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# Key concepts and changing labour relations in Norway
## Part 1 Country report

Nordic future of work project 2017–2020: Working paper 7. Pillar VI

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# Contents

# Preface

In the future of work project funded by the Nordic Council of Ministers, more than 30 researchers from the five Nordic countries study:

- What are the main drivers and consequences of the changing future of work in the Nordic countries?
- In what ways will digitalisation, new forms of employment, and platform work influence the Nordic models?
- What kind of renewal in the regulation of labour rights, health and safety, and collective bargaining is warranted to make the Nordic model fit for the future?

Through action and policy oriented studies and dialogue with stakeholders, the objective is to enhance research-based knowledge dissemination, experience exchange and mutual learning across the Nordic boundaries. The project runs from 2017 to 2020, and is organised by Fafo Institute for Labour and Social Research, Oslo.

The project is divided into seven pillars. This paper is part of Pillar VI Labour law & regulations, and this paper presents the labour law framework in Norway and discusses the concepts of employer and employee. The aim is to provide a basis for an analysis of whether and how changing labour relations pose a challenge to Nordic labour law.

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# 1 Introduction

Changing labour relation may challenge the interpretation and application of the key concepts of labour law in the future. This paper presents the labour law framework in Norway and discusses the concepts of employer and employee.[1] The aim is to provide a basis for an analysis of whether and how changing labour relations pose a challenge to Nordic labour law.

A common notion of the employment relationship has been influential in Norwegian law: A contractual relation characterized by subordination and dependence, often referred to as the contract of employment (arbeidsavtalen).[2] This common notion forms the core of the concepts of employer and employee.

The contract of employment is not explicitly defined in Norwegian legislation. Instead, legislation defines the relation indirectly, by defining its parties; the employer (arbeidsgiver) and the employee (arbeidstaker). There is however not one general and fully *unitary* definition of these key concepts. Definitions vary in different parts of the legal framework.

The labour law framework is characterized by a close interplay between statutory regulation and regulation by collective agreements. Trade union density is 49 percent and has been relatively stable the past 10 years.[3] Collective agreements cover ca. 50 percent of employees in the private sector and 100 percent in the public sector, resulting in a total coverage of ca. 70 percent.[4] The coverage has been gradually declining the last two decades, and it varies considerably in different sectors.[5]

The main legislative instruments are the Working Environment Act (WEA)[6] and the Labour Disputes Act (LDA)[7].

The WEA primarily regulates *individual* employment relations. The main regulatory approach is to confer rights and duties to the parties of individual employment contracts.[8] The WEA covers a broad range of issues, such as working environment, whistle-blowing, information and consultation, control measures, working time, (certain types of) discrimination, hiring of employees, requirements regarding written contracts of employment, fixed-term, part-time and temporary agency work, termination of employment, competitive clauses in employment, transfer of undertakings, disputes concerning working condition, regulatory supervision and penal liability. The WEA's explicit objective is focused on protection of individuals, but the act also seeks to balance the need for protection against the need for freedom, flexibility and creating of wealth.[9] Due to the protective purpose, the provisions of the WEA

[1] The study design is presented in Marianne Jenum Hotvedt and Natalie Videbæk Munkholm, "Labour law in the future of work. Introduction paper", *Fafo-paper 2019:06* [Hotvedt/Munkholm 2019].
[2] The tradition is rooted in Paal Berg, *Arbeidsrett*, 1930, p. 37 ff.
[3] Kristine Nergaard, "Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2016/2017", *Fafo-notat 2018:20* [Nergaard 2018a] p. 10.
[4] Nergaard 2018a p. 23 ff.
[5] Nergaard 2018a p. 27 and 32.
[6] Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven, WEA).
[7] Lov 27. januar 2012 nr. 9 om arbeidstvister (arbeidstvistloven, LDA).
[8] Ot.prp. nr. 49 (2004–2005) p. 73–74 and Ot.prp. nr. 49 (1983– 84) p. 17.
[9] The obective is expressed in more detail in WEA § 1-1. The need to balance oposing interests is discussed in the preparatory works, see i.a. Ot.prp. nr. 49 (2004–2005) p. 61.

cannot be derogated *in pejus* of the employee, neither by individual nor collective agreement, unless explicitly stated in the act.[10]

The LDA sets the main framework for *collective* employment relations, by defining the relevant type of collective agreement (tariffavtale) and recognizing its distinctive legal effects, and by establishing procedures and mechanisms for conflict resolution on a collective level. A collective agreement (tariffavtale) is legally binding, both for the parties and for the members covered by the agreement, whether they are individuals or organisations. Terms and conditions in a collective agreement cannot be derogated by individual employers and employees bound by the agreement; such individual terms are not legally valid, cf. LDA § 6. Consequently, collective agreements have normative effects in individual employment relations.[11]

The legislator has traditionally refrained from legislating on certain issues. There is a strong tradition to leave wages to collective bargaining and thus no statutory (general) minimum wage. The Extension Act[12] however empowers an independent administrative law body (Tariffnemnda) to adopt public law regulations on minimum terms and conditions for employment relations (allmenngjøringsforskrifter).[13] The regulations have reference to specific provisions in a collective agreement for the branch or industry concerned. An estimated 10 percent of employees in the private sector are covered by such regulations.[14]

Furthermore, the Holiday Act regulates rights to annual leave with pay for employees.[15] Separate acts regulate the employers' duty to provide work injury insurance and occupational pension.[16] The Equality and Anti-Discrimination Act (EDA) provides protection against (most types of) discrimination and includes specified rights and duties in the employment context. [17]

In this legal framework, there are nuances in the wording of definitions of employer/employee. The definitions in the WEA and the LDA are basically identical. An employee is defined as "anyone who performs work in the service of another", and employer is defined as "anyone who has engaged an employee to perform work in his service".[18]

In other statutory acts, definitions vary to some extent. In the Holiday Act, the wording of the definition of employee is identical to the WEA and the LDA, while employer is not explicitly defined. There are no explicitly definitions in the EDA.

[10] Cf. WEA § 1-9. The provisions on working time are however to a large extent derogable by collective agreements on a central level, cf. WEA § 10-12 (4).
[11] See further Stein Evju, "Norge", i: Tore Sigeman m.fl., Arbetsrätten i Norden. 1990 p. 225–316, p. 251–253.
[12] Lov 4. juni 1993 nr. 58 om allmenngjøring av tariffavtaler m.v. (allmenngjøringsloven,the Extension Act).
[13] See further Stein Evju, "Safeguarding National Interests. Norwegian Responses to Free Movement of Services, Posting of Workers and the Services Directive", in Stein Evju (ed.) Cross-Border Services, Posting of Workers and Multilevel Governance, Departement of Private Law Skriftserie 193 2013 p. 225–259.
[14] Nergaard 2018 p. 36.
[15] Lov 29. april 1988 nr. 21 om ferie (ferieloven, the Holiday Act).
[16] Lov 16. juni 1989 nr. 65 om yrkesskadeforsikring and lov 21. desember 2005 nr. 124 om obligatorisk tjenestepensjon.
[17] Lov 16. juni 2017 nr. 51 om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven, EDA).
[18] Cf. WEA § 1-8 and LDA § 1 a and b.

Slightly wider definitions of employee and employer occur in legislation on work injury insurance and tort.[19] The definitions of employee and employer in legislation on tax and social security are also slightly different.[20]

Notwithstanding these definitions, the regulatory approach to the key concepts is basically *jurisprudential*. The definitions as such provide limited guidance on how to define the scope of protection (in particular the distinction between employees and independent contractors), and how to identify the responsible party (or parties). Instead, case law has played a vital part in defining the key concepts and the employment relation.

In principle, this approach allows a nuanced and adaptable interpretation and application of both concepts. In practice, however, the approach to the concept of employee (which mainly concerns the personal *scope of protection*) is distinctly different from the approach to the concept of employer (which mainly concerns the *allocation of responsibilities*). Therefore, the two concepts are discussed separately, in section 2 and 3, with a focus on the labour law context. Section 4 addresses more specifically the responses in national law to certain challenging characteristics present in labour relations today.

The enforcement mechanisms are however common. Disputes on employment status and/or allocation of employer responsibility are decided by the courts, and there are no specific tribunal, commission etc. available for solving such disputes. Ordinary courts decide on individual claims, whether the legal basis for the claims are statutory rights or collective agreements. When ordinary courts interpret collective agreements in order to decide on individual claims, the exclusive competence of The Labour Court (Arbeidsretten) must however be respected. The Labour Court decides cases concerning collective claims, i.a. on the interpretation of collective agreements.[21] If the Labour Court has ruled on a specific interpretation of a collective agreement, this applies to any contract of employment based on the collective agreement, and ordinary courts – including the Supreme Court – must build on this interpretation.[22] Questions of employment status and/or allocation of responsibility may also arise in cases handled by other authorities, such as the Labour Inspection Authority (Arbeidstilsynet) and the Anti-Discrimination Tribunal (Likestillings- og diskrimineringsnemnda).

In August 2019, The Ministry of Labour and Social Affairs appointed a committee with a mandate to consider whether the legal framework of labour relations and business structures is sufficiently predictable, suitable and adaptable for the future.[23]

[19] See the corresponding definitions in the Work Injury Insurance Act § 2 and the Tort Act (lov 13. juni 1969 nr. 26 om skadeserstatning) § 2-1 nr. 2 and 3.
[20] See the definition of employee in the Social Security Act (lov 28. februar 1997 nr. 19 om folketrygd) § 1-8 and of employer in the Tax Payment Act (lov 17. juni 2005 nr. 67 om betaling og innkreving av skatte- og avgiftskrav) § 4-1 (1) c.
[21] On the exclusive competence of the Labour Court, see LDA § 33 and § 34. The Labour Court decides on legal disputes between organisations of employees and employers or organisations of employers concerning validity, interpretation or existence of a collective agreement, and claims based on a collective agreement. Furthermore, the Labour Court decides on disputes concerning breach of the peace obligation and of regulations on interest disputes, and on liability for breach of collective agreements.
[22] Cf. LDA § 34 (2) and i.a.HR-2019-424-A (para. 39).
[23] See the press release: https://www.regjeringen.no/no/aktuelt/utvalg-skal-se-pa-fremtidens-arbeidsliv/id2666279/.

This includes assessing the concepts of employee and employer and the legal regulations of different types of non-standard work such as agency work, fixed-term work, platform work etc. The committee consists of representatives from the main trade unions and employers' organisations as well as three independent experts. The committee will submit their report to the Ministry by June 1 2021.

# 2 Concept of employee: Personal scope

## 2.1 A broad discretionary assessment

Whether a person is an employee depends on a broad discretionary assessment of the realities of the relation, guided by certain criteria. The criteria serve as positive indicators of an employment contract and are listed in the preparatory works to the WEA:

- the worker is obliged to stay in service to perform personal work and cannot use substitutes on his/her own account;
- the worker is obliged to submit to the employer's supervision and control of the work;
- the employer provides the work location, machines, tools, work materials or other equipment necessary to perform the work;
- the employer bears the risk for the work result;
- the worker is remunerated by some form of wage;
- the parties' relation is relatively stable and is terminable with notice;
- the worker mainly works for one employer.[24]

The criteria reflect the broad and facts-oriented nature of the assessment. The list – and, hence, the assessment, is not limited to contractual obligations, practices are included.

According to the preparatory works, an employment contract is characterized by the *dependent* and *subordinated* position of the employee vis-à-vis the employer.[25] The list of criteria indicates that different types of dependency and subordination are relevant. Some criteria point to *legal obligations* that represent personal and organizational dependency: the obligation to stay at service to perform personal, subordinate work. Other criteria concern the *distribution of economic risks* and type of remuneration, and aim at revealing whether the worker stays at service, as opposed providing services (a specific work result) on his/her own account. The list also includes criteria that describe the duration and/or stability of the relation. These criteria target relations of *actual economic dependency*. The list therefore reflects the relevance of both personal, organizational and economic dependency and subordination, both contractual and actual.

The list is however not exhaustive, other factors and considerations may have relevance in a specific case. An *individualized* case-by-case assessment is apparently required, as several of the criteria point to factors that may vary among persons performing work under the same (formal) contractual arrangement. Furthermore, the assessment is *dynamic* and takes account of practice developments between the parties.[26]

[24] Ot.prp. nr. 49 (2004–2005) p. 73, author's translation. The criteria are basically the same as in the preparatory works to the Holiday Act. A similar, but slightly different list is found in the preparatory works to the Social Security Act, which also has relevance fot the Tax Payment Act.
[25] Ot.prp. nr. 49 (2004–2005) p. 73.
[26] See i.a. Rt. 1993 s. 231.

How – more precisely – to draw the distinction between dependent work (employees) and independent work (independent contractors), is left to case law. The preparatory works of the WEA underline an important advantage of this approach; an *adaptable concept* of employee. It is explicitly stated that the concept can – and should – adapt to changed realities and new forms of work:

> Even more importantly, there *should be room for developing the concept [of employee], corresponding to new ways of organising work and new work relations*. This development can and should happen in jurisprudence. The Committee finds that the criteria and overall assessment applied by the courts, to a sufficient degree, respond to the need for flexibility and predictability. The Committee, however, expects *future court decisions to reflect further developments in the labour market*.[27]

In recent jurisprudence, the Supreme Court has structured the assessment according to the list of criteria. The Court has considered each criteria respectively, decided whether it points to an employment contract or not, and then made an overall assessment.

Differences in statutory definitions, lists of criteria and classification practices can make it difficult to consider a *general* legal status as an employee. In recent case law, two types of claims seem to dominate. First, claims concerning *specific rights* conferred to employees, such as holiday pay or work injury insurance.[28] Second, claims for (permanent) *employment* with a specific employer.[29]

## 2.2 A purposive assessment

The purpose of the relevant legal framework affects the concept of employee in several ways. First, nuances in statutory definitions are often justified by reference to the purpose of the specific legal norms.[30] Second, diverging lists of criteria and diverging classification is related to the purpose pursued in different parts for the legal framework. For instance, a partner in a law firm was considered an employee in the context of employer responsibility in tort law, with reference to the purpose of providing adequate protection for the injured party.[31] Third, recent developments seem to enhance the purposive element. The Supreme Court has stated that a purposive assessment is the "methodological approach" to the interpretation and application of the concept of employee.[32] The court has explicitly said that the notion of a unitary concept only serves as a starting point.[33] Recent case law gives several examples where a purposive assessment has been decisive, leading to diverging classification practices depending on the legal framework and the purpose pursued. [34] Therefore, the concept of employee can be characterized as a variable concept within

[27] NOU 2004: 5, p. 163, author's translation, emphasis added.
[28] See i.a. Rt. 2013 s. 354 and Rt. 2010 s. 93.
[29] See i.a. Rt. 2013 s. 342 and HR-2016-1366-A.
[30] See i.a. on the definitions in social security law in NOU 1990: 20 s. 173.
[31] Rt. 2015 s. 475. Compensation for the injured parties (the heirs of a deceased client) was in this case dependent on employer liability for the firm, as no other basis for liability was applicable.
[32] Rt. 2015 s. 475 (para. 65), with reference to Rt. 2013 s 354 (para. 39). This was reaffirmed in a labour law context in HR-2016-1344-A (para 60).
[33] Rt. 2015 s. 475 (para. 64).
[34] See in particular Rt. 2010 s. 93, Rt. 2015 s. 475 and HR-2017-344.

in a common, yet flexible, frame.[35] Based on these developments, it has been suggested that the variations in the concept of employee form three branches; one of labour law, one of tort and insurance law and one of tax and social security law.[36]

In the labour law context, the protective purpose of statutory regulations has traditionally played a significant role for the interpretation and application of the concept of employee. An influential statement from the Supreme Court – that concept of employee must be given "a wide interpretation" – was derived from the protective purpose.[37] The protective purpose also justifies the "primacy of the facts", an assessment focusing on realities rather than formal contractual arrangements, see further in section 2.4.

The Supreme Court has explained the protective purpose as follows:

> It is the intention of the legislator that *those in need for the protection* provided by the Working Environment Act, the Holiday Act etc., *are protected*. [38]

In the closer assessment based on the criteria, the Court seems to focus on the need for protection due to subordination and/or dependency. The Court has also stressed that the assessment should *not* be a mechanical consideration of the criteria.[39]

Consequently, the purposive approach clarifies the *aim* of the assessment; identifying persons in need for labour law protection, due to a work relation characterized by subordination and/or dependency. The approach thereby clarifies the *justification* for the guiding criteria. Their relevance rests on being suitable indicators of subordination and/or dependency. Furthermore, as the list of criteria is not exhaustive, the purposive approach gives guidance for what *other* factors and considerations that may be included in the assessment. Other factors that indicate need for protection due to subordination and/or dependency may be relevant.

As mentioned above, the preparatory works states that the concept can – and should – adapt to new forms of work. Thus, is has been argued that the purposive approach require a critical assessment of the criteria, and that the list should be supplemented if the criteria no longer reflect the purpose when applied to new forms of work.[40]

## 2.3 The criteria's relative significance

Due to the purposive approach and the broad and discretionary nature of the assessment, the relative significance of the criteria can hardly be defined in general. As the criteria serve as indicators of subordination and/or dependency, the combination of criteria determining the specific case, may vary from case to case. As mentioned, the assessment should not be a mechanical consideration of the criteria. Although the

[35] Marianne Jenum Hotvedt, "Arbeidstaker – quo vadis? Den nyere utviklingen av arbeidstakerbegrepet", *Tidsskrift for Rettsvitenskap* nr. 1 2018 p. 42–103 [Hotvedt 2018a], p. 51.
[36] *Ibid*. p. 64.
[37] Rt. 1984 s. 1044 (p. 1048). This statement is repeated in later cases, see i.a. Rt 2013 s. 354 (para. 39).
[38] Rt 2013 s. 354 (para. 39). Author's translation, emphasis added.
[39] Rt 2013 s. 354 (para. 57). See also Rt. 2013 s. 342 (para. 46).
[40] See Marianne Jenum Hotvedt, "The contract-of-employment test renewed. A Scandinavian approach to platform work", *Spanish Labour Law and Employment Relations Journal,* No. 1–2 2018 [Hotvedt 2018b], p. 56–74.

purposive approach provides guidance, there are no explicit norms guiding the balancing of criteria or the overall assessment.

Nonetheless, the first two criteria – a continuous duty to perform personal work and the obligation to submit to supervision and control – are generally considered most important. The assessment usually focuses particularly on these criteria, and they are typically decisive: If they are found to be present, the worker will normally be considered an employee.[41] This is not surprising, as they strongly indicate both personal and organizational subordination.

Still, traditionally, these two criteria have not been considered essential or necessary to be an employee. An older case from the Supreme Court, Rt. 1968 s. 725, illustrates that rights as an employee does not necessarily require a duty to perform personal work or to submit to supervision and control. The woman in question performed leatherwork under an informal arrangement with a factory, and the case concerned the right to holiday pay. She was free to leave the work to others, and worked from home whenever and wherever she pleased, without supervision. The work relation was however stable and the work provided the only income for her and her family. With reference to the purpose of the Holiday Act, the Supreme Court simply found it reasonable – "most natural" – that she should be entitled to holiday pay. The case serves as an example of several aspects of the concept of employee: Actual economic dependency can be sufficient to be an employee. Thus, individual circumstances can be decisive. In this case, the financial and family situation had relevance. And – perhaps most importantly – a reference to the purpose (securing income by providing holiday pay) paved the way for this assessment.

However, recent case law may entail a stronger emphasis on the criteria of personal work under supervision and control. In HR-2016-1366-A, the Supreme Court emphasized the general significance of these two criteria. The court stated that employer supervision and control is "particularly central" when considering whether there is a relation of subordination and dependency, and referred to this criteria as a "requirement". [42] The court also commented, in an *obiter dictum*, that a possibility to leave the work to others, would "exclude" a contract of employment.[43]

There is some doubt whether these statements should be understood literally. Considering the two criteria as necessary requirements would not fit well with the purposive approach. It could also challenge the established principle of primacy of the facts. It is therefore argued that employment status still can be based on actual economic dependency.[44]

## 2.4 The primacy of the facts

A principle of "the primacy of the facts" applies to the concept of employee. Due to the protective character and purpose of labour law, the *realities* are decisive when assessing the relation. Considering realities as opposed to formal contractual arrangements is closely related to the need to counteract circumvention of labour law. This has several implications.

[41] See i.a. ARD 1955 s. 117, Rt. 1958 s. 1229, ARD 1968 s. 36, Rt. 1992 s. 534, Rt. 2013 s. 354 and HR-2016-1366-A.
[42] HR-2016-1366-A (para 63, 64 and 72). Further on the circumstances of the case, see section 4.2.
[43] HR-2016-1366-A (para. 70).
[44] Hotvedt 2018a p. 65–67. Fougner 2018 p. 82 consider Rt. 1968 s. 725 as still relevant and as a "good example of applying purposive arguments", author's translation.

First, the principle affects how the formal classification of the contract as a contract for services, or of the worker as an independent contractor, is considered. The preparatory works of the WEA presuppose that courts "cut through" to hinder circumvention if the relation in reality is one of subordination and/or dependence (an employment contract).[45] The Supreme Court has recently stated that it has no significance if the contract is classified as a contract of independent work.[46]

Second, the principle is reflected in the list of relevant criteria. Some of the criteria points to legal obligations, while other some points to mere facts. The latter reflect the principle by making the realities directly relevant.

Third, the principle influences the assessment of criteria phrased as legal obligations. This applies to the first two criteria – the *obligation* to stay in service and the *obligation* to submit to supervision and control. As explained above, these criteria are central to the assessment. While the aim is to reveal the realities, it is however not apparent *how* the realities are revealed – how tensions or discrepancies between formal contractual arrangements and mere facts are solved. Here, case law provides important guidance, in particular when assessing the criterion of supervisions and control.

One starting point is that *actually being exposed* to supervision and control can be sufficient to consider the worker "obliged". In HR-2016-1366-A, the Supreme Court found that continuous instructions fulfilled the "requirement" (criterion) and strongly indicated an employee.[47]

Another point of departure, clearly expressed in the same case, is that a *formal legal basis* for supervision and control is sufficient.[48] Consequently, a contract provision allowing supervision and control can be sufficient, regardless of whether supervision and control is exercised. In its reasoning, the Supreme Court referred to the need for a "robust" concept of employee: If actual supervision was required, individuals in the same type of positions could be judged differently, depending on experience and need for supervision, and this was not desirable.[49]

Case law also provides important guidance when assessing the realities of supervision and control in triangular work arrangements, see further in section 4.2.

Lastly, a focus on the realities is part of the approach to the contractual basis of the employment relation. As indicated in the introduction, the concept of the employee rests on the assumption that the employment relation has a *contractual* basis. Work performed on another type of legal basis will – at least as a starting point – not make the worker an employee in a labour law context.[50] A contractual basis therefore forms a requirement for full labour law protection. However, a formal contract is not

[45] Ot.prp. nr. 49 (2004–2005) p. 74 and NOU 2004: 5 p. 163.
[46] Rt. 2013 s. 354 (para. 37). Further on the circumstances of the case, see section 4.2.
[47] HR-2016-1366-A (para. 63 and 64).
[48] *Ibid*. (para. 65).
[49] *Ibid*.
[50] Still, the WEA partly applies to specific groups of workers that are not employees, see WEA § 1-6. On the significance of a contractual basis, see also Rt. 1995 s. 2018, ARD 1994 s. 16 and HR-2016-589-A. In the first case, a person working on a social security scheme was not considered an employee in the context of a collective agreement. In the two latter cases, persons in elected positions, a union representative and a major, were not considered employees.

required. Behavior implying a contract of employment – such as performing and receiving work – can be sufficient.[51] A contractual bond can also be based on the justified expectations (berettigede forventninger) of one party. Furthermore, the contract does not have to be valid according to general principles of contract law. When a position is acceded, the rules on termination of employment apply, regardless of contractual invalidity.[52] This can be considered another manifestation of the principle of primacy of the facts.

[51] See further on the contractual bond in a labour law context in Marianne Jenum Hotvedt, *Arbeidsgiverbegrepet. En analyse av grunnlaget for arbeidsgiverplikter*, 2016 [Hotvedt 2016] p. 299–346.
[52] Rt. 2004 s. 76.

# 3 Concept of employer: Allocation of responsibility

## 3.1 Core content and relativity

The concept of the employer is normatively linked to the contract of employment. The concept of employer is traditionally presented as a reflection of the concept of employee.[53] This implies that the employer is the stronger party to an employment contract.

Consequently, the *core content* of the concept of employer is derived from the contract of employment. Employer status is established by entering into this type of contract. The contract of employment triggers a set of legal obligations for the stronger (employer) party in relation to the opposing party, the employee. This reflects the classic rationale of labour law; legal protection aimed at redressing the inherent power asymmetries in the employment contract. Identifying the employer will therefore often be an easy task: The employer is the legal entity (or person) that has hired the employee and is party to the employment contract.

Still, interpreting and applying the concept of employer can cause difficulties. The concept is neither fully clear nor unitary. As mentioned above, statutory definitions in different parts of the legal framework vary to some extent. In the context of labour law, the concept is conceived as *relative* or *nuanced*, and it is recognized that employer responsibilities may rest on *several entities*.[54] The preparatory works to the WEA reflect conceptual relativity, while providing limited guidance for the interpretation and application of the concept.[55]

A key underlying issue is how to allocate employer responsibilities when the formal contractual arrangement does not correspond with the actual power structures – when other entities than the formal contractual party exercise employer functions or otherwise influence on employment conditions. On an abstract level, the preparatory works recognize a need to balance opposing interests and values when allocating employer responsibility.[56] On the one hand, the need for predictable and clear allocation of responsibility is highlighted. On the other hand, there are also references to the need for legal responsibility to correspond with actual power structures.

First, identifying the contractual employer may be challenging. The preparatory works describe the employer concept as *functional*. Although the formal identification of the contractual party is a starting point, this is not necessarily decisive. The realities – who exercises employer functions – are also relevant when identifying the employer. Therefore, identifying the employer may be obscured in cases where employer functions are exercised by other entities than the formal contractual party.

Furthermore, the basis for specific employer duties varies to some extent. The facts and considerations that trigger employer duties vary in different contexts. Some em-

[53] See i.a. Ot.prp. nr. 3 (1975–76) p. 102 and Jan Fougner, *Endring i arbeidsforhold*, 2. ed. 2016 p. 22.
[54] See i.a. Henning Jakhelln, *Oversikt over arbeidsretten*, 4. ed 2007 p. 36–43, Nils H. Storeng, Tom H. Beck and Arve Due Lund, *Arbeidslivets spilleregler*, 4. ed. 2016 [Storeng/Beck/Lund 2016] p. 65 and Jan Fougner, *Arbeidsavtalen – utvalgte emner*, 1999 p. 138.
[55] Ot.prp. nr. 49 (2004–2005) p. 73–74 and p. 76–77.
[56] Ot.prp. nr. 49 (2004–2005) p. 76–77.

ployer duties are extended by statutory regulation. As a result, certain employer duties hinge on other relations than contracts of employment and are triggered by particular employer functions.

Lastly, a doctrine of joint employer responsibility is recognized in Norwegian law. The doctrine is derived from case law and described in the preparatory works. According to the doctrine, *several* entities can be responsible for obligations that rest on the employer. Applying the doctrine however require a closer assessment of the involvement of several entities, i.a. whether several entities have exercised employer functions.

In the following, identifying the contractual employer will be discussed a little further (3.2). Then, statutory extension of employer duties will be briefly presented (3.3), before elaborating on the doctrine of joint employer responsibility (3.4).

## 3.2 Identifying the contractual employer(s)

Being the contractual employer presuppose both a contractual bond and a classification of the contract as a contract of employment (as opposed to a contract for independent work). Both issues are discussed above, from the opposite perspective, the concept of employee. An important remaining issue is how to identify the stronger party – the contractual employer. The contractual employer will, as a starting point and main rule, be responsible for the full "set" of legal obligations, whether the legal basis is the contract itself or statutory employer duties.

As a starting point, identification of the contractual employer follows general principles of contract (and corporate) law. Still, there are signs of a distinctive labour law approach. Applying this approach will normally lead to one responsible entity, but may lead to consider several entities as employers.

Normally, a legal person – usually a limited company – will be party to the employment contract. The contractual party may however also be an individual. The legal person as such is the contractual employer, although corporate organs or specific persons exercise various employer functions. Delegating employer functions does not release the company of legal responsibility.[57]

The contractual employer may be integrated with others entities, for instance in a group corporate structure. The main rule still is that each separate company is responsible for its own employees.[58] Contract law however allows for several entities or persons to enter into a contract of employment as employers.[59]

The formal arrangement serves as a starting point when identifying the employer, but is not necessarily decisive. Even where the employer is indisputably identified in the contract, courts will usually consider whether this is reflected in reality. Case law indicates that exercising some – not all – employer functions is sufficient in this regard.[60]

Furthermore, there is a low threshold for regarding the contract as unclear. In such cases of contractual obscurity, the employer will be identified by considering the realities, focusing directly on who has exercised employer functions. Case law gives examples of this approach leading to *two* responsible employers. In Rt. 1993 s. 954,

[57] Rt. 1998 s. 1357.
[58] Ot.prp. nr. 49 (2004–2005) s. 74.
[59] Rt. 2006 s. 420 is one example. Here, two companies had jointly entered into an employment contract with a real estate broker.
[60] Rt. 1993 s. 1428, Rt. 1997 s. 623 and Rt. 2003 s. 1593, see further Hotvedt 2016 p. 436–438.

there were no written employment contracts. The two owners of a restaurant were personally responsible as employers instead of the limited company they established. The court referred to general principles of contract law and found that entering into employment contracts and running the business established a personal responsibility as it was not made clear to the employees that the company was (intended to be) the employer.

What type of employer functions to consider remains somewhat unclear. Case law illustrates that different employer functions can be decisive.[61] A common trait, however, seems to be that the Court considered how the allocation of responsibility affected the protection of the employees. This indicates that the protective purpose of labour law has some influence when identifying the contractual employer.[62]

## 3.3 Statutory extension of employer duties

Certain statutory duties for the "employer" provide protection of others than the employer's own employees. Such extensions reflect a *broader concept of the employer* and an expanded and nuanced protective rationale: Some employer duties apply in *other* relations than contract of employment-relations.[63] Specific extensions are mainly found in four areas.

There are a number of extensions related to protection of *health and safety*. The duty on the employer to provide a healthy and safe working environment applies to persons performing work in connection to the enterprise, regardless of a contract of employment with this entity.[64] Furthermore, solo self-employed are obliged to respect certain regulations for the protection of their own health and safety.[65] Individuals who manage the enterprise on behalf of the employer can be held personally in criminal liability if statutory protection is not respected. [66] Consequently, these extensions of the duties are related to the employer function of having the operational responsibility for the enterprise. These extensions can be seen in light of earlier case law, where the employer concept has been interpreted particularly broadly in the context of health and safety.[67]

Other important extensions are related to protection against *discrimination*. Although the main legal framework – the EDA – provides general protection, the protection in the employment sphere is stricter and more comprehensive.[68] This protec-

[61] In Rt. 1993 s. 490, the hiring of employees was clearly the decisive function, while the court also focused on the running of the business in Rt. 1993 s. 954.
[62] See further Hotvedt 2016 s. 438–440.
[63] See further Hotvedt 2016 p. 198 ff.
[64] See in particular WEA § 2-2 and § 1-6.
[65] Cf. WEA § 1-4 and related regulations (forskrifter).
[66] Cf. WEA § 1-8 (2) 2. p. The extension applies in principle to all provisions in the WEA. In practice, however, the application is limited to cases of serious breach of health and safety regulations.
[67] See in particular Rt. 1985 s. 941 and Rt. 1990 s. 419. In addition, WEA § 1-8 (2) 2. p. is a basis for holding persons in charge *personally* responsible for working environment standards, see Rt. 1982 s. 878, Rt. 1983 s. 196 og 1984 s. 773, Rt. 1985 s. 185 og Rt. 1988 s. 692. See further Pillar VI Norway Country Report Part 2.
[68] The EDA generally prohibits discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity and gender expression. EDA chapter 5 contains special provisions with stricter and more specified protection related to employment relationships. WEA chapter 13 supplements the EDA by prohibiting discrimination on the basis of political views, membership of a trade union and age in employment specifically.

tion – phrased as duties for the employer – applies in relation to agency workers (despite another contractual employer) and to workers operating as independent contractors, when they perform work in connection to the enterprise.[69] Furthermore, these employer duties applies to persons seeking work, whether as employees, as agency workers or as independent contractors. Here, the extensions of the employer duties are related both to the operational responsibility for the enterprise and to the hiring of workers.

In the context of *agency work* (innleie), the agency (utleier) is the contractual employer and responsible for statutory protection. However, a broad range of employer duties also rest on the user entity (innleier). Consequently, there are *two* entities responsible for a number of employer duties in this context, see further in section 4.2. These extensions are closely related to the fact that the user entity exercises a key employer function of managing the work.

There is also an important extension in the context of *transfer of undertakings* (virksomhetsoverdragelse). Key employee rights in this context are derived from "rights and obligations arising from a contract of employment *or* from an employment relationship" from the transferring employer to the transferee.[70] According to the Court of Justice of the European Union (CJEU), the concept of (transferring) employer is not limited to a "contractual employer", it may include a "non-contractual employer".[71] In case C-242/09 *Albron*, an employee was linked by a contract of employment to one company, but assigned on a *permanent* basis to work for another company within the same group, when the latter undertaking was transferred. The CJEU considered the "non-contractual employer" to be a transferor within the meaning of the Directive, resulting in a right for the employee to be transferred. The Supreme Court has applied – and developed – this approach when interpreting the concept of the (former) employer in WEA § 16-2. In Rt. 2012 p. 983, the right to be transferred applied to employees *temporarily* assigned to work for the transferor. The court's reasoning clearly presupposes that there may be several employers – contractual and non-contractual – in this context.[72] The latter judgement is however also related to the doctrine on joint employer responsibility, see further in section 3.4.

Some of these extensions result in a *partial employer responsibility* (for the protection of persons who are not employees). Others result in a *joint employer responsibility* (several entities responsible for protecting the same employee). The extensions are however related to specific duties – not employer status or responsibility as such.

The extensions illustrate that the concept of the employer is not inextricably related to a contract of employment. Some employer duties may apply to other types of work relations and serve to align other positions of power.

[69] Cf. EDA § 29 (2) and WEA § 13-2 (2).
[70] Cf. Directive 2001/23/EC article 3 (1), implemented by WEA § 16-2, emphasis added.
[71] Case C-242/09 *Albron*, ECLI:EU:C:2010:625 (para. 25 and 26).
[72] Rt. 2012 s. 983 (in particular para. 101–104).

## 3.4 The doctrine of joint employer responsibility

A change in corporate structures, in particular higher prevalence of group corporate structures, lead to a debate on the concept of the employer in the 1990ies. The majority of a government committee suggested a general amendment to the definition of the employer in the WEA.[73] The suggested amendment would include any entity with significant influence on the contractual employer in the definition. The majority referred to examples in case law of joint employer responsibility in support of the amendment. The suggested amendment lead to controversy and was never passed. The work of the committee is still relevant to the concept of employer. The preparatory works of the WEA clearly build on the assessments of the committee's minority member. By this line of reasoning, joint employer responsibility, according to case law, require "special grounds" (særskilt grunnlag), and three main types are highlighted:

- several employers by *contractual agreement*
- several employers *in reality* due to several entities *exercising employer functions*
- several employers as a result of contractual *obscurity*.[74]

This forms the doctrine of joint employer responsibility.[75] The preparatory works however provide little guidance on how to interpreted and apply the doctrine. There is at least a partial overlap to the identification of the contractual employer. As mentioned above, contract law allows for several employers by contractual agreement. In the event of contractual obscurity, exercising employer functions will be decisive and *may* lead to joint responsibility. Furthermore, the implications of applying the doctrine are not clear. In Supreme Court jurisprudence, the doctrine has served as a basis for assigning *specific aspects of employer responsibility* on other entities than the contractual employer.[76] Some has however described the doctrine as a basis for assigning general *employer status* on other entities.[77]

The prevailing line of argument for joint responsibility in case law has been a combination of a close integration of the relevant entities, by ownership or otherwise, a contractual basis for certain employer functions and the actual exercise of managerial powers.[78] There are however also examples of a broader approach. In certain cases, joint responsibility has been based on the determining influence on the contractual employer and references to the protective purpose; the court has considered how allocation of responsibility would affect the effective realization of protective standards.[79] In sum, the doctrine on joint employer responsibility is a distinct labour

[73] NOU 1996: 6.
[74] Ot.prp. nr. 49 (2004–2005) s. 75, author's translation, emphasis added.
[75] The doctrine is recognised both in the preparatory works of the WEA, case law and doctrinal works. The doctrine is however presented using varying terminology ("delt arbeidsgiveransvar", "felles arbeidsgiveransvar", "flere arbeidsgivere", "ansvar på særskilt grunnlag" etc.).
[76] See i.a. Rt. 2012 s. 983, Rt. 1990 s. 1126 and Rt. 1989 s. 231. This seems to be reaffirmed in HR-2018-2371-A (para. 123), see further below.
[77] See i.a. Jan Fougner mfl. *Arbeidsmiljøloven. Lovkommentar*, 3. ed. 2018 p. 88 and Storeng/Beck/Lund 2016 p. 64.
[78] See in particular Rt. 2012 s. 983, Rt. 1990 s. 1126 and Rt. 1989 s. 231.
[79] See in particular Rt. 1937 s. 21, Rt. 1995 s. 270 and ARD 1980 s. 79.

law doctrine, where contractual and corporate law arguments are merged with the protective purpose of labour law.[80]

In a recent judgement – HR-2018-2371-A – the Supreme Court has clarified the doctrine. The case concerned the restructuring of the airline known as Norwegian, from a one-company-enterprise to a complex corporate group. Following multiple transfers, pilots and cabin personnel were formally employed by subsidiaries. They claimed employer responsibility for the parent company (NAS) and the Norwegian operating company (NAN), i.a. based on the doctrine of joint employer responsibility. The Supreme Court ruled in favor of the airline and did not find the doctrine applicable.

The Court referred to the concept of the employer as "functional", while reaffirming sole responsibility for the formal employer as a starting point and main rule. Joint employer responsibility was considered to be a "narrow exemption rule" with a high threshold for application, and the doctrine was described as "a rule on lifting on the corporate veil based on employment concerns".[81]

The court found no joint responsibility based on *contractual arrangement*. The court furthermore considered joint responsibility based on several entities *exercising employer functions*. The court concluded that NAS only exercised employer functions to a marginal degree. This assessment was mainly based on the formal contractual arrangement between the different companies in the corporate group. According to these contracts, the managerial powers vis-a-vis the crew mainly rested with the formal contractual employers (the subsidiaries) and not with NAS. The court also considered whether a broader assessment of the group structure and the determining influence of NAS represented "special grounds" for joint responsibility. The court rejected this, as it would resemble the suggested amendment to the definition of employer, which was never passed.[82] The Court referred explicitly to the need for predictable and clear allocation of responsibility, as highlighted in the preparatory works. The Court mentioned that complex corporate structure could have a negative impact on the protection of employees, but concluded that a wider concept was a matter for the legislator.[83] This line of reasoning, with a strong emphasis on the formal contractual arrangement, seems to represent a somewhat stricter interpretation of the scope of the doctrine than before.[84]

The court also touched on the *implications* of applying the doctrine. One issue was whether the judgement could generally declare that NAS "is the employer" without defining the legal implications. As the doctrine was inapplicable, the Supreme Court did not have to take a definite stand. The court however referred to "limited joint employer's responsibility" as "the most accurate description" of the doctrine. It also pointed out that generally declaring another entity as the employer would raise several questions as to the legal implications. The court thereby suggested that the doctrine concerns certain aspects of employer responsibility, not a general status as employer.[85]

[80] For a closer analysis of the doctrine, see Hotvedt 2016 p. 401 ff.
[81] HR-2018-2018-2371-A (para 110 and 121, translation by Lovdata).
[82] *Ibid*. (para. 117).
[83] *Ibid.* (para. 119).
[84] Marianne Jenum Hotvedt, "Plassering av arbeidsgiveransvar i konsern – HR-2018-2371-A Norwegian", *Nytt i privatretten* nr. 1 2019 p. 1–3.
[85] HR-2018-2371-A (para 123, translation by Lovdata).

# 4 Challenging characteristics: Specific responses

## 4.1 Introduction

Certain characteristics of non-standard employment have the potential to obscure the assessment of protected status as employee, complicate allocation of employer responsibility, and threaten predictability within an employment relation. In Norway, the share of non-standard employment (part-time, fixed-term, and solo self-employment) is relatively stable and amount in sum to ca. 30 percent of all persons in employment.[86] Part-time is the dominating type of non-standard work. The share of marginal part-time is at ca. 8 percent while long part-time is at ca. 12 percent. [87] Fixed-term employment is at ca. 8 percent, while temporary agency work amounts to 1,5–2 percent of employees.[88] The share of solo self-employment is stable, ca. 4 percent of persons in employment are self-employed without employees.[89] In addition, ca. 2 percent of employees have a secondary job as an independent contractor.[90] Recent estimates suggest that 0,5–1 percent are engaged in platform work.[91]

This section looks more specifically on responses in national law to certain challenging characteristics, namely triparty contracts and agency work (4.2), fragmented, empty or marginal contracts (4.3), artificial employment contracts (4.4) and platform work (4.5).

## 4.2 Triparty contracts and agency work

A triparty contract structure does not preclude a contract of employment in Norwegian law. A triparty contract is a contract of work where key employer functions are spread on different entities, for instance by stipulating a duty to work under subordination and control of a third party.[92] The typical example is agency work.

Agency work (innleie) is classified as contracts of employment.[93] The formal contract party – the agency (utleier) – is considered the contractual employer. The user entity – the hirer of labour (innleier) – is however responsible for a broad range of statutory employer duties, including providing a safe and healthy working environment and respecting working time regulations, rights related to whistle-blowing and protection against discrimination.[94] Furthermore, the user entity has joint liability for the payment of wages, holiday pay and any other remuneration pursuant to the principle of equal treatment.[95] Consequently, both the agency and the hirer may be held responsible as far as these specific employer duties are concerned. The hirer has

[86] Kristine Nergaard, "Atypical labour markets in Norway", *Nordic future of work brief 7*, Fafo march 2019. [Nergaard 2019].
[87] Nergaard 2019. Marginal part-time has gradually increased, while long part-time has declined.
[88] Nergaard 2019. Despite certain changes, both types have been relatively stable over time.
[89] Kristine Nergaard, «Tilknytningsformer i norsk arbeidsliv. Sluttrapport», *Fafo-rapport 2018:38* [Nergaard 2018b] p. 124.
[90] *Ibid*.
[91] Kristin Jesnes and Fabian Braesemann, "Measuring online labour: A subcategory of platform work", *Nordic future of work brief 2*, Fafo march 2019.
[92] Hotvedt/Munkholm 2019 p. 12.
[93] Cf. WEA §§ 14-12 ff.
[94] Cf. WEA § 2-2 (1) a and b, § 2A-1 (1), § 13-2 (2) and EDA § 29 (2), respectively.
[95] Cf. WEA § 14-12c.

a *partial* employer responsibility for the agency workers, despite the lack of a contractual link.

In addition, there are important restriction on the hiring of labour. The preparatory works to the WEA state that direct employment should continue to be the "norm". [96] Restrictions thus serve to prevent circumvention of direct employment as the main rule.

Hiring of workers from undertakings whose object is to hire out labour, is only permitted to the extent that fixed-term employment contracts are allowed. [97] The consequence of unlawful hiring is a right for the employee to claim a permanent employment relationship with the hirer unless this is clearly unreasonable. [98] A *full* employer status therefore may occur for the hirer, despite the lack of a contractual link. Case law also provide examples where hiring of workers has been deemed illegal as attempts to circumvent the main rule of direct and permanent employment. In a recent appeal court case, a permanent employee with a 30 percent part-time position worked extra in the same kindergarten as an agency worker. This was considered an irregular arrangement and a circumvention of statutory protection, and the court ruled that she was permanently employed in an 80 percent position. [99]

This comprehensive and relatively strict regulation of agency work makes is essential to distinguish between hiring of labour (innleie) and contracts for services (enterprise). The distinction rests on a broad assessment of several criteria, mainly which of the parties Has the managerial powers and the responsibility for the work result. The fact that a contract for services can concern an ongoing *staffing* service, can obscure the distinction. [100] There are no general restriction on the use of contracts for services. However, as regards regulations of minimum terms and conditions (allmenngjøringsforskrifter) adopted in accordance with the Extension Act, there is a joint liability for wages and accrued holiday pay. [101]

There are examples in case law of *other* types of triparty arrangements being classified as contracts of employment. In two cases, the Supreme Court concluded that support workers had contracts of employment with the relevant municipality, despite a formal status as independent contractors and a triparty contract structure. [102] The contract served as a framework for support services related to a specific child, performed by a support worker chosen by the family, and where the content, time and place of work was agreed between the worker and the family. The Supreme Court has also considered a case concerning a foster care provider in a temporary foster home. [103] Here, there was a different multiparty structure, the care provider had a framework contract with the state government, while contracts on the placement of

[96] Prop. 74 L (2011–2012) p. 8.
[97] Cf. WEA § 14-12 (1), cf. § 14-9 (2). Note that § 14-9 (2) f only applies to temporary work, not hiring of employees. Hiring of workers from *other* undertakings (than those whose object is to hire out labour) is less strictly regulated, see WEA § 14-13.
[98] Cf. WEA § 14-14. On this assessment, see further HR-2018-2371-A.
[99] Judgement of Borgarting lagmannsrett of May 29 2019, LB-2019-42779. The position of 80 percent corresponded with her actual working hours, see further below in section 4.3. The employee was also awarded compensation and damages.
[100] In Rt. 2013 s. 998 (para. 58 and 59), the Supreme Court clarifies that an ongoing staffing service may be organized as a contract for services.
[101] Cf. the Extension Act § 13.
[102] Rt. 2013 s. 354 and HR-2016-1366-A. The support worker is called "avlaster" or "støttekontakt" in Norwegian, depending on the type of support service.
[103] Rt. 2013 s. 342. The temporary foster home is called "beredskapshjem" in Norwegian.

a specific child was agreed with the municipality, and care was provided for the child. The court rejected status as employee for the care provider, but the multiparty structure was not part of argument to reach this conclusion. In all three cases, the authority responsible for the care service was the (potential) employer.

As explained above, the criterion of supervision and control is of particular importance when considering whether a worker is an employee. The Supreme Court has taken a comprehensive approach to supervision and control in a triparty structure, and chosen the worker's perspective. In the cases on support workers, the court took supervision and control from the families into account. The court justified this approach by referring to the protective purpose: A worker should not be left in "a labour law void" as a result of the contracting party leaving supervision and control to a third party.[104] This approach is well in line with the reasoning related to agency work, where supervision and control performed by the hirer is taken into account. Hence, the key issue does not seem to be whether the worker is obliged– or actually exposed – to supervision and control *from the potential employer*. The main issue seems to be whether the contract facilitate supervision and control of the worker, from the potential employer *or* a third party.[105]

## 4.3 Fragmented, empty or marginal contracts

As the main rule, rights as an employee does not depend on a certain duration or amount of work. Duration and amount of work may however affect the classification in an indirect manner, as stability of the parties' relation and amount of work for one employer are relevant criteria, see further section 2.1.

There are also some exemptions to the main rule in specific legal contexts. Certain employer duties are conditioned by a minimum duration or amount of work.[106] Notwithstanding such exemptions, fragmented, empty and marginal contracts such as fixed-term work, marginal part-time, zero hour contracts etc. are generally recognized as contracts of employment. The regulatory approach has been to provide specific protection aimed at enhancing predictability for non-standard workers, supplementing the minimum requirements of EU/EEA-law.[107] The type of protection however varies for different kinds of non-standard work. Here, the focus is on national law, not the EU/EEA-requirements.

As regards *fixed-term* contracts (and agency work), general restrictions apply. Permanent employment is the statutory main rule, and fixed-term contracts (midlertidig ansettelse) are only allowed under specific circumstances.[108] As in the case of agency work, unlawful fixed-term hiring gives the employee the right to claim a permanent employment relationship unless this is clearly unreasonable. The restrictions serve to prevent circumvention of permanent employment as the main rule.[109] The relatively strict provisions on termination of employment, which apply to *all* employees,

[104] Rt. 2013 s. 354 and HR-2016-1366-A.
[105] Hotvedt 2018a p. 69.
[106] Certain requirements apply to the duties to provide occupational pension and work injury insurance, see further Hotvedt 2016 p. 153–156.
[107] Cf. in particular directive 97/81/EC concerning the framework agreement on part-time work, directive 99/70/EC concerning the agreement on fixed-term work and directive 2008/104/EC on temporary agency work. All these directives are implemented in the WEA, see in particular § 13-1 (3), § 14-9 (2) and § 14-12 a.
[108] Cf. WEA § 14-9 and § 14-10.
[109] Cf. WEA § 14-11.

is an important context for these restrictions.[110] In addition, fixed-term workers have a preferential right to a new appointment when certain conditions are met.[111]

As regards (marginal) *part-time* (deltidsansettelse), there are no general restrictions. have a have a statutory right to employment corresponding to their *actual* working hours. Workers, who during the previous twelve months have worked regularly in excess of the agreed working hours, are entitled to a post equivalent to the actual working hours during this period, unless the employer can document that the additional work is no longer needed.[112] Part-time workers also have a preferential right to an extended post rather than the employer creating a new appointment.[113] Disputes concerning these entitlements are resolved by a specific Dispute Resolution Board, which also considers disputes concerning working time, parental leave, etc.[114]

As regards *empty* contracts (often referred to as zero hour contracts), the debate in Norway has primarily focused on two types: On-call contracts (tilkallingskontrakter) and permanent employment contracts with no, or very limited, predictability for work and pay (fast ansettelse uten garantilønn).[115] The first type is usually considered a framework for subsequent fixed-term contracts. Each work period must meet the requirements for fixed-term employment in order to be lawful.

The second type has raised several questions. Some has questioned their *legality* as such. There has been debate on legal *classification*: whether such contracts are a valid type of permanent employment, or if the actual work periods rather represent a series of (perhaps unlawful) fixed-term contracts. The debate also concerns the *legal content* of such contracts – whether the concept of permanent employment imply minimum requirements regarding stability and amount of work. Case law indicates that contracts lacking the predictability related to permanent employment may be considered an attempt to circumvent the restrictions for fixed-term employment.[116]

The WEA was recently amended with an aim to enhance predictability for workers with a permanent but "empty" contract. The amendment introduced minimum requirements to a permanent employment contract, effective from January 2019.[117] It is explicitly stated that permanent employment must be continuous and not time-limited, and that provisions of termination of employment must apply. Furthermore, the employee must be ensured predictability of employment in the form of *a clearly specified amount of paid working hours*.[118] The minimum requirements regarding a written contract of employment were also amended. In relations where work is performed periodically, the contract must now state *when* the work is to be performed or provide a basis for calculating this.[119]

[110] Cf. WEA chapter 15 and similar regulation for the public and maritime sectors.
[111] Cf. WEA § 14-2.
[112] Cf. WEA § 14-4a (1).
[113] Cf. WEA § 14-3.
[114] Cf. WEA § 14-4a (2). The competence of the Dispute Resolution Board is regulated in WEA § 17-2.
[115] A recent amendment to the WEA specifically targets such contracts, see further below. This contract type has emerged as the main employer organization for temporary work agencies, NHO Service, issued a standard contract where the right to work and pay depended on being awarded assignments, named "fast ansettelse uten garantilønn".
[116] Rt. 2005 s. 826 (para. 30). See also a judgement from a district court, TBERG-2016-131720.
[117] Amendment the WEA of July 22 2018 No. 46, see further Prop. 73 L (2017–2018).
[118] Cf. WEA § 14-9 (1).
[119] Cf. WEA § 14-6 (1) j.

## 4.4 Artificial employment contracts

There are a few examples in Norway of companies offering artificial employment contracts. One example is *Employ*, who offers employment contracts to freelancers, and claim to combine the benefits of being an employee with the independence of being a freelancer.[120] Another example is *Cool Company*, who offers "egenansettelse" and claim to reduce the risk of starting a company.[121] Both companies undertake employer functions vis-à-vis government authorities, such as deducting taxes, reporting duties etc. It is however unclear whether the companies undertake the key employer function of providing work and pay, or if the workers rather bear the risk of not finding assignments.

Neither the legislator nor the courts have explicitly addressed the legal classification of such contracts.[122] However, the restrictions of fixed-term work, rights for part-time employees and the recent amendments to the WEA mentioned above are particularly relevant to these types of contracts. It remains to be seen whether and how these provisions are implemented in these types of arrangements.

## 4.5 Platform work

A typical feature of platform work is that workers are formally classified as independent contractors. Still, in Norway, some platform use employment contracts (marginal part-time) to regulate the platform-worker relation.[123] In the case of *Foodora*, an app-based food delivery service, the couriers have employment contracts. Furthermore, the couriers have organized in the Norwegian Transport Union, and are negotiating with *Foodora* for a collective agreement.[124]

The legal issue of employment status of platform workers is not yet addressed by Norwegian courts. A government committee on the sharing economy (Delingsøkonomiutvalget) raised the issue, but did not take a stand on the legal classification.[125] The Labour Inspection Authority (Arbeidstilsynet) has however conducted inspection and control with several platform companies, including *Foodora*. Here, the Authority has issued orders based on a classification of the platform-worker relations as contracts of employment.[126] However, in an earlier case of VaskerHvitt, a net based company mediating cleaning services, the Authority found the customers – not the company – to be the "employer" as regards specific statutory requirements for cleaning services.[127]

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[120] https://employ.no/.

[121] https://coolcompany.com/no/.

[122] To this author's knowledge, The Labour Inspection Authority has not conducted inspection or control with such companies.

[123] Kristin Jesnes, "Employment Models of Platform Companies in Norway: A Distinctive Approach*", Nordic Journal of Working Life Studies*, Vol. 9 2019, Special issue No 56, p. 53–73 [Jesnes 2019] formulates a typology of the employment models of platform companies in Norway. Employment contracts with marginal part-time – the "hybrid model"– is contrasted to both the standard employment contracts and self-employment.

[124] Kristin Jesnes, Anna Ilsøe and Marianne Jenum Hotvedt, "Collective agreements for platform workers? Examples from the Nordic countries", *Nordic future of work Brief 3*, Fafo March 2019.

[125] NOU 2017: 4.

[126] Desicion by the The Labour Inspection Authority 19.7.2016, ref. 2016/20783.

[127] Desicion by the The Labour Inspection Authority 16.7.2015, ref. 2014/58106. The requirements are set in regulations pusuant to WEA § 1-4 and § 4-1 (Forskrift 8. mai 2012 nr. 408 om offentlig godkjenning av renholdsvirksomheter og om kjøp av renholdstjenester).

The platform-worker relation is also discussed in doctrinal work. Here, it suggested how the purposive approach to the concept of employee may form the basis for a more predictable distinction between independent and dependent work in a platform context.[128]

There is no consensus among the social partners generally on the classification of platform work. However, the largest workers federation, LO, has issued a paper on the collaborative economy, arguing for an adjusted concept of employee, and main workers federations have sent a joint request to the government to reconsider the key concepts of labour law in light of changing labour relations.[129] The recently appointed committee (see section 1) is a response to this request.

Interestingly, the institutional context (legal framework, pressure from trade unions and regulating actors such as The Labour Inspection Authority) is considered to be the main reason why certain platform companies in Norway prefer employment contracts to contracts for services.[130]

[128] Hovedt 2018b.
[129] The paper was issued in the summer of 2016, but is no longer available online.
[130] Jesnes 2019 p. 69–71.