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Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, currently Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, is also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors.

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Introduction

The Bulletins constitute a unique source of information and thought-provoking discussion, laying the groundwork for studies of employment relations in the 21st century, involving among much else the effects of globalization, new technologies, migration, and the greying of the population.

Contents/Subjects

Amongst other subjects the Bulletins frequently include the proceedings of international or regional conferences; reports from comparative projects devoted to salient issues in industrial relations, human resources management, and/or labour law; and specific issues underlying the multicultural aspects of our industrial societies.

Objective

The Bulletins offer a platform of expression and discussion on labour relations to scholars and practitioners worldwide, often featuring special guest editors.

The titles published in this series are listed at the end of this volume.

BULLETIN OF COMPARATIVE LABOUR RELATIONS – 94

New Forms of Employment in Europe

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Roger Blanpain

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Bernd Waas

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Summary of Contents

Notes on Contributors v

Acknowledgements xxxvii

Introduction
Bernd Waas 1

Part I
New Forms of Employment and EU Law 5

Chapter 1
Overview of New Forms of Employment
Irene Mandl 7

Chapter 2
New Forms of Employment and IT: Crowdsourcing
Jan Marco Leimeister, Shkodran Zogaj & David Durward 23

Chapter 3
New Forms of Employment: Implications for EU Law – The Law as It Stands
Simon Deakin 43

Chapter 4
Non-standard Employment: What Can the EU Do?
Catherine Barnard 55

Chapter 5
Directive 91/533/EEC and the Development of New Forms of Employment
Claire Toumieux 65

Chapter 6
Civil Law Contracts in Hungary
Tamás Gyulavári 79

Chapter 7
Crowdworking: Towards a 'New' Form of Employment
Martin Risak 93

Chapter 8
'Employees Without a Boss': *Portage Salarial* in France
Francis Kessler 103

Chapter 9
Payrolling in the Netherlands
Johan P.H. Zwemmer 117

Chapter 10
'New Forms of Employment': A Challenge for the Legislature
Bernd Waas 129

Part II
Country Reports 139

Chapter 1
New Forms of Employment in Austria
Martin Risak 141

Chapter 2
New Forms of Employment in Belgium
Wilfried Rauws 147

Chapter 3
New Forms of Employment in Bulgaria
Krassimira Sredkova 157

Chapter 4
New Forms of Employment in Croatia
Ivana Grgurev 167

Chapter 5
New Forms of Employment in Cyprus
Nicos Trimikliniotis 173

Chapter 6
New Forms of Employment in the Czech Republic
Petr Hůrka 183

Chapter 7
New Forms of Employment in Denmark
Jens Kristiansen 189

Chapter 8
New Forms of Employment in Estonia
Gaabriel Tavits 193

Chapter 9
New Forms of Employment in Finland
Matleena Engblom 199

Chapter 10
New Forms of Employment in France
Francis Kessler 203

Chapter 11
New Forms of Employment in the Former Yugoslav Republic of Macedonia
Todor Kalamatiev & Aleksandar Ristovski 217

Chapter 12
New Forms of Employment in Germany
Bernd Waas 223

Chapter 13
New Forms of Employment in Greece
Costas Papadimitriou 229

Chapter 14
New Forms of Employment in Hungary
György Kiss 233

Chapter 15
New Forms of Employment in Iceland
Elín Blöndal 243

Chapter 16
New Forms of Employment in Ireland
Anthony Kerr 249

Chapter 17
New Forms of Employment in Italy
Edoardo Ales 255

Chapter 18
New Forms of Employment in Latvia
Kristīne Dupate 259

Chapter 19
New Forms of Employment in Liechtenstein
Wolfgang Portmann 263

Chapter 20
New Forms of Employment in Lithuania
Tomas Davulis 269

Chapter 21
New Forms of Employment in Luxembourg
Jean-Luc Putz 273

Chapter 22
New Forms of Employment in Malta
Lorna Mifsud Cachia 279

Chapter 23
New Forms of Employment in Montenegro
Vesna Simović-Zvicer 285

Chapter 24
New Forms of Employment in the Netherlands
Barend Barentsen 291

Chapter 25
New Forms of Employment in Norway
Helga Aune 301

Chapter 26
New Forms of Employment in Poland
Leszek Mitrus 305

Chapter 27
New Forms of Employment in Portugal
José João Abrantes & Rita Canas da Silva 313

Chapter 28
New Forms of Employment in Romania
Raluca Dimitriu 323

Chapter 29
New Forms of Employment in Serbia
Senad Jašarević 327

Chapter 30
New Forms of Employment in Slovakia
Robert Schronk 333

Chapter 31
New Forms of Employment in Slovenia
Polonca Končar 343

Chapter 32
New Forms of Employment in Spain
Joaquín García Murcia & Iván Antonio Rodríguez Cardo 349

Chapter 33
New Forms of Employment in Sweden
Mia Rönnmar 355

Chapter 34
New Forms of Employment in Turkey
Kadriye Bakirci 361

Chapter 35
New Forms of Employment in the United Kingdom
Catherine Barnard 365

Table of Contents

Notes on Contributors v

Acknowledgements xxxvii

Introduction
Bernd Waas 1

PART I
New Forms of Employment and EU Law 5

CHAPTER 1
Overview of New Forms of Employment
Irene Mandl 7
§1.01 Introduction 7
§1.02 New Forms of Employment in Europe: An Overview 8
§1.03 Impact of New Employment Forms on Working Conditions and the Labour Market 14
§1.04 Conclusions and Policy Pointers 21

CHAPTER 2
New Forms of Employment and IT: Crowdsourcing
Jan Marco Leimeister, Shkodran Zogaj & David Durward 23
§2.01 New Forms of Value Creation in the Age of Digitisation 23
§2.02 What Are Crowdsourcing and Crowd? 25
§2.03 Crowd Work as a New Form of Organisation of Work 28
§2.04 In Which Fields Is Crowd Work Already Being Used? 29
§2.05 How Does Crowd Work Function? 31
[A] Management of the Crowdsourcing Process 32
[B] Management and Monitoring of Crowd Activities 33

§2.06 Working in the Crowd: Forms of Work, Themes and Incentive Structures 34
§2.07 What Opportunities and Risks Does Crowd Work Conceal? 39
§2.08 Crowdsourcing as the Organisation of Work of the Future?: New Paths and Challenges in Implementing Crowd work 41

CHAPTER 3
New Forms of Employment: Implications for EU Law – The Law as It Stands
Simon Deakin 43
§3.01 Introduction 43
§3.02 Policy Considerations 43
§3.03 Specific Issues Posed By New Forms of Working: The Case of ZHCs 46
[A] The Nature and Effect of ZHCs 47
[B] Legal Problems with ZHCs: Employment Protection Rights 48
[C] The Role of the Tax-Benefit System in Promoting ZHCs 50
§3.04 Possible Solutions to Precariousness and Dualism in Labour Markets 51
§3.05 Conclusion 53

CHAPTER 4
Non-standard Employment: What Can the EU Do?
Catherine Barnard 55
§4.01 The Issue 55
§4.02 Free Movement of Persons 57
§4.03 Non-migrant Workers 60
§4.04 Enhanced Cooperation 63
§4.05 Conclusions 64

CHAPTER 5
Directive 91/533/EEC and the Development of New Forms of Employment
Claire Toumieux 65
§5.01 Introduction 65
§5.02 Summary of the Main Provisions of Directive 91/533/EEC 66
[A] Scope 66
[B] Obligations Established by the Directive 67
[1] Who Is Required to Inform Employees? 67
[2] When Must Notification Take Place? 67
[3] How Must the Notification Be Made? 67
[4] What Information Must Be Communicated? 68
[5] What Are the Sanctions? 69
§5.03 Directive 91/533/EEC and the Development of New Forms of Employment 69
[A] Development of Forms of Employment Not Included within the Directive's Scope or Whose Inclusion is Uncertain 69
[1] Self-Employed Workers 69
[2] Other Forms of Work Not Involving Employee Status 70

[3] On-Demand Work and Zero-Hours Contracts 70
[B] Difficulties Encountered in the Application of the Directive's Requirements to New Forms of Employment 70
[1] Difficulties That Can Be Overcome 72
[2] Difficulties That Are Excessive or Insurmountable 73
§5.04 Adaptation of the Directive to New Forms of Employment: Possible Solutions 74
[A] Proposals Giving Priority to Workers' Information Rights 74
[B] Giving Flexibility Priority 75
[C] Towards a Middle Way 76

CHAPTER 6
Civil Law Contracts in Hungary
Tamás Gyulavári 79
§6.01 Introduction 79
§6.02 The Hungarian Legal Framework of Working Relationships 79
§6.03 Incentives and Consequences of Bogus Civil Law Contracts in the Hungarian Labour Market 81
§6.04 Applicability of EU Directives 82
§6.05 Recent Measures Against Bogus Civil Law Contracts 84
§6.06 Assessment of the Legal Nature of Working Relationships 85
§6.07 An Unsuccessful Attempt to Regulate Economically Dependent Work 86
§6.08 Similarities in Eastern Europe 90
§6.09 Conclusions 91

CHAPTER 7
Crowdworking: Towards a 'New' Form of Employment
Martin Risak 93
§7.01 What Is Crowdworking? 93
[A] The Phenomenon 93
[B] Economic and Social Implications 95
§7.02 Contractual Aspects of Crowdworking 96
[A] Contractual Relationship Between the Crowdworker and the Crowdsourcer 97
[B] Contractual Relationship Between the Crowdworker and the Crowdsourcing Platform 97
[C] Contractual Relationship Between the Crowdsourcer and the Crowdsourcing Platform 99
§7.03 Application of the European Standards 100
[A] Applicable Law 100
[B] Substantive European Labour Law 100
[C] Co-determination 101
§7.04 Initial Provisional Findings and Recommendation 102

CHAPTER 8
'Employees Without a Boss': *Portage Salarial* in France
Francis Kessler 103
§8.01 Introduction 103
§8.02 The Unconstitutionality of the Mechanism for Implementation of *Portage Salarial*: A Complete Makeover Has Been Necessary! 105
§8.03 How *Portage Salarial* Works 106
[A] Regulating *Portage Salarial*: A Bumpy Road 106
[B] *Portage Salarial*: A Three-Way Employment Relationship 107
[C] Classification as an 'Employment Contract' 108
[1] The Legal Relationship of Subordination 110
[2] Existence of Remuneration 111
[3] Classification of the Worker as an Executive 112
[D] Fixed-Term Contracts under the *Portage Salarial* System 112
§8.04 *Portage Salarial* and Unemployment Insurance 113
[A] Regulations Relating to Unemployment Insurance 113
[B] Application of the Regulations *Portage Salarial* 114
§8.05 European Law and *Portage Salarial* 115

CHAPTER 9
Payrolling in the Netherlands
Johan P.H. Zwemmer 117
§9.01 Introduction 117
§9.02 Defining the Employer in Terms of Civil Law 118
§9.03 Reality Takes Precedence over Appearance 120
§9.04 The Temporary Employment Agreement 121
§9.05 The Employer in Payrolling 123
§9.06 The Views of Social Partners and the Dutch Cabinet on Payrolling 124
§9.07 Integrating Payrolling into the Existing Labour Law System; Or Is It Merely a Symptom of a Deeper Problem? 125
§9.08 Should There Be a Future for Payrolling? 127

CHAPTER 10
'New Forms of Employment': A Challenge for the Legislature
Bernd Waas 129
§10.01 Introduction 129
§10.02 Legal Analysis 130
[A] On-Call Work 130
[1] Motives and Interests 130
[2] Legal Problems 131
[3] Regulatory Options 132
[B] Job Sharing 133
[1] Motives and Interests 133
[2] Legal Problems 134

[3] Regulatory Options 134
[C] Crowdsourcing 135
[1] Motives and Interests 135
[2] Legal Problems 135
[3] Regulatory Options 136
§10.03 Concluding Remarks 136

PART II
Country Reports 139

CHAPTER 1
New Forms of Employment in Austria
Martin Risak 141
§1.01 Introduction and Background 141
§1.02 Possible New Forms of Employment 142
[A] Crowd Employment 142
[B] Casual Work 143
[C] Labour Pooling 143
[D] Job Sharing 144
[E] Interim Management 144
[F] Employee Sharing 144
[G] ICT-Based Mobile Work 145
[H] Voucher System 145
[I] Specific Employment Statutes 145

CHAPTER 2
New Forms of Employment in Belgium
Wilfried Rauws 147
§2.01 Crowd Employment 147
§2.02 Casual Work 147
§2.03 Portfolio Work 148
§2.04 Labour Pooling 150
§2.05 Job Sharing 151
§2.06 Interim Management 151
§2.07 Employee Sharing 152
§2.08 ICT-Based Mobile Work 153
§2.09 Voucher System 154
§2.10 Specific Employment Statutes 154

CHAPTER 3
New Forms of Employment in Bulgaria
Krassimira Sredkova 157
§3.01 Introduction 157
§3.02 New Forms of Employment 160
[A] Homeworking 160

[B] Telework 161
[C] Temporary Agency Work 162
[D] Posting of Workers 164
§3.03 Conclusion 164

Chapter 4
New Forms of Employment in Croatia
Ivana Grgurev 167
§4.01 Introduction 167
§4.02 New Forms of Employment in the Labour Act 168
[A] Labour Pooling 168
[B] Non-conventional Workplace 169
[C] Non-standard Fixed-Term Employment Contracts 170
[D] New Forms of Employment in the Act on The Promotion of Employment of 2012 (Voucher System) 171
§4.03 Conclusion 171

Chapter 5
New Forms of Employment in Cyprus
Nicos Trimikliniotis 173
§5.01 Introduction and Background 173
§5.02 The Legal and Institutional Framework Regulating Flexible Forms of Employment: Including New Forms of Employment 175
[A] Crowd Employment 176
[B] Portfolio Work 176
[C] Labour Pooling 177
[D] Casual Work 177
[1] Agricultural Seasonal Employment 178
[2] Unskilled Jobs in the Construction Industry 178
[3] Cleaning Service Industry 178
[4] Teaching and Research in Tertiary Education 178
[E] Specific Employment Statutes 180
[F] Interim Management 180
[G] Portfolio Work 181
§5.03 Conclusion 181

Chapter 6
New Forms of Employment in the Czech Republic
Petr Hůrka 183
§6.01 Introduction 183
§6.02 Crowd Employment 183
§6.03 Casual Work 184
§6.04 Portfolio Work 184
§6.05 Labour Pooling 185
§6.06 Job Sharing 186

§6.07 Interim Management 186
§6.08 Employee Sharing 187
§6.09 ICT-Based Mobile Work 187
§6.10 Voucher Systems and Specific Employment Statutes 187
§6.11 Civil Law Contracts 187
§6.12 Conclusion 188

Chapter 7
New Forms of Employment in Denmark
Jens Kristiansen 189
§7.01 Introduction 189
§7.02 Crowd Employment 190
§7.03 Casual Work 190
§7.04 Portfolio Work 190
§7.05 Labour Pooling 191
§7.06 Job Sharing 191
§7.07 Interim Management 191
§7.08 Employee Sharing 191
§7.09 ICT-Based Mobile Work 191
§7.10 Voucher Systems 192
§7.11 Specific Employment Statutes 192

Chapter 8
New Forms of Employment in Estonia
Gaabriel Tavits 193
§8.01 Introduction 193
§8.02 Specific Types of Employment 194
[A] Crowd Employment 194
[B] Casual Work 194
[C] Portfolio Work 195
[D] Labour Pooling 195
[E] Job Sharing 195
[F] Interim Management 195
[G] Employee Sharing 196
[H] ICT-Based Mobile Work 196
[I] Voucher Systems 196
[J] Specific Employment Statutes 196

Chapter 9
New Forms of Employment in Finland
Matleena Engblom 199
§9.01 Introduction 199
§9.02 Temporary Agency Work 200
§9.03 Casual Work 200
§9.04 Mobile Work 201

CHAPTER 10
New Forms of Employment in France
Francis Kessler 203
§10.01 Introduction and Background 203
§10.02 French *Portage Salarial* (System of Umbrella Companies) 203
[A] Definition 203
[B] How the System Works 204
[C] Advantages of the System 204
[D] Recent Developments in Case Law Concerning the *Portage Salarial* 204
§10.03 Fixed-Term Contracts 205
[A] Grounds for Recourse to Fixed-Term Contracts 205
[B] Duration and End of the Fixed-Term Contract 206
[C] Trial Period 207
[D] Regulations 207
[E] Remuneration 207
[F] End of Contract 208
§10.04 Temporary Work 208
[A] Definitions 209
[1] Formalities of the Contrat de Mise à Disposition 209
[2] Formalities of the Assignment Contract 210
[B] Cases of Recourse 210
§10.05 Teleworking 211
[A] Legal Background 211
[B] Workers Concerned 211
[C] Places of Teleworking 212
[D] Implementation of Telework 212
[E] Supervision of Working Time 212
[F] Teleworker's Rights 212
[G] End of Teleworking 213
§10.06 Homeworking 213
[A] Definition 213
[B] Provisions Applicable to Homeworkers 213
[C] Conditions 213
[D] Employer's Obligations 214
[E] Paid Leave and Minimum Wages 214
[F] Collective Rights 214
§10.07 The Notion of *Groupement d'Employeurs* 214
[A] Legal Background 214
[B] Definition 215

CHAPTER 11
New Forms of Employment in the Former Yugoslav Republic of Macedonia
Todor Kalamatiev & Aleksandar Ristovski 217
§11.01 Introduction 217

§11.02 Casual Work 218
§11.03 Labour Pooling 219
§11.04 Job Sharing 220
§11.05 Interim Management 220
§11.06 ICT-Based Mobile Work; Crowd Employment and Portfolio Work 221
§11.07 Employment Contracts and Ordinary Civil Law Contracts 221

Chapter 12
New Forms of Employment in Germany
Bernd Waas 223
§12.01 Casual Work 223
§12.02 On-Call Work 224
§12.03 Labour Pooling 225
§12.04 Job Sharing 226
§12.05 Interim Management 226
§12.06 ICT-Based Mobile Work 226
§12.07 Crowdsourcing 227
§12.08 Portfolio Work 227
§12.09 Employment Contracts and Ordinary Civil Law Contracts 227

Chapter 13
New Forms of Employment in Greece
Costas Papadimitriou 229
§13.01 Casual Work 229
§13.02 Labour Pooling 230
§13.03 ICT-Based Mobile Work 230
§13.04 Voucher Systems 231

Chapter 14
New Forms of Employment in Hungary
György Kiss 233
§14.01 Introduction and General Remarks 233
§14.02 New Forms of Employment 234
[A] Crowd Employment 234
[B] Casual Work 237
[C] Portfolio Work 237
[D] Labour Pooling 237
[E] Job Sharing 239
[F] Interim Management 240
[G] Employee Sharing 240
[H] ICT-Based Mobile Work 240
[I] Voucher System 240
[J] Specific Employment Status 241

Chapter 15
New Forms of Employment in Iceland
Elín Blöndal 243
§15.01 Introduction 243
§15.02 Tendency in Recent Years 244
[A] Legislation and Collective Agreements 244
[B] Interim Management 246
[C] Casual Work 246
[D] Monitoring of Wages and Terms under Collective Agreements 246
§15.03 Conclusion 247

Chapter 16
New Forms of Employment in Ireland
Anthony Kerr 249
§16.01 Introduction 249
§16.02 Employee Sharing, Portfolio Work and ICT-Based Mobile Work 250
§16.03 Interim Management 250
§16.04 Casual Work and Zero-Hours Contracts 251

Chapter 17
New Forms of Employment in Italy
Edoardo Ales 255
§17.01 Introduction 255
§17.02 The Network Contract 255
§17.03 Secondment of Workers 256
§17.04 Joint Employership (*Codatorialità*) 256
§17.05 Joint Hiring 257

Chapter 18
New Forms of Employment in Latvia
Kristīne Dupate 259
§18.01 Introduction and Background 259
§18.02 Bogus Self-Employment 261
§18.03 Casual Work 261
§18.04 Co-working 262

Chapter 19
New Forms of Employment in Liechtenstein
Wolfgang Portmann 263
§19.01 Introduction 263
§19.02 Casual Work 264
[A] Casual Work in a Narrower Sense 264
[B] On-Call Work 264

§19.03 Portfolio Work 265
§19.04 Labour Pooling 265
[A] '*Regiearbeit*' (A Form of 'Delegated' Work) 265
[B] Host Company Network 266
§19.05 Job Sharing 266
§19.06 Interim Management 266
§19.07 Employee Sharing 267
[A] General Comments 267
[B] *Portage Salarial* 267
§19.08 ICT-Based Mobile Work 267
§19.09 Specific Employment Statutes 268

Chapter 20
New Forms of Employment in Lithuania
Tomas Davulis 269
§20.01 Introduction: Voucher Systems 269
§20.02 ICT-Based Mobile Work 270
§20.03 Employee Sharing 271

Chapter 21
New Forms of Employment in Luxembourg
Jean-Luc Putz 273
§21.01 Introduction 273
§21.02 Casual Work 273
§21.03 Portfolio Work 275
§21.04 Labour Pooling 275
§21.05 Job Sharing 275
§21.06 Interim Management 276
§21.07 Employee Sharing 276
§21.08 ICT-Based Mobile Work 277
§21.09 Voucher System 277
§21.10 Specific Employment Statutes 278

Chapter 22
New Forms of Employment in Malta
Lorna Mifsud Cachia 279
§22.01 Introduction 279
§22.02 Atypical Contracts and the Application of Legislation 279
[A] Crowd Employment 279
[B] Casual Work 280
[C] Other Forms 280
[D] Conclusion 280
§22.03 The Employment Status National Standard Order 2012 280

CHAPTER 23
New Forms of Employment in Montenegro
Vesna Simović-Zvicer 285
§23.01 Introduction 285
§23.02 Fixed-Term Employment Contracts 285
§23.03 Work Outside of Employment Contracts 286
§23.04 Temporary Employee Leasing 286
§23.05 Employment Contract for Directors 288
§23.06 Contract for the Performance of Jobs with Increased Risk 288
§23.07 Part-Time Contract 288
§23.08 Telework 288
§23.09 Contract for Domestic Work 289
§23.10 Casual Jobs 289
§23.11 Contracting for Performing Work Outside the Employer's Premises 289
§23.12 Contract for Voluntary Work 289

CHAPTER 24
New Forms of Employment in the Netherlands
Barend Barentsen 291
§24.01 Introduction 291
§24.02 Exception: Self-Employment 293
§24.03 What Is So New about New Forms of Employment? 295
[A] Online Work 295
[B] Casual Work 295
[C] Interim Management 297
§24.04 Sharing the Employer 297
[A] Single Employer Within a Group of Companies 297
[B] Payrolling 298
§24.05 Training and Rehabilitation 299
§24.06 New Forms of Employment (Virtually) Unknown 299
§24.07 Summary 300

CHAPTER 25
New Forms of Employment in Norway
Helga Aune 301
§25.01 Introduction: Crowd Employment 301
§25.02 Casual Work 301
§25.03 Portfolio Work 302
§25.04 Labour Pooling 302
§25.05 Job Sharing 303
§25.06 Interim Management 303
§25.07 Employee Sharing 303
§25.08 ICT-Based Mobile Work 303
§25.09 Voucher System 304
§25.10 Specific Employment Statutes 304

CHAPTER 26
New Forms of Employment in Poland
Leszek Mitrus 305
§26.01 Introduction 305
§26.02 Crowd Employment and Casual Work 306
§26.03 Portfolio Work 307
§26.04 Labour Pooling 307
§26.05 Job Sharing 307
§26.06 Interim Management 308
§26.07 ICT-Based Mobile Work 308
§26.08 Voucher System 309
§26.09 Specific Employment Statutes 310
§26.10 Conclusion 310

CHAPTER 27
New Forms of Employment in Portugal
José João Abrantes & Rita Canas da Silva 313
§27.01 Introduction 313
§27.02 Legal Subordination 314
§27.03 Labour Pooling: '*Plurality of Employers*' 316
§27.04 Job Sharing 316
[A] '*Group of Employees*' 316
[B] '*Part-Time Work*' 317
§27.05 Interim Management 318
[A] '*Term Employment Contracts*' 318
[B] '*Agency Work*' 319
[C] '*Temporary Services Commission*' 319
§27.06 ICT-Based Mobile Work: '*Telework*' 320
§27.07 Casual Work: '*Intermittent Work*' 320
§27.08 Employee Sharing: '*Temporary Assignment of an Employee to Another Employer*' 320
§27.09 Specific Employment Statutes 321
[A] '*Employment Contracts Under a Special Regime*' 321
[B] '*Home Working*' 321
§27.10 Multiple Forms of Services Agreements 322

CHAPTER 28
New Forms of Employment in Romania
Raluca Dimitriu 323
§28.01 Introduction 323
§28.02 Casual Work 323
§28.03 Interim Management 325
§28.04 ICT-Based Mobile Work 326

CHAPTER 29
New Forms of Employment in Serbia
Senad Jašarević 327
§29.01 Introduction 327
§29.02 Crowd Employment 329
§29.03 Casual Work 329
§29.04 Portfolio Work 329
§29.05 Labour Pooling 329
§29.06 Job Sharing 330
§29.07 Interim Management 330
§29.08 Employee Sharing 330
§29.09 ICT-Based Mobile Work 330
§29.10 Voucher Systems 331
§29.11 Specific Employment Status 331
§29.12 Conclusion 331

CHAPTER 30
New Forms of Employment in Slovakia
Robert Schronk 333
§30.01 Introduction 333
[A] Work Performance Agreement 335
[B] Agreements on Temporary Jobs for Students 336
[C] Agreement on Work Activity 336
§30.02 Current Legal Regulation of Atypical Employment in Slovakia 337
[A] Fixed-Term Employment Relationship 337
[B] Part-Time Employment Relationship 337
[C] Home Working and Telework 337
[D] Job Sharing 338
[E] Flexible Working Time 338
[F] Working Time Account 339
§30.03 New Specific Forms of Employment 339
[A] Standby Work 339
[B] Labour Pooling 340
[C] Job Sharing 340
[D] Interim Management 340
[E] Employee Sharing 340
[F] ICT-Based Mobile Work 341
[G] Specific Employment Statutes 341
§30.04 Conclusion 341

CHAPTER 31
New Forms of Employment in Slovenia
Polonca Končar 343
§31.01 Introduction 343
§31.02 Crowd Employment 343

§31.03 Casual Work 343
§31.04 Portfolio Work 344
§31.05 Labour Pooling 344
§31.06 Job Sharing 344
§31.07 Interim Management 344
§31.08 Employee Sharing 345
§31.09 ICT-Based Mobile Work 345
§31.10 Cooperation Between Self-Employed Persons 345
§31.11 Voucher Systems 345
§31.12 Specific Types of Work 346
[A] Temporary or Casual Work by Pensioners 346
[B] Student Work 346

Chapter 32
New Forms of Employment in Spain
Joaquín García Murcia & Iván Antonio Rodríguez Cardo 349
§32.01 Crowd Employment 349
§32.02 Casual Work 349
§32.03 Portfolio Work 350
§32.04 Labour Pooling 350
§32.05 Job Sharing 351
§32.06 Interim Management 351
§32.07 Employee Sharing 352
§32.08 ICT-Based Mobile Work 352
§32.09 Voucher Systems 352
§32.10 Specific Employment Statutes 352

Chapter 33
New Forms of Employment in Sweden
Mia Rönnmar 355
§33.01 Introduction 355
§33.02 The Notion of Employee and the Scope of Labour Law 356
§33.03 The Regulation of Fixed-Term Work 357
§33.04 Regulation of Temporary Agency Work 359
§33.05 Work Organisation and Working Time Arrangements 360

Chapter 34
New Forms of Employment in Turkey
Kadriye Bakirci 361
§34.01 Introduction 361
§34.02 Labour Pooling 362
§34.03 Interim Management 363
§34.04 Casual Work 363
§34.05 Mobile Work 363
§34.06 Voucher System 364

Chapter 35
New Forms of Employment in the United Kingdom
Catherine Barnard 365
§35.01 Introduction 365
§35.02 'Worker' Status 365
§35.03 Zero-Hours Contracts 367

CHAPTER 9

Payrolling in the Netherlands

Johan P.H. Zwemmer[*]

§9.01 INTRODUCTION

Payrolling has become increasingly popular among businesses in the Netherlands in recent years. When a business opts for payrolling, it hands over the legal and administrative aspects of its role as an employer to a payroll company. The business – 'the entrepreneur' – first recruits and selects the employee, and then hires a payroll company to operate as the employee's legal and administrative employer. The payroll company concludes an employment contract with the employee and makes the employee exclusively available to the entrepreneur and – in principle – for the longer term. Some entrepreneurs entrust their entire personnel base to a payroll company, which, in turn, places the same personnel back at their disposal. The payroll company pays the salaries, deducts taxes and insurance premiums, and may offer a severance deal in the event of redundancy.

Entrepreneurs use payrolling in order to absolve themselves of the legal and administrative obligations associated with being an employer, and because they are looking to obtain a more flexible staff complement.[1] Even Dutch government organisations use payrolling. Government organisations are the own-risk bearer for the

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1. The fact that payrolling is aimed at circumventing employers' obligations and liability, as well as legal employer status, and at securing the most flexible deployment of employees possible, is also evident from the way in which payroll companies present themselves, particularly on the Internet. This can be illustrated with quotations taken from the website of one of the largest payroll companies in the Netherlands (https://www.payrollselect.nl – accessed April 2015):

> With Payroll Services, you delegate the personnel and wage administration to Payroll Select. Your employees are on our wage list, with all of the benefits this brings. →
> Fewer employer risks: With payrolling, your workers are employed by Payroll Select.

purposes of the Unemployment Act, which in addition to issues of flexibility, provides another important reason for employing people on the basis of an employment contract with a payroll company, rather than in a civil service appointment.

Payrolling affects the employment rights of the employee. In various labour laws and regulations the employment protection regulated there entails responsibilities and obligations for the owner or operator of the business in which the employee works, who is assumed to be the legal employer of the employee. This protection is not as effective as originally intended if – as in the case of payrolling – the role of employer falls to another party as a result of an agreement between contracting parties. Dutch law does not recognise the concept of payrolling. It is therefore open to question whether, under employment law, an entrepreneur and a payroll company may agree that 'on paper' the payroll company is the legal employer of an employee who has been recruited and selected by, and works for, the entrepreneur.

§9.02 DEFINING THE EMPLOYER IN TERMS OF CIVIL LAW

The Dutch Civil Code (hereafter DCC) includes a separate arrangement for the employment agreement. In Article 7:610 of the DCC the employment agreement is defined. This article serves as an access point to the arrangement of the employment agreement laid down in Title 10 Book 7 of the DCC. The employment agreement is defined as follows in Article 7:610 of the DCC:

> An employment agreement is an agreement whereby the one party, the employee, undertakes to perform work in the service of the other party, the employer, on payment of wages during a certain period.

Article 7:610 of the DCC is a mandatory provision. If the relationship between the parties satisfies the elements of the definition contained in Article 7:610 of the DCC – remuneration, work, and an authority relationship – then an employment agreement exists between the parties and the provisions regarding the employment agreement in Title 10 Book 7 of the DCC will apply. Even if the parties do not describe their legal relationship as an employment agreement, it will be qualified as an employment agreement if the legal relationship satisfies this definition. Requirements of form, such as a written agreement, are not decisive when defining the existence of the employment agreement. Article 7:610 of the DCC is mandatory law because the autonomy of will and contractual freedom of parties, as embodied in the general provisions on legal acts and agreements in Book 3 and Book 6 of the DCC, are incompatible with the protection of the employee – the weaker counterparty of the employer in socio-economic terms – as envisaged in the arrangement of the employment agreement in Title 10 Book 7 of the DCC. If the parties were able to agree that no employment

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Because we are formally the employer, you face significantly fewer risks under employment law in relation to employment contracts, continued wage payments, probationary periods, illness etc. → Dealing flexibly with personnel: Payrolling your staff via Payroll Select means that you are not tied down to employment contracts. This gives you the freedom to respond to market developments with greater flexibility' (author translation).

agreement exists between them, despite the fact that their conduct towards each other effectively provides evidence of this, then the protection of employees contemplated in Title 10 Book 7 of the DCC would have little practical impact. When the Act on the employment agreement was passed in the Netherlands at the start of the twentieth century, the Dutch government explained the need for the mandatory nature of the definition of the employment agreement as follows:

> You may establish as many protective rules for employees as you can think of; it doesn't matter; the employer will present them a contract in which they waive their rights: when they have signed – and they will always sign except during strikes – their rights are not worth anything.[2]

Both the employment agreement as a legal relationship and the identity of the legal employer form part of the mandatory scope of the definition in Article 7:610 of the DCC. In Article 7:610 of the DCC the employer is defined as the party in whose service – under whose authority – the employee performs the work. The principle underlying this, is that the employer is the owner or operator of the business in which the employee works. This accommodates the basic international principle that labour is not a commodity and the entrepreneur must observe certain obligations towards the employees who are working in his service.[3] Social and economic developments, specifically during the final quarter of the last century, have however brought radical changes to the role and capacity of both the employer and the employee. Although the employer and the employee are still not on an equal footing in socio-economic terms, the higher educational levels of employees and the expansion of the welfare state after the Second World War have led to the economic dependence of employees diminishing, their work becoming increasingly independent and flexible, and their negotiating position vis-à-vis the employer becoming stronger. The role and capacity of the employer, as the party contracting with the employee in the employment agreement, has also changed. At the start of the twentieth century, the factor of capital was still clear and recognisable, readily identifiable with an individual of flesh and blood. Today, employers house their businesses and assets in legal entities. These legal entities can incorporate a range of management layers responsible for managing departments, divisions or business units into which the enterprise is subdivided.

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2. See Bles, A.E., De wet op de arbeidsovereenkomst, Part I, p. 212, (Belinfante, The Hague, 1907). This is a quotation from De Courcy's '*Le droit et les ouvriers*', which in Dutch read as follows:

> gij kunt zooveel regels van aanvullend recht ten behoeve der arbeiders verzinnen als gij wilt; het zal u niets baten; de werkgever legt hun een contract voor, waarbij zij van hunne rechten afstand doen; wanneer zij hebben geteekend - en zij zullen altijd teekenen behalve in tijden van werkstaking - dan blijft er van al hunne rechten niets over.

3. 'Labour is not a commodity' is included in Art. I (a) of the Declaration concerning the aims and purposes of the International Labour Organisation [Declaration of Philadelphia] (10 May 1944), *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration (accessed April 2015), (setting out the manifesto for what we now know as the International Labour Organisation (ILO)) as one of the 'fundamental principles' of the ILO.

Another relevant factor is that, from the late 1970s, the formation of corporate groups increased substantially, meaning the employer as a legal entity was increasingly likely to be part of a group under the central governance of another legal entity, the parent company.

§9.03 REALITY TAKES PRECEDENCE OVER APPEARANCE

The developments described above have contributed to a practise in which the employment agreement embodies less and less of a 'personal' involvement on the part of the employer in the work performed by the employee. As a consequence, the contractual arrangements made between the parties have started to play a more important role in the legal qualification of the employment agreement. This increased importance of contractual arrangements is however sometimes in a tense relationship with Article 7:610 of the DCC as a mandatory access point to the arrangement of the employment contract contained in Title 10 Book 7 of the DCC. This tension exists not only in situations where the parties agreed that the labour would be performed under an agreement other than an employment agreement – just think of the increase in the numbers of self-employed – but also in situations where the 'contractual' employer is a party other than the entrepreneur in whose business the employee actually performs the work.

Under the general provisions on legal acts and agreements contained in Book 3 and Book 6 of the DCC, the parties are free to determine not just the content of the contract but also the identity of the contracting parties. In principle, only the parties to the contract can be obliged to comply with it. Agreements involving a third party always require the third party's cooperation to enforce the obligations contained in the agreement. Like any other agreement within the meaning of the DCC, the employment agreement goes into effect following an offer and its acceptance by the other party. In principle, the parties can choose to configure an agreement for the performance of work in a form other than an employment agreement. The mandatory nature of Article 7:610 of the DCC may however require the courts to ignore these contractual arrangements made by the parties and deem the contractual relationship an employment agreement. This would be the situation if the arrangements that were made when entering into the contract did not coincide with the actual way in which the contract was subsequently implemented by the parties. Case law from the Dutch Supreme Court indicates that in such cases reality takes precedence over appearance when qualifying these contractual arrangements for the purposes of Article 7:610 of the DCC.[4] The same parameters operate for the qualification of the employer as a party to the employment contract for the purposes of Article 7:610 of the DCC. If the employee is working within the business of a third party by virtue of an employment contract with another 'contractual' employer, then, dependent on how the employment contract with the contractual employer came into being and how this contract was subsequently implemented, it must be considered whether an employment agreement with the

4. See Supreme Court 14 November 1997, ECLI:NL:HR:1997:ZC2495.

contractual employer was actually intended. Such an agreement might be presumed if the part played by the contractual employer in the completion and implementation of the employment agreement was sufficiently independent and substantively significant.

In situations where the 'employer capacity' of the contractual employer lacks any such independent and substantive significance, the court may hold that an employment agreement instead exists with the third party in whose business the employee performs the work, and not with the contractual employer.

§9.04 THE TEMPORARY EMPLOYMENT AGREEMENT

In Article 7:690 of the DCC the contractual employer who, in the context of his profession or business, makes his employees available to hirers, in order to perform work at and under the authority of those hirers, is deemed the legal employer of those employees. If the temporary employment agreement satisfies the definition in Article 7:690 of the DCC, then the contractual employer's client, the hirer, can be certain that he will not be qualified as the employer of the hired employee pursuant to Article 7:610 of the DCC. As a triangular relationship under employment law, the temporary employment agreement is defined as follows in Article 7:690 of the DCC:

> A temporary employment agreement is an employment agreement whereby, within the framework of the conduct of a profession or business of the employer, the employee is placed by the employer at the disposal of a third party in order to perform work under the supervision and direction of the latter by virtue of a contract for services granted by the latter to the employer.

Article 7:690 of the DCC is a mandatory provision and operates as the access point to the 'relaxed' employment law regime for temporary employment agreements laid down in a special section of Title 10 Book 7 of the DCC, allowing multiple fixed-term employment contracts to be entered into with the employee and for the employment contract to be more easily terminated at an interim stage. This mitigated dismissal regime is intended to do justice to the flexibility that is characteristic of temporary employment and is inherent in the allocation function of the temporary employment agency.[5] Article 7:690 of the DCC entered into force in 1999. During the parliamentary debate on the special arrangement of the temporary employment agreement in the DCC the Dutch government pointed out that, although the allocation

5. On the other hand the Act on the Allocation of Workers by Intermediaries (Waadi) ensures, *inter alia*, that the absence of a contractual link with the hirer does not result for the temporary employee in a lower salary compared with employees who are employed in the same or similar positions at the hirer. The Netherlands implemented Directive 2008/104/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work in the Waadi. The term 'agency', used in this Directive, is defined in Art. 3.1 (b) of the Directive as 'any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction'. In my opinion the use of the expression 'agency' in the Directive and the fact that this definition refers to temporary assignments means that there is the matter of the assignment of employees within the meaning of the Directive if the employer who assigns employees to clients has an allocation function in the labour market.

function was not explicitly mentioned in the text of Article 7:690 of the DCC, this arrangement was confined exclusively to those contractual employers who actually fulfil an allocation function within the labour market. This allocation function means, in essence, that the contractual employer links the supply of, and demand for, (temporary) work in the labour market.

Contractual employers with an allocation function, like employment agencies, satisfy the temporary need for specialist personnel in situations of peak demand or illness. They play an increasingly important role in introducing or reintroducing employees to the labour market and, in times of recession, they make an important contribution to economic recovery by fulfilling the increased requirement for flexible labour. In addition, agency work also caters to the need for flexibility among certain categories of workers, such as women and juveniles.[6]

Although the arrangement of the temporary employment agreement in a special section of Title 10 Book 7 of the DCC was confined exclusively to those contractual employers who actually fulfil an allocation function within the labour market, the definition of the temporary employment agreement in Article 7:690 of the DCC was intended to have a broader scope of application than the traditional assignment of staff to cover for peak demand periods and illnesses by temporary employment agencies. According to the Dutch government, the arrangement could also apply to other organisations such as secondment companies and labour pools provided that they fulfil an allocation function within the labour market. The definition included in Article 7:690 of the DCC was therefore not intended to provide a statutory basis for triangular relationships under employment law, where no allocation function is fulfilled by the contractual employer. The unambiguous governmental explanation of the scope of Article 7:690 of the DCC means the definition must be interpreted accordingly. This would mean, in my view, that the allocation function has to be 'read into' the definition in Article 7:690 of the DCC.

The lower courts have ruled diversely on the meaning of the allocation function for the applicability of Article 7:690 of the DCC. Various courts held that the allocation function is a requirement for the applicability of Article 7:690 of the DCC.[7] Other courts chose to ignore the legislative history and, referring to the text of this article, ruled that fulfilling an allocation function in the labour market is not required for the applicability of Article 7:690 of the DCC.[8] The Dutch Supreme Court is expected to provide definitive

6. For situations in which there is a need for flexible employment offered by employment agencies and the way in which the agency worker is distinguished from a 'normal' worker see Moolenaar, D.E.G., *The Dutch Market for Agency Work* (diss. Amsterdam UvA), (Saarbrücken, Lambert Academic Publishing 2002).
7. Court of Appeal Arnhem-Leeuwarden 3 February 2015, ECLI:NL:GHARL:2015:670; Sub-District Court Amsterdam 22 September 2014, ECLI:NL:RBAMS:2014:6356; Sub-District Court Amsterdam 11 March 2014, ECLI:NL:RBOVE:2014:1214; Sub-District Court Amsterdam 3 September 2013, ECLI:NL:RBAMS:2013:6063; Sub-District Court Amsterdam 1 July 2013, ECLI:NL:RBAMS:2013:6257; and Sub-District Court Enschede 21 March 2013, ECLI:NL:RBONE:2013:BZ5108.
8. Court of Appeal Amsterdam 28 October 2014, ECLI:NL:GHAMS:2014:4547; Court of Appeal Amsterdam 9 September 2014, ECLI:NL:GHAMS:2014:4616; and Sub-District Court Amsterdam 4 July 2014, ECLI:NL:RBAMS:2014:5783.

clarity regarding the meaning of the allocation function for the application of Article 7:690 of the DCC in 2016.

§9.05 THE EMPLOYER IN PAYROLLING

There is no statutory definition of payrolling. The sectoral organisation protecting the interests of its affiliated payroll companies, adopts the view that payrolling is a 'special form' of the temporary employment agreement provided by Article 7:690 of the DCC. This would mean that the payroll employee has the same legal position as an agency worker. As stated above, the definition of the temporary employment agreement included in Article 7:690 of the DCC is not intended to accommodate businesses in their desire to outsource the obligations connected to being a legal employer of a third party. The allocation function of employment agencies within the labour market was the reason for including the special arrangement for the temporary employment agreement in Title 10 Book 7 of the DCC. There is no such allocation function with payrolling. The payroll employee is recruited and selected by the client. The client then goes on to hire a payroll company to operate as the legal and administrative employer of this employee, who is assigned exclusively to this client (the employee's de facto employer).

If the payroll company would not qualify as the employee's employer under Article 7:690 of the DCC because of the absence of an allocation function, then the question arises whether the payroll company can still be qualified as the payroll employees' employer under Article 7:610 DCC. When qualifying the employer in a triangular relationship that does not qualify as a temporary employment agreement within the meaning of Article 7:690 of the DCC – much the same as when qualifying the employment agreement – the contractual arrangements made between the parties only gain significance if they coincide with the actual way in which they are subsequently implemented.

The fact that the payroll employee and the client have no written agreement between them is not an intrinsic impediment to qualifying the client as the legal employer of that payroll employee. In the Stichting Thuiszorg Rotterdam/PGGM judgment, the Dutch Supreme Court confirmed that the absence of a written agreement concluded between the worker and the 'client' was not an obstacle to the possible existence between them of an employment agreement under Article 7:610 of the DCC.[9] In his opinion for the judgment in Stichting Thuiszorg Rotterdam/PGGM, which was followed by the Supreme Court, the Advocate-General formulated this as follows:

> The parties concerned may have set out a structure on paper, with another party involved at an intermediate stage, which – taking everything into account – did not coincide with what they actually intended to agree. In such a case, it is the intention of the parties, rather than the written text reflecting the legal relationships, that is decisive. The fact that the definition of the employment agreement in

9. Supreme Court 13 July 2007, ECLI:NL:HR:2007:BA6231.

> Article 7:610 of the DCC is mandatory law, plays an important role in this. The parties cannot simply circumvent that definition without further ado.

While the employer and employee are free as parties to choose with whom they enter into a contract, the mandatory nature of Article 7:610 of the DCC implies that the role of the contractual employer in concluding and implementing the employment contract must have sufficiently independent and substantive significance, in order to qualify this contractual employer as the legal employer under Article 7:610 of the DCC. This is questionable in the case of payrolling. As stated above, payrolling is designed to outsource the legal and administrative obligations associated with being an employer and to further promote a more flexible labour relationship with the employee. The payroll agreement is set up because the client wants to be the de facto employer of the employees, although not their employer in formal terms, that is to say 'on paper'. From the outset, the payroll company operates purely as a 'contractual extension' of the client, both for the completion and for the implementation of the employment agreement with the payroll employee.

The Dutch Supreme Court has not yet issued a ruling on the employer status of the payroll company. Lower courts have ruled differently on the employer status of the payroll company. In most of the cases so far, the courts looked beyond the contractual agreements made by the parties when qualifying the employer of the payroll employee.[10] Thus deeming the client to be the payroll employee's employer under Article 7:610 of the DCC despite the employment contract the payroll company concluded with the payroll employee. In other cases, however, the courts found that the payroll company had to be considered the legal employer of the payroll employee based on Article 7:690 of the DCC and/or on the fact that the payroll company concluded an employment contract with the employee.[11]

§9.06 THE VIEWS OF SOCIAL PARTNERS AND THE DUTCH CABINET ON PAYROLLING

The Dutch trade unions have major, fundamental problems with payrolling because it results in unjustifiable unequal treatment – during, and at the end of, the employment agreement – between payrolled employees and employees who would be directly employed by the payroll company's client. They categorise payrolling as a 'major disappearing act for good employer practices'. In the view of the trade unions,

10. Court of Appeal Arnhem-Leeuwarden 25 March 2014, ECLI:NL:GHARL:2014:2340; Sub-District Court Almelo 11 March 2014, ECLI:NL:RBOVE:2014:1214; Sub-District Court Amsterdam 3 September 2013, ECLI:NL:RBAMS:2013:6063; District Court The Hague 26 June 2013, ECLI:NL:RBDHA:2013:7749; Sub-District Court Almelo 13 May 2013, ECLI:NL:RBOVE:2013:CA1178, Sub-District Court Almelo 21 March 2013, ECLI:NL:RBONE:2013:BZ5108; and Sub-District Court Leeuwarden 21 October 2012, ECLI:NL:RBLEE:2012:BY0861.
11. Sub-District Court Amsterdam 4 July 2014, ECLI:NL:RBAMS:2014:5783; Court of Appeal Leeuwarden 23 March 2010, ECLI:NL:GHLEE:2010:BL9881; and Sub-District Court Rotterdam 21 December 2012, ECLI:NL:RBROT:2012:BZ1299.

payrolling radically undermines employment and dismissal law and enables employers to use this type of legal construct to circumvent their obligations and duties towards employees. The employers' organisations, for their part, consider payrolling to be a form of service that is important for a properly functioning flexible labour market and consider the delegation of certain risks associated with being an employer to a payroll company in exchange for payment of a fee to be legitimate. In their opinion there are no particular problems with payrolling as long as the arrangements between the payroll company, the client and the payroll employee are clear to all parties.

The Social Agreement dated 11 April 2013 – in which social partners and the Dutch cabinet made arrangements regarding dismissal law reform and improvements to the legal position of the flexible worker – states it is the joint desire of the social partners to encourage clarity concerning mutual rights and obligations, and also to achieve a clear legal qualification of the increasing number of triangular relationships within the existing labour law system. They proposed including an obligation for a written employment contract in the DCC for situations of payrolling, and requiring the contract to contain 'the essentials of the employment agreement'. Failure to issue such a written agreement would mean the employment agreement would be presumed to be with the client instead of the payroll company.

The Dutch Minister of Social Affairs and Employment, referring to the arrangements in the Social Agreement, announced that the intention was to prevent triangular relationships, including payrolling, from being used improperly and to render relationships transparent in all cases, preventing misunderstandings about the position of the employee. In the meantime the Minister of Social Affairs and Employment adapted the rules of dismissal in order to (partly) compensate the limited dismissal protection of payroll employees.

§9.07 INTEGRATING PAYROLLING INTO THE EXISTING LABOUR LAW SYSTEM; OR IS IT MERELY A SYMPTOM OF A DEEPER PROBLEM?

Social partners have been discussing the possibilities of integrating payrolling into the existing labour law system, in a working group especially formed for this purpose. The likelihood of this resulting in a unanimous opinion to the Minister of Social Affairs and Employment is minute if the payroll sector persists in retaining its current business model. The Minister of Social Affairs and Employment has announced that he will await the opinion from the working group, but will personally look into how to deal with payrolling if this takes too long. If things go that far, the Minister will have to take into account that the current business model for payrolling was able to grow because entrepreneurs have found labour law to be too severe a burden and they no longer want to be saddled by the legal obligations associated with being an employer. In payrolling, entrepreneurs have discovered a way of contracting this out in exchange for a fixed fee.

If increasing numbers of employers delegate their legal employer status, despite the extra costs and the risk of legal proceedings and social unrest, then it may well be

time to reconsider labour law as a whole, and whether the current package of rules and regulations remains tolerable for entrepreneurs, rather than trying to integrate payrolling into the existing labour law system. The obligation for a written employment contract with the payroll company, as proposed by social partners, would signify an acceptance that the present range of obligations that labour law attaches to being an employer can be 'contracted out' to a third party without any tangible assets. This would effectively amount to recognising the problem – that being an employer has become too onerous an obligation for entrepreneurs – but then legitimising the symptom of this problem – payrolling – instead of trying to remedy it. This would not only be turning the world on its head, but would also be in conflict with the mandatory legal qualification of the employment agreement under Article 7:610 of the DCC, which is a fundamental principle of Dutch labour law. The employee, as the weaker party to the employment contract on a socio-economic level, could then be compelled, with a single stroke of the pen, to renounce the employer status of the owner or operator of the business where he works. Such a rift between the contractual and the de facto employer status would put the employee into a worse position in terms of labour law.

This is not solved by adjusting the rules on dismissal for payrolling in such a way that the protection of payroll employees against dismissal would be equivalent to that of employees who would be employed directly by the client. The payroll employees' modest protection against dismissal is not the only issue with payrolling. Since the contractual employer under payrolling is someone other than the owner or operator of the business where the employee works, other provisions in the arrangement of the employment contract in Title 10 Book 7 of the DCC, which are linked to the legal employer status of the owner or operator of the business where the employee performs the work, would also not have their desired effect. Illustrative examples include the employer's and employee's reintegration obligations in employment disability cases; the transfer of the employee in cases of transfer of the undertaking in which the employee works; the special prohibitions against termination; and the application of the Labour and Care Act. The same applies to the application of (mandatory) industry-wide collective bargaining agreements.

The tension with collective labour law is that the payroll company is required to apply a collective agreement only if that company itself is bound by that collective agreement or if its business or activities fall within the scope of a mandatory industry-wide collective agreement. Payroll employees would consequently be unable to invoke the industry-wide collective agreement that applies to the client – the de facto employer – and the agreements recorded in it that specifically relate to the work in an undertaking, such as that of the de facto employer, including provisions in the field of pension, childcare and education. The position of the payroll employee under labour law would then be the same as that of temporary agency workers who are working in the business, albeit that they are not contractually employed by an employer whose 'own' business is aimed at the allocation of labour.

§9.08 SHOULD THERE BE A FUTURE FOR PAYROLLING?

In order to integrate payrolling into the existing system of labour law, the payroll company needs to be something more than a mere 'paper' structure.[12] Currently, payroll companies are primarily satisfying the need of entrepreneurs for delegating or 'contracting away' their legal employer status to a 'paper' employer, which plays no independent or substantive part in the completion and implementation of the employment agreement. Although working for the client on the basis of an employment agreement, the payroll employee's status as a 'paper employee' of the payroll company puts him in a less favourable position under labour law than if he were, or had remained, directly employed by the client.

Even if the payroll employee is aware of this when entering into the contract with the payroll company, he still generally has no choice, being the weaker counterparty of the employer in socio-economic terms, but to agree to the payroll contract. This type of payrolling cannot be integrated into the existing Dutch system of labour law. Things would be different if the payroll sector would reinvent itself and payrolling become a form of service provision, with the focus not resting purely on entrepreneurs divesting themselves of the obligations that are legally associated with being an employer.

Payrolling does not seem necessary in a government service or a large business, but could provide added value in small- and medium-sized enterprises, for both the entrepreneur and the employee. This would be the situation if payroll companies were to provide, and start to develop, know-how in the fields of – interim – education and training of payroll employees, relocation of payroll employees, e.g., in the form of labour pools, or, in case of disability of the employee, the reintegration of the payroll employee. This might also solve the problem of protecting payroll employees against dismissal. After all, if a client wants to terminate the payroll agreement with such a payroll company, the employees' chances of relocating to a new client – or actually entering into employment with a new employer – would be significantly greater.

12. See author dissertation: Zwemmer, J.P.H., *Pluraliteit van werkgeverschap* (Deventer, Kluwer 2012), http://dare.uva.nl/record/1/393051 (accessed April 2015), with summaries in English and German.