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IMPOSED EMPLOYMENT AND EMPLOYMENT CONDITIONS UNDER THE ISRAELI EMPLOYMENT OF EMPLOYEES VIA MANPOWER CONTRACTORS LAW OF 1996

TO WHOM DO THESE APPLY?

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"The injury to the principle of equality in employment caused by the suppression of the natural and legitimate ambition [of the employee] for advancement in employment, is one of the manifestations of the humiliation involved in discrimination in which lies the constitutional aspect of the principle of equality in this case. This is true, having regard to the significance which is usually attached to the value of employment, the role of employment in the formation of the personality and the destructive effect of the frustration caused by the obstruction of equal opportunity for advancement in employment".[1]

Judge Neta Ruth
Labor Judgment (Tel-Aviv) 7506/07 Shrem v. The State of Israel

There is an increasing phenomenon of businesses outsourcing their activities to manpower and service contractors, in order to achieve a reduction in employment costs, increased independence in hire and fire management decisions and an erosion of the union bargaining power. The Israeli Employment of Employees via Manpower Contractors Law of 1996 contains two revolutionary provisions which are intended to combat partially the phenomenon of prolonged employment of temporary employees via manpower contractors: a provision imposing the employment conditions of the actual employer on the manpower contractor's employees and a provision creating an employment relationship between the manpower contractor's employees and the actual employer, after nine months of consecutive employment with the same actual employer. These provisions do not apply, however, to service contractors in cases in which an activity has been genuinely outsourced. The question arises as to the distinction, in this connection, between purchasing manpower via a manpower contractor and purchasing a service via a service contractor.

Forward

1. The Employment of Employees via Manpower Contractors Law of 1996 ("**the Manpower Contractors Law**"[2]) includes two major provisions which amount to an acute intervention of the legislature in the freedom of contract: **(a)** a provision according to which an employee of a manpower contractor is entitled, as of the beginning of his employment at the workplace, to be employed in the same conditions as the employees who are employed directly by the actual employer (excluding an employee of a manpower contractor whose employment conditions with the actual employer are regulated in a general collective agreement the provisions of which have been extended in an extension order[3]) – this provision came into effect as of 19.1.2001[4] ("**the Equalization of Conditions of Employment Provision**");

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1 All translations in this article are free translations.

2 Published, *Sefer Hukim*, 1578, 21.3.1996, bill published, *Hatzaot Hok* 2380, 6.3.1995.

3 *See*: Extension Order in the Manpower Supply Branch 2004, *Yalkut Pirsumum*, 53260, 1.9.2004, which extended the provisions of the general collective agreement between the Organization of Manpower Supply Companies in Israel and the National Association of Manpower Companies of the Association of Chambers of Commerce on the one hand, and the New General Federation of Labor and the General Federation of Workers in Israel of 16.2.2004, on all employers engaged in the supply of manpower services in the commercial sector only and their employees. An "employer in the commercial sector" is defined as an employer which is not an "employer in the public sector" and an "employer in the public sector" includes the State of Israel, municipalities and various other specified bodies in the public sector.

4 Published *Sefer Hukim* 1784, 28.7.2000, bill published, *Hatzaot Hok* 2879, 31.5.2000. In the original law, employees of a manpower contractor were excluded from the Equalization of Conditions of Employment Provision (which applied only after the employees were employed with the actual employer for a period exceeding three years) if their employment conditions at the manpower contractor were regulated in a collective agreement under the Collective Agreements Law of 1957, *Sefer Hukim*, 1578, 21.3.1996. In a certain case, a manpower contractor which had signed a collective agreement with a union, establishing the employment conditions of the manpower contractor's employees, argued that due to the application of this collective agreement, its employees could not rely on the Equalization of Conditions of Employment Provision and the Imposed Employment Provision. However, the labor court ruled that the collective agreement was intended to apply only to situations of temporary employment with the actual employer: Labor Judgment (Tel Aviv) 911583/99 Hani Avni-Cohen v. The State of Israel – Court Management and O,R.S. Overseas Representation Services Ltd. ("**the Avni Judgment**").

(b) a provision according to which an employee of a manpower contractor who is employed in the same workplace for nine months consecutively, will be deemed to be the employee of the actual employer – this provision came into effect, after many deferrals, as of 1.1.2008 ("**the Imposed Employment Provision**"[5]). The labor court has referred to this legislation as a "revolutionary arrangement which in effect interferes with the freedom of contract and the autonomy of the free will, which belong to the human rights protected by the Basic Law: Human Dignity and Freedom"[6].

2. The Equalization of Conditions of Employment Provision and the Imposed Employment Provision were enacted in view of the widening phenomenon of employing employees with the purchaser of services (or "actual employer"[7]) via manpower contractors (often accompanied by a changeover in manpower contractors as a result of the periodic tenders for manpower services which are compulsory in many public bodies) in permanent positions for prolonged periods, in conditions inferior to those of the regular employees of the actual employer, thus circumventing obligations under collective agreements or arrangements applicable to the employees of actual employer, both obligations with respect to employment conditions and obligations with respect to union protection intended to provide employment security in the workplace[8]. In this way, the actual employers achieved a reduction in employment costs, increased independence in hire and fire management decisions and an erosion of the union bargaining power[9]. As a result of this widening phenomenon, two classes of employees with the same actual employer were created[10]: "Class A" employees formally and directly employed by the actual employer, in conditions regulated by the applicable collective agreements/arrangements, in tenured positions with union protection providing security in the workplace, and "Class B" employees employed via a manpower contractor, in inferior conditions determined by the manpower contractor, in untenured positions, without union protection and with no security in the workplace. "Class B" employees were often employed, not only in temporary positions for temporary periods, but also in permanent positions for prolonged periods.

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5 Published *Sepher Hukim* 1997, 11.4.2005, bill published, *Hatzaot Hok Hamemshala* – 143, 6.12.2004.

6 Labor Judgment (Jerusalem) 2918/08 Golan Zohar *and others* v. O.R.S Human Resources Ltd. *and others* ("**the Zohar Judgment**").

7 The term "'actual employer" or "user" are commonly used in the literature, judgments and legislation to describe the party with whom the employee is actually employed in the triangular relationship formed when a party contracts with a manpower contractor or a service contractor for the purchase of services which involve the actual employment of the employees of the service or manpower contractors in the premises of the party that purchases the services. *See* for example the definition of "actual employer" in section 1 of the Employment of Employees via Manpower Contractors Law, which, however, refers only to a party contracting with a manpower contractor.

8 *See:* Ruth Ben Yisrael, "Outsourcing Out: Employment of Employees via Manpower Contractor's – A Different Interpretation: Conversion of Formal Employment to Authentic Employment". Employment Law Yearbook (7) 5, ("**Ruth Ben Yisrael**").

9 Supreme Court Judgment 450/97 Tenufa, Manpower Services and Holdings Ltd. V. the Minister of Labor and Welfare, Supreme Court Cases 52(2) 433, 443 ("**the Tenufa Judgment**"); Labor Appeal 11/07 El-Or Eilat Operating and Holding Ltd. V. The State of Israel *and others* ("**the El-Or Judgment**"); Labor Appeal 410/06 The National Insurance Institution v. Rayid Fahoum *and others* ("**the Fahoum Judgment**").

10 Labor Appeal 1189/00 Levinger v. The State of Israel *and others* ("**the Levinger Judgment**").

3. The Equalization of Conditions of Employment Provision was clearly intended to combat the phenomenon of employment of employees with actual employers via manpower contractors in inferior conditions[11]. The Imposed Employment Provision was clearly intended to combat the phenomenon of prolonged employment of employees with actual employers via manpower contractors, without a formal and direct employment relationship being created with actual employer, and to limit the legitimate activity of manpower contractors to the placing of employees in temporary positions, for limited periods, in situations in which a genuine need arises for temporary employment, such as to substitute for an employee on leave, to perform a specific project of limited duration or for a probationary period. Within these limits, the Manpower Contractor's Law recognizes the legitimacy and even the advantage of the employment relationship between the manpower contractor and the employee[12].

4. The Manpower Contractors Law was recently amended to include certain provisions imposing regulation on service contractors in specific areas (to date, guarding, security and cleaning)[13]. To date however, neither the Equalization of Conditions of Employment Provision nor the Imposed Employment Provision have been extended to apply to service contractors, not even to those areas to which the recent amendment applies[14].

5. In view of the applicability of the Equalization of Conditions of Employment Provision and the Imposed Employment Provision, to employees of manpower contractors and not to employees of service contractors, there is an increased phenomenon of employers contracting with service contractors rather than manpower contractors, and positions traditionally occupied by manpower contractor's employees, are now "outsourced" to a service contractor[15].

The Question of the Distinction between a Manpower Contractor and a Service Contractor

6. One of the preliminary questions which arise, therefore, in connection with the applicability of the Equalization of Conditions of Employment Provision and the Imposed Employment Provision, is the distinction between contracting with a manpower contractor for the purchase of manpower services and contracting with a service contractor for the purchase of services beyond mere manpower services[16].

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11 Labor Appeal Judgment 273/07 Dovrat Shweb v. The State of Israel ("**the Shweb Judgment**").

12 *See:* M. Meroni, "Who is the Employer – Definition of Employee-Employer Relationship in Modular Employment Patterns", The Tel-Aviv University Law Review - *Iyunei Mishpat*, 9, (1983) 505, 527; the Avni Judgment. In cases of genuine temporary placement, the manpower contractor remains the constant employer, despite the changeover in employers and places of employment. This is considered to be one of the main purposes of recognizing the manpower contractor as employer: *see* the Levinger Judgment.

13 Published *Sefer Hukim* 2203, 23.7.2009; bill published *Hazaot Hok Hamemshala* – 436, 16.6.2009.

14 Initiatives have been taken to extend the liability of actual employers to employees of service contractors in cases in which the service contractor reneges on his liabilities towards his employees: Liability of a Purchaser of Contractor Services for the Employee's Entitlements Bills of 2005, 2006 and 2010 submitted by various MP's.

15 *See*: Sharon Rabin-Margaliot, "Service Contractors, Purchasers of Services and Especially The Distinction Between Them: Their Status and the Enforcement of the Rights of the Employee's of the Service Contractors", Bar-Ilan University Law Research - *Mechkerei Mishpat*, 25, 2009, 525 ("**Sharon Rabin-Margaliot**").

16 The question of the distinction between a manpower contractor and a service contractor the employees of which are employed with actual employers arose also after the enactment of the original Manpower Contractor's Law in 1996, which did not include the Imposed Employment Provision. *See*: Ruth Ben Yisrael and Records of Parliamentary Debate of 134 session of the fifteenth Knesset of 19 July 2000.

Following we will detail some of the criteria often used in making the distinction. These criteria should be distinguished from the criteria which apply in establishing the identity of the employer, in various cases in which an actual employer uses manpower, without creating a direct and formal employment relationship with the employee[17]. The question of the identity of the employer, precedes the question of the applicability of said provisions, since the creation of an employment relationship between the actual employer and the employee, obviates the necessity of resorting to the Manpower Contractor's Law (and to the distinction between manpower contractor and service contractor) in order to achieve equalization of employment conditions with the conditions of employment of the employees of the actual employer or in order to achieve liability of the actual employer as employer towards the manpower contractor's employee.

The Relevant Provisions of the Manpower Contractor's Law

Section 12A of the Manpower Contractors Law provides:

"(a) An employee of a manpower contractor will not be employed with an actual employer for a period exceeding nine consecutive months; employment will be deemed to be consecutive for the purposes of this section, even if it is interrupted for a period not exceeding nine months.

(b) Notwithstanding the provisions of subsection (a), the Minister may, in exceptional cases, allow the employment of an employee with an actual employer for a period exceeding nine months, providing the total period of employment with the same actual employer shall not exceed fifteen months.

(c) Should an employee as aforesaid be employed with the same actual employer for a period exceeding nine consecutive months or an extended period according to subsection (b), the employee will be deemed to be the employee of the actual employer, upon the expiry of the nine month period or the extended period, as the case may be.

(d) Should an employee of a manpower contractor be deemed to be the employee of the actual employer according to subsection (c), the employee's seniority during the period of his employment by the manpower contractor with the same actual employer, will be added to the employee's seniority during the period of his employment by the actual employer.

(e) (1) This section shall not apply to a foreign employee, who is the employee of a manpower contractor, licensed to provide manpower services of employees who are not Israeli residents according to section 10, and employed with an actual employer, in the type of employment or branch of employment detailed in the first annex; in this subsection, "a foreign employee" – as defined in the Foreign Employees Law of 1991.

17 Labor Judgment 52/3-142 Hassan El-Harinat v. Kefar Ruth and others, Labor Cases 24(1), 535 ("**the Kefar Ruth Judgment**"); the Avni Judgment.

(2) The minister, with the authority of the Employment, Welfare and Health Committee of the Knesset, may, by order, change the first annex."

Section 13 of the Manpower Contractor's Law provides:

"(a) Employment conditions, and in a workplace to which a collective agreement applies – the provisions of the collective agreement applicable to the employees in a workplace in which also manpower contractor employees are employed, will apply, as the case may be, to employees of a manpower contractor employed at the same workplace, respectively, *inter alia*, to the type of work and the seniority with the actual employer.

(b) Should more than one collective agreement apply to the employee of a manpower contractor, the provision which is more beneficial to the employee will apply; for the purposes of this subsection, a "collective agreement" – including a collective agreement which applies to the employees pursuant to subsection (a) or a collective agreement regulating the employment conditions with the manpower contractor.

(c) Subsection (a) shall not apply to an employee whose employment conditions with the manpower contractor are regulated in a general collective agreement as defined in the Collective Agreements Law of 1957, providing such an agreement has been extended by an extension order, and the definition of "collective agreement" in section 1 shall not apply in this case."

Sections 13A and 15 of the Manpower Contractor's Law provide, respectively:

"**13A**. Sections 12A and 13 shall not apply to an employee of a manpower contractor employed with an actual employer in computer positions; for this purposes, "computer positions" – maintenance, development and assimilation of computer systems…"

"**15**. A provision in an agreement prohibiting, either permanently or temporarily, an actual employer in a workplace in which an employee of a manpower contractor is employed, to be the employee of the actual employer in such workplace – is void…"

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7. The Manpower Contractor's Law defines the term "Manpower Contractor as "one which is in the business of providing manpower services of its employees for employment with another, including a private agency as defined in the Occupation Service Law of 1959 which is also in the business of providing manpower services", and the term "Service Contractor" as "one which is in the business of providing a service in one of the areas of employment defined in the second annex, via its employees, with another"[18].

The Purpose of the Imposed Employment Provision

8. As is apparent from the parliamentary debates and from the provisions of the Manpower Contractor's Law, the Imposed Employment Provision is intended to combat the phenomenon of prolonged employment of employees via manpower contractors, without a direct and formal employment relationship being created between the employee and actual employer[19].

18 Section 1 of the Manpower Contractor's Law.

19 *See:* explanatory notes to the bill, *Hatzaot Chok* 2380, 6.3.1995; *Hatzaot Chok* 2879, 31.5.2000; Records of Parliamentary Debates of the Employment, Welfare and Health Committee of 22.5.2000, record number 123; Records of Parliamentary Debate of the 36th session of the fifteenth Knesset of 20 October 1999; Records of Parliamentary Debate of the 134th session of the fifteenth Knesset of 19 July 2000.

The legislature considers the separation between the place of employment and the employee, and the lack of stability in the identity of the employer resulting from the changeover of manpower contractors by the actual employer, as in themselves injurious to the employee, and as unjustifiable in cases in which the actual employer has no genuine, legitimate need for employing employees via a manpower contractor[20]. The employment of an employee with an actual employer in a permanent position via a manpower contractor, thus depriving the employee of equal employment conditions, equal opportunity in the workplace and effectively undermining his right to unionize, is considered contrary to the principle of equality recognized and protected in the Basic Law: Human Dignity and Freedom[21] and contrary to the constitutional right to unionize. The legislature recognizes the legitimacy and indeed, the advantages of an employment relationship between the manpower contractor and its employees in cases in which the employees are placed in temporary positions, for limited periods, in cases in which a genuine need arises for temporary employment, such as a substitute for an employee on leave, for the performance of a specific project of limited duration, or for hiring employees and placing them for probationary periods, after which they will be employed directly by the employer[22]. In cases of genuine temporary placement of manpower contractor employees with changing employers, the manpower contractor remains stable, while a changeover of actual employers and workplaces[23] takes place. This stability is considered to be one of the main advantages, from the manpower contractor employee's perspective, of recognizing the manpower contractor as the employer[24]. The legislature's purpose is to limit the legitimate activity of manpower contractors to what the legislature considers as its genuine and legitimate purposes. Therefore, employees of a manpower contractor employed with the same actual employer for a period exceeding 9 months, are deemed to be the employees of the actual employer. On the other hand, the legislature also recognizes the legitimacy of genuine outsourcing of an activity which is not in the core activity of the enterprise, in order to attain objectives such as limiting the workforce, cutting costs, increasing professionalism, maintaining management flexibility and raising the level of service, by purchasing the service from a service contractor which specializes in providing the service[25].

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20 The Avni Judgment. The court ruled that, in case of prolonged employment with the same actual employer via changing manpower contractors, "the injury is in the changeover of employers every few years, and the lack of tenure in the workplace which is caused by this form of employment.. The injury caused by this form of employment is not necessarily a concrete injury; it is an injury relating to the employment relationships in the workplace, the organizational culture in the enterprise, the degree of loyalty and sense of belonging of the employee to the organization in which he operates, all of which are closely related to the general concept of "human dignity", and are naturally difficult to prove.".

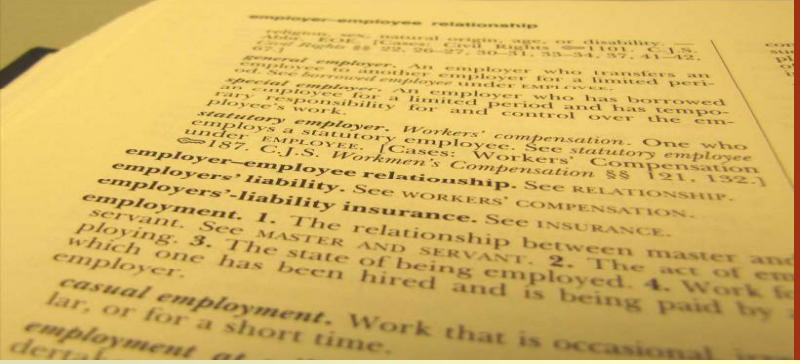
21 Labor Judgment (Tel-Aviv) 7506/07 Raphi Shrem v. The State of Israel – the Ministry of Health, *and others* ("**the Shrem Judgment**"); Labor Appeal Judgment 326/03 The state of Israel – the Ministry of Health, and others v. Yelena Chepkov, *and others* ("**the Chepkov Judgment**"); Labor Judgment 6141/03 Luna Hlawi and others v. The State of Israel – Ministry of Education.

22 The Levinger Judgment.

23 The Levinger Judgment.

24 The Fahoum Judgment.

25 The Shweb Judgment. In the Shweb Judgment such advantages however, were attributed to employment of a manpower contractor's employees as well as to outsourcing. Labor Appeal 328/07 Israel Attias and others v. The Israeli Airport Authority and Guarding and Security Ltd. ("**the Attias Judgment**"); the Fahoum Judgment.



Indeed, the national labor court has ruled that "it is the policy of the governments of Israel as of the mid eighties to transfer the market from a government controlled market to a competitive market. One of the means of achieving this policy is by privatization of services which were formally provided by the State via its employees. The labor court should not and must not prevent this policy"[26]. Genuine outsourcing can also involve the placement of the service contractor's employees in the premises of the purchaser of services for varying periods of time (and indeed, it is mainly in relation to such cases that the question of the distinction between an employee of a manpower contractor and a service contractor arises). However, the employees of a service contractor will not become employees of the purchaser of services, even if they are employed in its service for a periods exceeding nine consecutive months. In a situation of genuine outsourcing, the length of time in which the employees of the service contractor are employed with the purchaser of the services, is not considered to be a decisive factor in creating an employment relationship with the employees[27].

The Criteria Applied in Distinguishing between Employment of Employees via a Manpower Contractor and the Outsourcing of an Activity to a Service Contractor

9. Following are some of the main criteria often applied for distinguishing between employment of employees via a manpower contractor and the outsourcing of an activity to a service contractor in cases in which the employees are placed in the premises of the purchaser of services for varying periods of time: **(a)** The purpose of the contractual engagement with the manpower contractor, is limited to the supply of manpower services to other enterprises, whereas the purpose of the contractual engagement with the service contractor extends to the supply of the end service[28];

(b) A service contractor has experience and expertise in the area in which it provides the service, and provides a comprehensive service which includes planning, management and supervision. The "service" supplied by the manpower contractor is solely manpower, whereas the "service" provided by a service contractor extends beyond the sole supply of manpower[29];

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26 The Shweb Judgment – the opinion of President Adler.

27 The Labor Judgment (Beer-Sheva) 3200/06 Michael Dahan v. The Israeli Electricity Company Ltd. ("**the Dahan Judgment**"); Labor Judgment (Be'er Sheva) 4615/03 Tzion Alon *and others* v. The Israeli Airport Authority *and others* ("**the Alon Judgment**").

28 Ruth Ben Yisrael, footnote 6; Sharon Rabin-Margliot; Opening Motion (TA) 200345/98 *Bitachon Ezrachi* (Civil Security) Ltd. v. The Airport Authority *and others*; Labor Appeal Judgment 55/02-109 Osnat Daphne Levine v. The National Security Institution, Labor Judgment 29, 326 ("**the Levine Judgment**"); The Alon Judgment; R. Ben Yisrael, "Temporary Employment In Israel – The Legal Perspective" *Management 2000* (1990) 44, 50; F. Raday, "The Policy of Employing Employees via Manpower Contractors: The Legislature, the Courts and the Union – the New General Federation Of Employees", The Institute for Economic and Social Research 1, 6; Labor Appeal Judgment 57/54-3 Michel Lankri v. A.N.S. Asset Holding and Investment Company Ltd.; the El-Or Judgment; Labor Judgment 11142/06 (Tel Aviv) Rina Zadok v. Education, Culture and Neighborhood Rehabilitation Institutions Company Ltd. ("**the Zadok Judgment**"); Labor Appeal 116/03 The State of Israel – Ministry of Education v. Moshe Hagbi *and others* ("**the Hagbi Judgment**"); the Fahoum Judgment.

29 Labor Judgment 10295/08 (Tel-Aviv) Dr. Yaffa Skali *and others* v. The State of Israel, Ministry of Education; the El Or Judgment.

(c) The employee's services are part of the services which the service contractor has contracted to supply according to the contractual agreement with the purchaser[30]; **(d)** Outsourcing is recognized as legitimate when it involves an activity which is not part of the core activity of the purchaser's enterprise, and is not performed by the purchaser via its regular employees, but is rather external and supplemental[31]. Protection, security, messengers, cleaning, maintenance, and food supply, are examples of activities which have been recognized as typically "supplemental" to purchasers not themselves engaged in such activities, and as activities which can be legitimately outsourced[32]; **(e)** A manpower contractor is required to have a license to supply manpower and the supply of manpower will be included in the bylaws of the contractor, whereas a service contractor is required to have the licenses relevant to the supply of the service and said supply will be included in the bylaws of the contractor[33]; **(f)** The remuneration of a manpower contractor is usually calculated by multiplying the salary by the number hours or days of work of the employees with the addition of overhead, whereas the remuneration of the service contractor is calculated per end service, inclusive of all expenses involved in its supply[34]; **(g)** The actual employer of the manpower contractor's employees may take interest in the identity of the manpower contractor's employee and conduct screening procedures, as the employee is usually integrated in the enterprise – albeit for a short period – whereas the purchaser of services is usually indifferent as to the identity of the service contractor's employee as its interest is the end service and it will not usually conduct screening procedures[35]; **(h)** The manpower contractor's employees are usually integrated into the business of the actual employer and this integration is manifested in the involvement of the actual employer in determining the qualifications of the employees, the procedures for performing the work, the scope of work and in supervising the work[36], whereas the employees of a service contractors are usually integrated into the business of the service contractor[37].

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30 Labor Judgment 5852/07 (Tel Aviv) Yehuda Mudachi v. Elbit Electro Optical Systems El-Op Ltd *and others* ("**the Mudachi Judgment**"). In this case an employee was originally placed by a service contractor, with the purchaser of services, within the framework of a genuine outsourcing of services. However, when the contract of the purchaser of services with the service contractor came to an end, said purchaser continued to employ the employee, and at its demand, the employee was not employed directly, but rather via another service contractor which was not a manpower contractor. The services of the employee were, however, outside the scope of the services which the service contractor undertook, under the service agreement, to provide to the purchaser of services. Therefore the court ruled that the service contractor did not operate, with respect to the employee, as a service contractor but rather as a payroll manager, and that the purchaser of services was the employer of the employee.

31 The Levine Judgment; the Dahan Judgment; the Attias Judgment; the Hagbi Judgment. .

32 Prof. A. Galin "OutSourcing: The Organizational and Management Aspect", Employment Law Yearbook 7, 43, 46; the Levine Judgment ; the Fahoum Judgment.

33 The Alon Judgment; the Zadok Judgment.

34 The Tenufa Judgment; the El-Or Judgment.

35 The Zadok Judgment. In another case, this criterion was not regarded as a decisive criterion for the creation of an employment relationship and the labor court has ruled that also a purchaser of services which outsources a service to a service contractor who places an employee with the purchaser within the framework of as service agreement, may need to interview the employee, without this creating an employment relationship – *see:* the Mudachi Judgment.

36 The Fahoum Judgment.

37 The Shweb Judgment. However, this is not a decisive criterion as a purchaser of services may also need to exercise supervision without this creating an employment relationship.

10. As the national labor court has emphasized, the distinction between an engagement with a service contractor and an engagement with a manpower contractor, is not always clear cut[38] and the classification does not involve the mere technical application of various criteria, but also general policy considerations[39].

Labor Judgment (Jerusalem) 1307/09 Abdala Hagazi *and others* v. Brick Projects Management and Initiation Ltd. *and others*

11. The Imposed Employment Provision was recently applied in an interesting judgment of the regional labor court in Jerusalem[40]. Employees who were employed as day laborers in antiquity salvation digging by the Antiquities Authority via a Manpower Contractor, and who were dismissed by the manpower contractor after the expiry of nine consecutive months of employment with the manpower contractor, filed a claim for a judgment that they should be deemed to be employees of the Antiquities Authority. The employees were employed, on short notice, in various development projects, according to orders of contractors engaged in development projects. The digging in each project was of short duration, lasting between a few days and a few weeks. According to the orders it received from the contractors, the Antiquities Authority submitted orders to the manpower contractor for the supply of employees. The orders specified the number of employees required for each digging project. The Antiquities Authority was indifferent as to the identity of the employees. The Antiquities Authority maintained contact with the manpower contractor which recruited the employees. The employees were not obliged to undertake the work in any specific project. The employees were not employed with the Antiquities Authority on a day to day basis, though most were employed for a few days per month. The manpower contractor which recruited the employees determined and paid the salaries and social conditions of the employees, whereas the Antiquities Authority provided the employees with working tools and supervised their work. The labor court rejected the manpower contractor's argument that it operated as a service contractor and not as a manpower contractor. The labor court gave weight to the fact that the contractor held a manpower contractor license, that the contracts between the contractor and the Antiquities Authority defined the contractor's obligations as the supply of manpower, that the orders specified the number of employees required, and that antiquity digging is the core of the activity of the Antiquities Authority, whereas the contractor had no expertise in the field. The labor court also rejected the argument that the Manpower Contractor's Law does not apply to employees in such temporary positions who were not employed on a day to day basis.

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38 *See:* Sharon Rabin-Margliot; The Hagbi Judgment.

39 *Compare*: the Shrem Judgment.

40 Labor Judgment (Jerusalem) 1307/09 Abdala Hagazi *and others* v. Brick Projects Management and Initiation Ltd. *and others* ("**the Hagazi Judgment**").

The labor court ruled that the legislature regards the separation between the place of employment and the employee as in itself injurious to the employee. The labor court also rejected the argument, that budgetary considerations prevent the application of the provisions of the Manpower Contractors Law, particularly as the relevant budgetary considerations derived only from the additional cost involved in human resource management as a result of the direct employment of the employees as compared to the payment to the manpower contractor with the addition of VAT, and emphasized that the accrual of additional costs is characteristic of other mandatory employment laws which intervene in freedom of contract in order to ensure decent employment conditions. The labor court ruled that the Antiquities Authority was employer of the employees.

12. This ruling is an example of the debate surrounding the distinction between a manpower contractor and a service contractor, resulting from the applicability of the Equalization of Conditions of Employment Provision and the Imposed Employment Provision, to manpower contractor's and not to service contractor's employees. It is to be expected that the debate surrounding the distinction between genuine outsourcing and employment via a manpower contractor, will increase, in view of the increased phenomenon of employment of service contractors' employees, for prolonged periods, with actual employers, not only in temporary positions, but also in permanent positions.

The Employment of Temporary Manpower Contractor's Employees in Permanent Positions

13. It should be noted, however, that the present language of the Manpower Contractor's Law, achieves the purpose of limiting employment of manpower contractor's employees to temporary positions, only partially. The present language of the Manpower Contractor's Law does not specifically restrict the employment of manpower contractor's employees to temporary positions and therefore, does not specifically prohibit a changeover of employees, each employed for a period of less than nine months, in the same position. Combating such a phenomenon remains at present, in the hands of the unions or labor courts[41].

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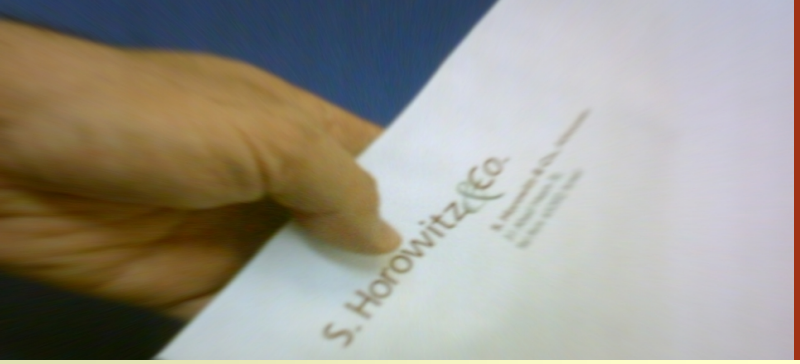
41 The Zohar Judgment. Employees of manpower contractors dismissed from the place of actual employment before the expiry of nine months, professedly in order to prevent their being considered employees of the actual employer according to the Imposed Employment Provision, filed a motion for a declaration that such dismissal is unlawful. The court rejected the motion for interlocutory injunction and thereafter rejected the claim, ruling that the Imposed Employment Provision specifically provides that only a manpower contractor's employee employed consecutively for more than 9 months is deemed to be the employee of the actual employer, and that this provision was not intended to increase the workforce of the purchaser of manpower services by preventing the dismissal of manpower contractor employees before the expiry of 9 months of employment. The court also pointed out that the Manpower Contractor's Law did not adopt an arrangement similar to that adopted in the Severance Pay Law of 1963, according to which dismissal close to the expiry of a year's employment does not deprive the employee of the right to severance pay. The national labor court rejected a request to appeal: *see* Request for Permission to Appeal 582/08 Zohar Golan and others v. O.R.S. Manpower Ltd. *and others*. An appeal on the Zohar Judgment is pending in the national labor court which has requested the Attorney General, the General Federation of Labor, the Manufacturer's Association and the Manpower Organizations, to submit their positions on the question of whether an employer is entitled to dismiss a manpower contractor's employee employed before the expiry of 9 months in order to prevent the employee being deemed its employee.



Secondment

14. In addition, the present language of the Manpower Contractor's Law does not apply to the secondment of an employee by an employer to another employer, where the employment is outside the framework of a contractual agreement with a manpower contractor or a service contractor. Combating a phenomenon of long-term secondment in circumstances of deprivation and discrimination of the seconded employee as compared to the regular employees of the actual employer, remains mainly in the hands of the union and labor courts, who can rely on the traditional criteria for establishing the existence of an employment relationship, in cases in which manpower is used by an actual employer, without a direct an formal employment relationship having been created between the employee and the actual employer[42].

An Additional Preliminary Question as to the Identity of the Employer

15. We have referred in this article to the preliminary question which arises in applying the Imposed Employment Provision, as to the distinction between employees of a manpower contractor and employees of a service contractor. Another preliminary question which arises in applying the Manpower Contractor's Law in general, is the question of the identity of the employer, which, as mentioned, precedes the application of the Manpower Contractor's Law[43], since the creation of an employment relationship between the actual employer and the employee, obviates the necessity of resorting to the Manpower Contractor's Law (and to the distinction between manpower contractor and service contractor) in order to achieve equalization of employment conditions to those of the employees employed directly by the actual employer or in order to achieve liability of the actual employer as employer towards the manpower contractor's employees[44]. Obviously, the Manpower Contractor's Law premises the existence of an employment relationship between the manpower contractor and its employees[45]. Prior to the enactment of the Imposed Employment Provision, employees of manpower contractors, employed in inferior conditions as compared to those of the employees employed directly by the actual employers and/or for prolonged periods with actual employers, resorted to attempting to prove the creation of an employment relationship with the actual employer, in order to establish the actual employer's liability towards them[46]. The need to do so may still arise, for example, when the conditions of employment of the manpower contractor' employee under the general collective agreement fall significantly short as compared to those of the regular employees of the actual employer[47], or in cases in which the

42 The Mudachi Judgment.

43 *See*: the Labor Judgment 54/3-96 Elharinat v. Kefar Ruth *and others*, Labor Cases 24, 535 ("**the Kefar Ruth Judgment**"); the Avni Judgment; Labor Judgment 2918/08 Golan Zohar and others v. O.R.S. Manpower Ltd. *and others* ("**the Zohar Judgment**"); the El-Or Judgment.

44 The Avni Judgment.

45 The Tenufa Judgment.

46 The Avni Judgment; the Shrem Judgment.

47 *See:* the Hagbi Judgment which however, dealt with a contractual engagement with a service contractor. The services were provided to the purchaser of the services vis-à-vis the same employees for a prolonged period. However, the employee's' employment conditions with the service contractor were proven to be better as compared to those they would have received had they been directly employed by the purchaser of services.

manpower contractor reneges on its liabilities towards the employee[48] or when the manpower contractor's employee is employed in a permanent position and prior to the expiry of nine consecutive months of employment, the actual employer causes the termination of his employment solely to avoid the employee being deemed its employee and employs in his stead a different employee of a manpower contractor[49]. Liability of the actual employer towards the employee of the manpower contractor may be established by adopting one of the legal models adopted in other cases in which manpower is used by an actual employer, without a direct and formal employment relationship being created between them, in circumstances which are considered unlawful, such as fictitious outsourcing intended to circumvent the actual employer's obligations according to law or applicable collective agreements[50]. Among these legal models are recognizing the existence of a direct employment relationship between the employee of the manpower contractor and the actual employer (either as sole or joint employer[51]) according to the applicable criteria for establishing the identity of the employer in other cases in which manpower is used by an

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48 *See*: the Fahoum Judgment. With respect to the employee's entitlement to minimum wage, in a case in which the manpower contractor reneges on its liability to pay minimum wages to its employee, the legislature has provided the employee with a direct remedy also towards the actual employer, without the employee having to prove an employment relationship with the actual employer: *see* section 6A of The Minimum Wage Law of 1988.

49 As mentioned, the Manpower Contractor's Law does not specifically prohibit the consecutive employment of changing employees, each for a period of less than nine months, in permanent positions. *See*: the Zohar Judgment.

50 *See*: the Aloni Judgment; the Mudahi Judgment; the Fahoum Judgment However, in a genuine situation of manpower placement by a manpower contractor these criteria may lead to re-asserting the employment relationship with the manpower contractor and not the actual employer. *See* also: Labor Judgment (Beer Sheva) 2883/07 Trop v. Shitrit and Sons, Sand Cleaning and Development Company Ltd *and others* ("**the Trop Judgment**"). In this case a service contractor engaged by a municipality for cleaning duties reneged on its liabilities towards its employees under mandatory employment laws and a general collective agreement. The employees filed a claim both against the service contractor and against the municipality. The court ruled that according to the criteria applicable to establishing the identity of the employer the municipality was not the employer. However, the court ruled that, irrespective of whether or not the municipality is employer or joint employer, the municipality is nonetheless liable to the employees, since it breached the standard of care it owes the employees. The court ruled that that the "race to the bottom", the vulnerability of employees characteristic of the branch of cleaning, and the necessity to protect the employees and to ensure that they receive their entitlements according to the mandatory employment laws and collective agreements, justify imposing on the purchaser of the services, a standard of care towards the employees. The court ruled that if the purchaser of services intentionally or negligently ignores factors relevant to the employment conditions of the service contractor's employees – such as the financial stability, prior experience in the business, turnover of the service contractor, and the discharge of its obligations towards the employees - then the purchaser of services will be liable towards the employees, whether or not it is a joint employer. This judgment has the effect of imposing supervisory liabilities on the purchaser of services. A purchaser of services which reneges on these supervisory liabilites, becomes directly liable to the employees and may be called upon to discharge the employees' entitlements according to the mandatory employment laws and the general collective agreement in the branch of cleaning. *See* also: the Alon Judgment and the Zadok Judgment.

51 *See:* The Fahoum Judgment: the Judges of the national labor court differed in their opinions on whether the actual employer and the manpower contractor are joint employers of the employee who is deemed to be the employee of the actual employer. According to the opinion of the President of the national labor court, recognizing the creation of an employment relationship between the actual employer and the manpower contractor's employee should not have the effect of diminishing the manpower contractor's liability towards the employee (who in not, in any event, be entitled to double payments). This opinion is convincing, since it retains the manpower contractor's liability towards the employee, and promotes the purpose of supplying the employee with additional security. In addition, it prevents the exposure of the actual employer to double payment, both to the manpower contractor and to the actual employee.

actual employer[52] without a direct and formal employment relationship being created between them; the imposition, on the actual employer, of a standard of care towards the employees' of manpower contractors to take reasonable measures to ensure that the manpower contractor fulfills its liabilities towards its employees[53]; the adoption, in the case of a changeover of manpower contractor's employees in a permanent position (not on genuine probation), of an interpretation of the Manpower Contractor's Law as legitimizing the employment relationship between the manpower contractor and it's employees only in situations in which there has arisen a genuine need for temporary employment and the employees are placed in temporary positions, for limited periods[54].

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52 These criteria were applied, and are still applied, with respect to periods of employment prior to the enactment of the Imposed Employment Provision, for determining whether an employment relationship has been created between the actual employer (either as sole or joint employer) and the manpower contractor's employees and are also are applied for establishing whether an employment relationship has been created between the purchaser of services (either as sole or joint employer) and the service contractor's employees. *See*: the Avni Judgment and the Shrem Judgment. Among these criteria are: **(a)** how the parties perceived and defined the relationship between them. The assumption is that the real parties to the employment relationship are the actual employer and the employee and the party that argues that a third party is the employer bears the onus of proof. This can be proven if two separate relationships have been created: between the third party and the employee and between the third party and the actual employer, and if the latter relationship was not intended to circumvent the employer's obligations towards the employee or towards the collective bargaining partner; **(b)** which party has the power to dismiss the employee and to which party does the employee have to submit his resignation; **(c)** which party hired the employee, which party determined his employment conditions, his placement in the position, his transfer from position to position; **(d)** which party is responsible for paying the employee and ultimately for establishing his remuneration and employment conditions; **(e)** which party gives the employees leave and from which party must the employee require permission for leave; **(f)** the position of the parties *vis-à-vis* the authorities; **(g)** which party supervises the employment and instructs the employee as to the performance of his duties and to which party does the employee report; **(h)** which party owns the equipment and materials used by the employee; **(i)** is the work for which the employee was hired part of the regular operation of the actual employer and routinely performed by its own employees; **(j)** the consecutive, temporary/permanent nature and duration of the employment; with respect to manpower contractors the court has ruled that the maximum nine month period of consecutive employed is a benchmark also with respect to the period prior to the coming into effect of the Imposed Employment Provision, as of July 2000, the date on which said provision was enacted (notwithstanding the deferrals in its coming into effect); **(k)** does the third party have a business which the employee is an integral part of?; **(l)** does the employee remain in the same enterprise despite the changeover of contractors as a result, for example, of periodic tenders for the selection of a service contractor (which are mandatory in many public bodies?) **(m)** has the contractor undertaken, towards the actual employer, to continue the employment of the employee's of the predecessor contractor? **(n)** is there a changeover of contractors with the actual employer, while the employees continue to be employed with the same actual employer, and are transferred from one contractor to its successor? Is the contractor entitled, after the termination of the contractual engagement between the contractor and the actual employer, to continue the employment of the employees and place them with another employer, or is the contractor obliged to leave the employees with the actual employer in order to enable them to be employed by the successor contractor, in which case the relationship with the employment contractor is not a personal voluntary employment relationship; **(o)** does the contractor comply with the legal requirements applicable to the field in which he operates, such as licenses? **(p)** all the above is subject to principles such as public policy and good faith, for example, that the relationship between the actual employer and the third party was not intended to circumvent the actual employer's liabilities towards the employee or towards the collective bargaining partner, for example under collective agreements or relationships. In cases of long term employment of employee's of manpower contractors, the actual employer bears the onus to prove the legitimate business reason for this type of employment [*see*: the Kefar Ruth Judgment; the Levine Judgment; Labor Judgment 54/3-96 The Construction Department of the National Kibbutz Ltd. v. Halil Abed El Rahman Aebad *and others*, Labor Judgment 29, 151; Labor Judgment 129-3/340 Hershkowitz v. the State of Israel, Labor Cases 12(1), 255; the Avni Judgment; the Shweb Judgment; the Shrem Judgment; Labor Judgment 5002/06 (Tel Aviv) Hanna Aloni and others v. the State of Israel – the Ministry of Education and others ("**the Aloni Judgment**"); the Zadok Judgment; the Hagbi Judgment; The Fahoum Judgment; M. Meroni, "Who is the Employer – Definition of Employee-Employer Relationship in Modular Employment Patterns", *Iyunei Mishpat* 9, (1983) 505; M. Goldberg, "Employee" and "Employer" – Survey, *Iyunei Mishpat* 17 (1) (1992) 19; 59.

53 The Trop Judgment; *See also:* Sharon Rabin-Margaliot who advocates a model according to which the purchaser of services will have a duty of supervision based on a standard of reasonable care rather than absolute responsibility towards the employees. According to this model, the purchaser of services will only be liable for the employer's liabilites to the employees, if the purchaser of services reneges on its supervisory duties, and the exercise of the supervisory duties will not be used against him to indicate the creation of a direct employment relationship with the service contractor's or manpower contractor's employees.

54 *Compare*: the Fahoum Judgment and *see:* the Zohar Judgment.

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These models differ in the scope and content of liability which they impose on the actual employer or purchaser of services[55]. Also in this context, the decision as to the identity of the employer or the liability to be imposed on the actual employer, does not involve the mere technical application of various criteria, but also general policy considerations[56].

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55 *See*: Sharon Rabin-Margaliot.

56 *See*: the Shrem Judgment.