the Philippines as well as their position in relation to the core of regular employees.

At the bottom are the trainees, apprentices and learners who are actually outside the employment relationship, and hence, beyond the reach of industrial relations. (Students are not counted as part of the official labor force.) There are reports of employer abuses of this group. They have no employment rights except for the acquisition of skills; employers may grant them a training allowance. Next to the bottom of the hierarchy are the contingent employees, with the temporary or replacement workers, including the casuals being the most vulnerable. They have no seniority rights, or guarantees of pay and benefits under the law. Project employees are based on short term contracts, hence they are also called contractual employees. Probationary employees are a bit better off, with prospects of regularization after six months of continuous service. At the high end of the hierarchy are the "golden collar" workers: consultants who are usually professionals with multiple clients and with a high degree of independence of tasks and time allocation.

## Review of cases on contingent employment

Many cases of illegal dismissals filed by contingent workers have ended up being decided by the Philippine Supreme Court. These cases illustrate the vulnerability of contingent workers to abusive and exploitative terms and conditions of employment.

***Figure 2***
**Hierarchy of Contingent Employees as Prescribed by Labor Laws in the Philippines**




Illegal dismissal cases are first decided upon by the labor arbiters of the Department of Labor and Employment (DOLE). Invariably, either employer or the worker appeals the arbiter's decision to the National Labor Relations Commission, which is a quasi-judicial body attached to the DOLE. With sufficient citation of abuse of discretion, the decisions of the NLRC could be appealed to the Supreme Court. Employers have more financial and time latitude to make appeals, in contrast to workers who must seek means to survive while attempting to perfect their appeals up to the highest court. Some of these cases take more than a decade to be settled, from the initial filing of the complaint to the final resolution by the Supreme Court. Due to clogging with illegal dismissal cases, the Supreme Court recently decided to add another layer to the appeals procedure, by referring such cases for review to the Court of Appeals.

The Supreme Court decisions illustrate the rich jurisprudence on various forms of employment relations in the Philippines. Such

*Box 2.*

**List of legitimate and non-legitimate forms of contingent employment as defined by the Secretary of Labor**

*Permissible contracting/subcontracting*:

a. Works or services needed to meet abnormal increase in the demand of products or services
b. Works or services temporarily or occasionally needed.
c. Services temporarily needed to introduce or promote new products.
d. Works and services not directly related or not integral to the principal business or operation. Includes: casual work, janitorial, security, landscaping and messengerial services; work not related to manufacturing processes.
e. Services involved in the public display orf manufactured products.
f. Specialized works involving some particular, unusual or peculiar skills beyond the competence of the regular workforce or production capacity.
g. Substitute services for absent regular employees, unless there is a regular reliever system.

*Prohibited forms of contracting/subcontracting*

a. Labor-only contracting, where the contractor merely recruits, supplies or places workers to perform a job, work or service.
b. Contracting out work which will displace employees from their jobs or reduce their regular work hours.
c. Contracting out work with a "cabo" (a person or group of persons who in the guise of a labor organization supplies workers to an employer, as an agent or independent contractor).
d. Taking undue advantage of the economic situation or lack of bargaining strength of contractual employees.
    - Requiring contractual employees to perform functions done by regular employees;
    - Requiring quitclaims, signatures in blank payrolls, etc. as preconditions for employment;
    - Work contracts shorter than that between the principal and the contractor.
e. Contracting out of a job, work, or service through an in house agency.
f. Contracting out of a job, work, or service by reason of a strike or lock-out.
g. Contracting out of a job, work, or service to split the collective bargaining unit.

Source: Department of Labor and Employment (DOLE). 1997. ***Department Order No. 10: Rules on Job Subcontracting*** Also Rule VII-A, Sections 6 and 7 of the Labor Code.

**Note:** D.O. 10 was subsequently revoked by D.O. 3 (2001), issued on May 8, 2001 by DOLE Secretary Patricia A. Sto. Tomas.

jurisprudence enshrines workers rights and the bias towards labor justice. These decisions provide evidence that given access to proper information and the correct legal advice at an affordable price, there could be justice and equity for contingent employees (for documentation, please see Azucena, 1999; De Guzman, 1999). Unfortunately, there are many cases which do not reach the highest level due to many reasons foremost of which is the high price of pursuing these cases in court.

*Box 3* presents what the author considers as the most important labor cases on contingent employment. These cases prove that there is justice and equity in existing labor laws on contingent employment, but only after a long and costly period of litigation, stress and uncertainty, all of which compound the abusive and exploitative practices of employers.

## Policy issues and alternatives

Gust (1999) points out specific policy options to promote the employability of workers in the context of a developing society. Findings by Macaraya (1999) and McKay (1999) confirm that Philippine labor laws are not relevant to employers' practices on contingent employment; workers are not aware of laws which aim to protect them from abuse and exploitation. In fact, McKay finds that many workers would want to work at any wage rate, given the high level of unemployment .

An important policy consideration is how to bring contingent employment into the umbrella of protective industrial relations. The phenomenon of contingent workers—most of them are outside the scope of traditional labor-management relations—should be part of the landscape of changing work patterns and industrial relations, the hypothetical parameters of which have been identified by Reich (1991) and Erickson and Kuruvilla (1998). Ozaki (1999) highlights the need to negotiate flexibility through collective bargaining, and through negotiations between the social partners and the State. Huiskamp (1995) provides a compact framework of employment regulation. In the case of the Philippines however, employers prefer not to include labor flexibility in collective bargaining; very few agreements include a provision in this regard.

What are the policy options?

*Box 3*

**Important Supreme Court decisions on contingent employment**

*TYPE OF CONTINGENT EMPLOYMENT AND ISSUES*

*Casual employment.* La Tondena, which manufactures wines and liquor hired a painter paid on a daily basis through petty cash vouchers. The employee requested regularization after working for more than one year. Company dismissed the employee, and argued that painting the building is not part of manufacturing wines. *(De Leon vs. NLRC, GR No. 70705, Aug. 21, 1989)*

*Resolution:* Court ordered reinstatement, on grounds that employee's job of painting is part of maintenance work, essential to the business. Reinstatement with back wages.

*Contractual employment.* Every three months, a carpenter was made to sign an mployment contract relating to a particular phase of work in a specific project, from April 17, 1980. On March 6, 1982 carpenter was told he could not work anymore because he was already old. His contract expired, and was not renewed. (*Magante vs. NLRC, GR No. 74969, May 7, 1990)*

*Resolution:* Court ordered reinstatement, with backwages and other rights, including seniority. Worker regularly assigned tasks usually necessary and desirable in the usual business of the company.

*Day to day contractual employment.* A country club employed a gardener on a day-to-day basis in various capacities as dishwasher and laborer, for 10 months from October 1, 1979 to July 24, 1980. Hired again as a gardener from September 1, 1980 to October 1, 1980. Rehired again on November 15, 1980 to January 4, 1981until dismissed. NLRC favored the worker, arguing that he has worked for more than one year as laborer, gardener and dishwasher and was a regular employee when terminated. Country club argued that worker is a contractual employee, whose employment was for a fixed and specific period. *(Baguio Country Club vs. NLRC, GR No. 71664, Feb. 28,1992)*

*Resolution:* Supreme Court ordered reinstatement with B backwages, since the worker is a regular employee performing tasks necessary and desirable to the business. Repeated rehiring and continuing need for his service sufficient evidence of necessity and indispensability of the worker's services.

*Temporary employment.* Clerk-typist hired on a temporary basis, for purposes of meeting the seasonal or peak demands of the business; services terminated after tasks were accomplished. *(Beta Electric Corp. vs. NLRC, GR No. 86408, Feb. 15, 1990)*

*Resolution:* Supreme Court ordered reinstatement with back wages. Clerk-typist' s work not seasonal or temporary, but necessary and desirable to the business.

*Project employment.* Electrical contractor depends on contracts from real estate developers for projects. Employees were terminated because their appointments were coterminous with the project phase or item of work assigned to them. *(Cartagenas vs. Romago Electric Co. GR No. 82973, Sept. 15, 1989)*

*Resolution:* Supreme Court ruled that employees' appointments are coterminous with projects.

*Project employment, work pool.* Construction workers belong to a work pool hired for specific projects. Repeatedly rehired; continuing need for their services for 7 years. Employees assigned to a particular project until completion. Company laid off workers. *(Tomas Lao Construction, et. al vs. NLRC GR No. 116781, Sept. 5, 1997)*

*Resolution:* Supreme Court ruled that employment became non-coterminous with specific projects when they were continously rehired and reengaged without interruption.

*Seasonal employment.* Workers of stevedoring company supplied by a labor organization. Regularly worked during milling seasons. Company refused to hire 139 workers since there is no employer-employee relations, and milling season ended. *(Visayan Stevedore vs. CIR GR No. L-21696, February 25, 1967)*

*Resolution:* Supreme Court ruled that company's contention is untenable. No independent contract with the labor organization. Employer- employee relations continue to exist even during off season.

**Source:** Supreme Court of the Philippines. Cases cited in Azucena (1999), pp. 530-565.

*POLICY OPTION 1: Deregulation.* This implies the abolition of Department Order No. 10 of the Department of Labor and Employment which prescribes the do's and don'ts of job subcontracting, and the deletion of Article 106 of the Philippine Labor Code which prohibits "labor only contracting". Esguerra (1997) argues that employment of non-regular workers is bound to occur even in the absence of restrictive labor standards or labor unions. An extreme view is to do away with labor standards. Hiring costs and firm specific human capital influence firms to invest in long term employment. Flexible labor policies, which include fewer rules on matters ranging from severance pay requirements to advance notices of dismissals promote the creation of jobs.

The free labor market option is a corollary of free competition, the consequence of which is deregulation. This option preaches that the free market will reward those who engage in the best employment practices — through employee loyalty, commitment, and high quality of work. Those who resort to bad, abusive employment practices will be punished by the forces of supply and demand in the freely competitive labor market, rather than by laws, rules and sanctions. Employees will leave the abusive employers, or even punish them with bad quality of work, disloyalty, shirking, and even sabotage.

The disadvantage of this option is that without labor laws and standards on employment and wages, good employers who comply will be edged out of competition by the bad noncompliant employers. Deregulation will work when there is perfect competition among firms, labor mobility, and cheap access to information, conditions that are absent in the Philippine labor market.

*POLICY OPTION 2: Deregulation with self-regulation.* An attractive option is self-regulation by employers who engage in contingent employment. Self regulation may complement deregulation. However, deregulation with self-regulation requires strong and widely respected industry associations with leaders of good reputation. Their constitutions and by-laws must have clear provisions on membership and accreditation standards, discipline of erring members, self-regulatory procedures, incentives for the adoption of best practices, transparency, and prohibition of bribery of government officials by association members.

Given the highly competitive nature of job or service contracting, it is unreasonable to expect a high degree of self-regulation from the employers involved. Civil society's opposition to abuses and exploitation associated with the downside of labor flexibility is to be expected under a deregulated policy.

*POLICY OPTION 3:* ***Status quo on restrictions to contingent employment.*** It is difficult for employers and managers in the Philippines to work out the necessary conditions for deregulation and self-regulation. Advocates of this policy option argue that DOLE Department Order No. 10 is an important progressive step toward mitigating the effects job subcontracting, among others. If special protection for contingent employees is not feasible, then it is best to retain the current rules and regulations governing them .

*POLICY OPTION 4:* ***Special protection to contingent workers.*** There is a wide consensus among employers and the unions for the stronger protection of contingent workers—through provision of social security, health maintenance, assured access to credit or livelihood funds, safety nets, and unemployment insurance. Protection of contingent employees will contribute to the leveling of the playing field for competition between good employers who comply with labor laws, and bad employers who do not. Current labor laws are either vague or "toothless" in this respect. Legislative bills have been filed to protect casuals and contractuals, and make their status, pay and benefits comparable to regular workers, but none of these has passed into law.

***Prognosis.*** Without the conditions which guarantee effective deregulation and self-regulation, other stakeholders in the employment relationship in Philippine society will believe that industry is not ready for such a policy framework. If Philippine industries are not ready for deregulation and self-regulation, it is best that existing laws and rules on flexibility in employment and pay—profoundly enriched by local jurisprudence—remain in full force and effect. A brief, non-specialist review of Supreme Court jurisprudence provides evidence that given access to quality legal advice, there is equity and justice from existing Philippine labor laws which protect contingent employees from abuse and exploitation.

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