

The regulation of the notion of employer in an overregulated framework: the case of the Chilean labour law

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1. Introduction to the Chilean context. 2. Legal framework of labour relations and definitions. 3. Outsourcing regulations: Subcontracting, Multi RUT and Temporary employment agencies. 4. Final reflections.

Abstract

This work presents the notion of employer in Chilean labour law. It begins with a brief introduction of the context of the Chilean overregulated legislation. Then, it is studied the definition of employer and some basic concepts of the Labour Code. The phenomena of subcontracting, multi RUT and temporary agency of work are analysed. A final section contains some reflections on these aspects.

Keyword: Employer; Overregulation; Subcontracting; Liability.

1. Introduction to the Chilean context.

It is quite hard to find one single piece of labour law literature in Chile regarding the notion of employer¹ from a theoretical perspective, although it has been a relevant subject for the Chilean doctrine as well as for the jurisprudence. Recent developments take into the consideration the evolving notion of employer, from one single person to a more complex legal entity², that at the same time is divided in multiple functions or entities.

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¹ In France it is possible to find classic publications such as Vacarie I., *L'employeur*, Sirey, Paris, 1979, and also but in a different sense Catala N., *L'entreprise, Droit du travail*, Vol. 4, directed by Camerlynck G. H., Dalloz, Paris, 1980.

² See for example: Pinto Sarmiento Y., *Problemáticas en torno a la subcontratación. Análisis a diez años de vigencia de la Ley*, Editorial Librotecnia, Santiago, 2017, 20, 123; Ugarte Cataldo J.L., *El grupo de empresas en el derecho chileno: la empresa unitaria en materia laboral*, in *Revista de Derecho Laboral y Seguridad Social*, 2014, II, 3, 79-88; Ugarte Cataldo

In order to better comprehend this proposal, it seems necessary to first resume in a few lines about the context of labour regulations in Chile. The current regulation has its roots in the “Labour Plan” adopted in 1975 and the Labour Code from 1987, based on that plan³. In this context it is important not to forget the major influence of neoliberal ideology on labour regulation⁴. After the 1973 coup d’Etat an important group of economists entered the government with the purpose of reforming the socialist model⁵. The economists were known as the “Chicago Boys”⁶, followers of the economist Milton Freedman’s theories. These Chilean economists prepared in this period a document called “el ladrillo”⁷ that contains the foundations for the economic reconstruction of the country. Their position in the government was discredited after the economic crisis of 1982 and their incapacity to react in time. However, it must be clarified that in terms of labour regulations, the Chicago boys did not participate in the reformulation of legislative texts. This is because the Labour Ministry during this period was not from the school of Chicago. The minister was Jose Piñera⁸ and he has studied at Harvard University. This is a key to understand how the Chilean model was reformed, but far away from the sense of what the Chicago boys had proposed.

During this period a marked preference for individual relations in opposition to collective ones, affiliation to unions and the right to strike were, and still are, difficult to exercise. This is meant to be part of the ideology behind the government in this period giving more relevance to individuals over the collective interest. The definitions and the regulations

J.L., *El concepto legal de empresa y el Derecho Laboral Chileno: cómo salir del laberinto*, in *Revista Laboral Chilena*, Febr.-Mar., 2012, 54-68; Rojas Miño I., *La externalización laboral y la cesión ilegal de trabajadores en el sistema jurídico chileno*, in *Revista Ius et Praxis*, 2010, 16, 1, 171-196; Rojas Miño I., *Evaluación de la nueva normativa legal sobre subcontratación laboral*, *Estudios Laborales No. 5*, in *Revista de la Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social*, 2010, 37-72; Gamonal Contreras S., Prado López P., *El suministro de trabajadores en la Nueva Ley No. 20.123: acerca de la calidad de coempleador y la doble subordinación*, in *Revista Laboral Chilena*, 2008, 8, 59; Gamonal Contreras S., *Los grupos de empresa en Chile: tensiones y problemas*, in *Revista Laboral Chilena*, 2006, 9-10, 68; Ugarte Cataldo J.L., *El concepto legal de empresa en el derecho laboral chileno: mucho ruido, pocas nueces*, in *Revista Laboral Chilena*, 2001, 7, 60; Ugarte Cataldo J.L., *Suministro de trabajadores y trabajo temporal en empresas sin trabajadores*, in *Cuaderno de Investigación*, 10, 1999; Tapia Guerrero F., *El concepto de Empresa y los derechos sindicales en el Derecho chileno del Trabajo*, in *Estudios en homenaje al Profesor William Thayer A.*, Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social, Santiago, 1998.

³ In this context the position of Chilean doctrine is mentioned in: Gamonal Contreras S. *La reforma laboral, la Constitución & la libertad sindical*, in Arellano Ortiz P., Severín Concha J. P., Feres Nazarala M. E. (eds.), *Reforma al Derecho Colectivo del Trabajo. Examen crítico de la ley núm. 20.940*, Legge Ediciones Jurídica, Santiago, 2016, 31-62; Ugarte Cataldo J.L., *Derecho del trabajo: invención, teoría y crítica*, Colección Ensayos Jurídicos, Thomson Reuters, Santiago, 2014; Caamaño Rojo E. *Crítica a las ideas fundantes del actual modelo normativo de negociación colectiva en Chile y a su reforma*, in *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, 2016, XLVI, 381-406; Gamonal Contreras S., *La reforma laboral: interpretación, antinomias y vacíos*, in *Revista Laboral Chilena*, 2016, 73-78; Gamonal Contreras S., *La reforma laboral: un paso adelante y dos atrás*, in *Revista Laboral Chilena*, 2015, 67-70; Narbona K., *Antecedentes del modelo de relaciones laborales chileno*, 2015.

⁴ Feres Nazarala M. E., *Prólogo*, in Arellano Ortiz P., Severín Concha J. P. and Feres Nazarala M. E. (eds.), *Reforma al Derecho Colectivo del Trabajo. Examen crítico de la ley núm. 20.940*, Legge Ediciones Jurídica, Santiago, 2016.

⁵ Ministers: Sergio De Castro, Miguel Kast, Hernan Buchi, Pablo Baraona, Jorge Cauas, among others.

⁶ It is the name given to the Chilean students that participated in an exchange program between the University of Chicago and the Pontificia Universidad Católica de Chile, between 1955 and 1961.

⁷ “The brick”.

⁸ Brother of current president of Chile Sebastian Piñera. He was Minister of labour between 1978 and 1980, and also Minister of mining between 1980 and 1981.

incorporated at this time remain intact today in the current labour code. This is part of the legacy from this part of Chilean history: an overregulated labour law⁹.

Considering this context, we will present first the basic notions on labour regulation contained in the Chilean labour code. Once those definitions are explained we will briefly describe two modes of outsourcing which are extremely detailed in the Chilean regulations: the subcontracting and the temporary agencies of work. A last section will include some final reflections on the topic.

2. Legal framework of labour relations and definitions.

As we have pointed out, labour regulation is extremely overregulated, clearly marked by a tradition of regulating everything in details by legal texts. Hence the Labour Code tries to consider every possible case within the existing labour relations, individual and collective. One example of this is Article 3 where the concepts of employee, employer and company are defined for the purposes of the Code.

Article 3 defines that for all legal purposes the following terms:

- a) employer: the natural person or legal entity which makes use of the intellectual or material services of one or more persons under an employment contract,
- b) employee: any natural person who provides personal intellectual or material services under dependence or subordination and under an employment contract, and
- c) independent worker: who in the execution of his/her activity does not depend on the employer and does not have employees who are dependent on him/her.

The employer is considered as an independent worker for the purposes of social security payments.

For the purpose of labour and social security legislation the term of company is understood as any organization of personal, material or immaterial means under the direction of an employer for the achievement of economic, social, cultural or beneficial goals with a determined legal personality.

The last paragraph is the one relevant for the purposes of this work. But, before entering the discussion around this concept, we will try to present a brief description of the legal framework of the employment relationship, which will help to understand the problems of the Chilean notion of employer.

The Labour Code establishes a detailed regulating standard for employment contracts. Article 6 of the Code determines that an employment contract may be individual or collective. For the purpose of this paper we will limit ourselves to the examination of individual employment contracts, as defined in Article 7.

An individual employment contract¹⁰ is an agreement by which the employer and employee are mutually obliged, the latter to render personal services as a dependant and subordinate, and the former to pay a determined salary for such services¹¹. The individual

⁹ A more detailed work is under revision as part of a collective forthcoming publication, the chapter has for title: "Chile: The tension between judicial principled interpretation and statutory overregulation".

¹⁰ In relation to the features of the employment contract see: Walker Errazuriz F., Arellano Ortiz P., *Derecho de las relaciones laborales, Volume 1 Derecho Individual del Trabajo*, Editorial Librotecnia, Santiago, 2016, 190-192.

¹¹ According to Article 7 of the Labour Code.

labour right is embedded within this conceptual framework, as well as the consensual character of the employment relationship.

The consensual contract is understood such that in order to exist the contract it solely requires the agreement between the contracting parties, the employee and the employer. More explicitly this means that if both sides agree upon the services to be rendered and the remuneration to be paid for such services, an employment contract exists. However, in view of protection, the legislator requires a certain structure of contract in order to provide protection for the employee and also to safeguard the agreements concluded under the contract.

The formalities for concluding an employment contract are established in Article 9 of the Labour Code, indicating that the contract is consensual and must be laid down in written form in two copies, each signed by both parties of the contract. The employer must produce the written contract within a period of fifteen days after recruiting the employee, or within five days in the case of contracts regulating determined services for less than thirty days. Non-compliance on behalf of the employer will be subject to a fine from the Labour Inspection Office.

In case the employee is unwilling to sign the written contract, the employer must send the contract to the corresponding Labour Inspection Office in order to request the employee's signature. If the employee insists in his/her unwillingness, he/she can be dismissed without any right to compensation, unless he/she can prove that he/she had been recruited under circumstances which differ from the ones established by the written document.

The most relevant aspect related to the concept of consent has to do with the nonfulfillment of the employer's obligation to produce a written employment contract. Without a written document the law assumes that the conditions of the contract are the ones declared by the employee. In other words, the contents of the contract are defined by the employee. This is considered as a manifestation of the principle of primacy of reality¹². According to the Uruguayan author Américo Plá, this principle means that, when there are differences between what is established in the documents and what is happening in reality, eventually what happens in practice prevails. This principle has been widely recognized by the Chilean doctrine and is also found in other legislations¹³. This principle has also international recognition in ILO's Employment Relationship Recommendation, 2006 (No. 198), in particular in its paragraph 9.¹⁴

The concept of consent is of utmost importance within the Chilean system of labour relations. It is common that the employer does not formalize the employment contract in a written document. This has several reasons, as for example to avoid paying taxes or social security contributions or to avoid registering employees under his/her responsibility. In these cases, the courts have the competence to determine if the contract was notarized within the legal timeframe, or on the contrary apply legal sanctions according to the content indicated by the employee. In any case, the contract is considered as existing as soon as there is consent between the parties.

¹² Primacy of reality is used as a synonym of primacy of facts.

¹³ See Arellano Ortiz P., *Chile: The tension between judicial principled interpretation and statutory overregulation*, forthcoming publication.

¹⁴ The full text of the Recommendation can be consulted in the following link:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R198.

Going back to the concept of employer, Chilean doctrine is not unanimous on the meaning and role of the elements of the current definition, it exists even a great debate aiming for a reform of the notion. However, when subcontracting and temporary employment agencies, and also recently with the Multi RUT reform, were introduced the definition remained almost untouched. The main problem raised by the doctrine was the element of “individual legal entity”, which it was considered that led to the undermining of individual and collective rights by the eventual abuse of division of the employer in many entities (different RUTs) or by just simple absorption, merging or division of the companies¹⁵.

In the next section we will revise the regulation introduced that tried to tackle this controversy and at the same time adapted the labour code to the current development regarding the notions of employer and its responsibilities.

3. Outsourcing regulations: Subcontracting, Multi RUT and Temporary employment agencies¹⁶.

Under the regulations contained in the Chilean Labour Code it is possible to organize business activities in a way that production is structured on the basis of outsourcing, be it through contracting services or the execution of certain works by a third person, as in subcontracting, or be it through the provision of labour by a third person. Both cases correspond to the concept of outsourcing and hence productive decentralization. In general outsourcing corresponds to works and activities which do not form part of the main business activities of the main company, like transitory or temporary functions¹⁷.

The subcontracting arrangement is defined under Article 183-A. The definition identifies three categories of parties: the Principal company (main company) the contractor or subcontractor and the employee who is dependent on the contractor or subcontractor. This provision establishes that subcontracting is the activity performed under an employment contract by an employee for an employer, who is denominated as the “contractor” or “subcontractor”, who through a commercial agreement, executes works or performs services at his own expense and risk for a third natural person or legal entity that is the owner of the work and denominated as “Principal company”. The relationship between the Principal company and the contractor (or the contractor and the subcontractor) is regulated by a civil

¹⁵ See the debate in: Ugarte Cataldo J.L., *El concepto legal de empresa y el Derecho Laboral Chileno: cómo salir del laberinto*, in *Revista Laboral Chilena*, Febr-Mar, 2012, 54-68; Gamonal Contreras S., *Los grupos de empresa en Chile: tensiones y problemas*, in *Revista Laboral Chilena*, 2006, Issue 9/10, 68; Ugarte Cataldo J.L., *El concepto legal de empresa en el derecho laboral chileno: mucho ruido, pocas nueces*, in *Revista Laboral Chilena*, 2001, 7, 60; Ugarte Cataldo J.L., *Suministro de trabajadores y trabajo temporal en empresas sin trabajadores*, in *Cuaderno de Investigación No. 10*, Dpto. de Estudios Dirección del Trabajo, junio de 1999; Tapia Guerrero F., *El concepto de Empresa y los derechos sindicales en el Derecho chileno del Trabajo*, in *Estudios en homenaje al Profesor William Thayer A.*, Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social, Santiago, 1998.

¹⁶ Law No. 20.123, from October 16, 2006, introduces a new regulation related to this matter, drastically modifying existing standards. Formally Articles 64 and 64a of the Labour Code, which formed part of Chapter VI Book I Title 1 on the protection of compensation payments, were repealed and a new Title 7 on the subcontracting of work and services and on the supply of temporary labour in temporary employment agencies was added.

¹⁷ For a revision of these two concepts from a Latin American perspective see: Ermida Uriarte O., Colotuzzo N., *Descentralización, Tercerización, Subcontratación*, OIT, Proyecto FSAL, Lima, 2009; Sanguinetti Raymond W., Carballo Mena C. (eds.), *La tercerización empresarial en América Latina*, Palestra, Lima, 2019.

or commercial agreement, the relationship between the contractor or subcontractor and the employees by an employment contract¹⁸.

When analysing the phenomenon of subcontracting it may be interesting to explain the problem of multiple RUT identification numbers¹⁹, which is a very particular issue in the Chilean context. In terms of labour law it can be observed that a company appears for all or for some purposes as different legal entities with different RUT numbers. Hence employees of one company may have different contracts depending on the services they deliver. For example, cleaning staff is hired by a legal entity with a different RUT than the principal company, and other employees of the same company under a different contract may have a better regulation of their labour relationship with wider benefits. However, all employees, independent of the legal identity of their employer, contribute to the principal company's business activity.

This phenomenon of multiple RUT identification has different impacts, as a company may deliberately divide itself and thus its staff in order to avoid the formation of unions. On the other hand, individual rights may be affected as for example in the case of calculating benefits based on profits.

In order to reduce the negative effects of this multiple RUT identification phenomenon, a reform of the regulation regarding the definition of a company was made²⁰ and incorporated a series of rules, considering the scenarios when employees are recruited by different companies which are themselves associated - as for instance in the case of retail business - and this affects labour rights, individual and collective rights, and the right to social security benefits. The new provisions aim at identifying the actual employer, thus protecting the individual or collective rights of the employees and ending the practice of multiple RUT. The employer in the facts will be the responsible and not necessarily the one that appears on the individual labour contract, thus another manifestation of the principle of primacy of facts previously mentioned.

The new paragraph 4 of Article 3 indicates that two or more companies will be considered as one single employer for the purposes of labour rights and social security, when they share one *common management* and when the products they sell or services they provide are similar or complementary, or when they are under the same controlling institution. Consequently, from this new paragraph 4 it can be concluded that it is not enough to have one common management, but it is also necessary to fulfil at least one more additional requirement such as the similarity or complementarity of the business activities of the different legal entities that recruit the staff or the existence of a common controlling body. Interpretation of the first requirement is rather flexible, so in certain cases a court ruling may be necessary in order to clearly define this matter. In the case of the common controlling body, the range of possible interpretation is narrower, as Law No. 18.045 on stock market regulations defines the condition of a controlling body of a corporation. The same paragraph 4 of Article 3 also

¹⁸ This paragraph does not apply to works or services which are executed or provided sporadically. This means that under the principle of subcontracting the services have to be permanent, habitual, and periodical or following a certain time pattern which is neither brief, nor specific, nor transitory. Hence, in Chile it is possible that the main business activity of a company is subcontracted when the requirements of a permanent, habitual and periodical activity are met.

¹⁹ RUT (Rol Único Tributario) is the tax identification number of any natural or legal person in Chile.

²⁰ Law N° 20.760, from July 9, 2014, modified Article 3 of the Labour Code.

provides that the mere circumstance of participating in the ownership of a company does not as such constitute an element of the condition identified in the above section, meaning that participation constitutes only a possible indication of a common management, and as such does not necessarily constitute a determining factor for the definition as one single employer.

One important feature is the one of paragraph 6 of Article 3 which points out that companies complying with the provisions of section four will have joint liability for the compliance of labour law and social security obligations stipulated by the law in relation to all individual or collective contracts. According to this, the law expressly establishes solidary responsibility of companies with a determined legal identity, which form one actual employer, so that a possible creditor may claim either of them or all of them as responsible for the complete fulfilment of one or several obligations, in this case those of labour or social security nature.

The solution against possible fraud through the use of multiple RUT identification is mainly provided by the rule contained in paragraph eight of the same provision, which indicates that the employees of all the companies which are considered as one single employer may form one or several unions or maintain their existing organizations; they may furthermore bargain collectively with all or any of the companies which have been considered as one single employer. These multi-company unions, which exclusively comprise dependent employees of companies which have been declared one single employer, may present a draft of collective agreements, and the employer has the obligation to discuss with these unions.

Matters resulting from the application of the provisions regarding the misuse of RUT numbers shall be decided by a labour judge who shall resolve the matter upon informing the Labour Inspection Office. Labour Court judges have the right to request information from other public institutions in order to do so. The exercise of judicial action derived from the application of paragraph 4 of article 3, as well as the definite court decision, must furthermore consider the provisions contained in Article 507 of the Labour Code²¹.

In this context Chilean labour legislation sanctions these fraudulent practices²², which aim at evading the obligations resulting from the employment relationship through determined actions, and become relevant when identifying the employer as part of this relationship, or when exercising the rights provided under the employment contract. These principles of simulation and subterfuge are sanctioned as illicit labour practices. The paragraph 3 of the Article 507 determines the content of the judge's decisions, when the latter totally or partially

²¹ The law provides that judicial action derived from the application of section four of Article 3 of the Labour Code may be exercised by the unions or employees of the respective companies who consider that their labour or social security rights have been violated. Moreover, it is established that these actions may be undertaken at any time, except during the periods of collective bargaining as mentioned in Chapter I Title II Book IV of the Code, and when the court procedure exceeds the deadline of collective contract presentation, when the date of presentation of the project for collective contract, the terms and effects of the collective bargaining process must be suspended while the aforementioned action is pending resolution. Due to the latter, it will be understood that the effectiveness of the collective instrument in force is extended until 30 days after the judicial resolution is firm, day in which the negotiation shall be resumed in the manner determined by the court and the law.

²² Non-compliance with labour obligations previously regulated in Article 478 is currently contemplated by Article 507. This article was first modified by Law 20.123 from 2006, establishing severe sanctions for cases of contract simulation. More recently Law 20.760 from July 9, 2014 substitutes the previous text in accordance with the new definition of the Company contained in Article 3.

relates to the actions taken by the employees of unions, in cases of fraudulent practices. The judge's decision recognising the employment relationship shall contain the following:

1. Identity the companies which are considered as one single employer for the purpose of labour and social security matters, in accordance with the provisions of section four of Article 3 of the Code.
2. Indicate concrete measures to be taken by the employer in order to comply with his/her obligations as such, in terms of compliance with labour and social security law and the payment of all corresponding benefits, under penalty of 50 or 100 monthly tax units²³, which may be repeated until obtaining due compliance with the decision.
3. Determine whether the alteration of the individuality of the employer is due to contract simulation by a third party, or to the use of any subterfuge in order to hide or alter identity or property, and whether this has resulted in the non-compliance of labour and social security obligations as established by the law or convention. In case the Labour Court determines such circumstances, it must precisely indicate the actions which constitute such simulation or subterfuge and the labour and social security rights thus violated, and apply a penalty of 20 to 300 monthly tax units. In these cases, the penalties established in section five of Article 506 of the Labour Code will be applicable.

For the purposes of this study it may be interesting to add that paragraph 4 describes what is to be understood within the concept of subterfuge:

- a. any malicious alteration performed through the establishment of different company names;
- b. the creation of legal identities;
- c. the division of the company, and other actions whenever these imply the diminution or loss of employees' individual labour rights (specially profit sharing and severance payments per years of service) or collective labour rights (specially the right to unionization and collective bargaining).

Article 507 also provides that the judge's final decision must be applied to all employees of the companies which are considered one single employer for all labour and social security purposes. This provision is of utmost importance for employees, as the results of the sentence are automatically transmitted to all employees of the companies declared as one single employer, even to those employees who have not taken court action and those who have any kind of legal relationship with the companies for the purpose of providing personal services under dependence and subordination.

Furthermore, Law No. 20.123 introduces the concept of regulating the supply of employees by means of temporary employment agencies, which constitutes our third example of development regarding the notion of employer. The purpose of this regulation is to allow for certain frequently occurring qualified cases²⁴ in the companies where the availability of temporary workforce is convenient in order to comply with different changing

²³ The monthly tax unit (Unidad Tributaria Mensual, UTM) is an account unit which is updated according to inflation used in Chile for tax purposes and fines. Its value is set on a monthly basis and varies depending on the inflation rate. As an example, in March 2018 its value was 47.301 CLP (78USD).

²⁴ These cases are explicitly established in Article 183-N of the Labour Code.

production events. In this context the supply of transitory employees is considered to be exceptional and the only way for intermediation on the labour market for a private company, under the belief that an adequate regulatory framework benefits job opportunity for the unemployed. Under this concept a specific contract for the provision of transitory services is established, where the employment relationship is clearly determined, with the disciplinary power remaining with the user company and the contractual relationship, including the payment of salaries, with the temporary employment agency.

This type of arrangement considers 3 parties²⁵: the user company, the temporary employment agency and the temporary services employee. The first, which can be a natural or legal person, agrees with a temporary employment agency (which must be a registered legal entity with a determined company purpose) upon the supply of workforce to carry out transitory or occasional services or tasks in the user company under the circumstances defined by the law. A supply contract regulates the relationship between the user company and the temporary employment agency, while the relationship between the temporary services employee and the temporary employment agency is ruled by a transitory services employment contract, which is a special contract with certain particularities. The user company is entitled to exercise certain powers in relation to the employee within the limits of the employee's basic rights.

One of the particularities of this contract is that on one hand it must have the same content as the employment contract; on the other hand, it is also an agreement which establishes mutual obligations. However, in this case the underlying formality is not consensus, but the contract has to be concluded in written form in order to exist²⁶.

The supply of workforce in the case of the temporary employment agency is a situation which is conceived as exceptional. This type of contract may only be concluded under the conditions exhaustively indicated in Article 183-Ñ of the Labour Code, that establishes that a contract to supply transitory services employees may be celebrated under the following circumstances in the user company:

- a) suspension of the employment contract or the obligation to provide services, as applicable, of one or several employees due to medical leave, maternity leave or holidays;
- b) extraordinary events, such as the organization of congresses, conferences, trade fairs, expositions or other events of similar nature;
- c) specific new projects of the user company, such as the construction of new facilities, the enlargement of existing facilities or the expansion to new markets;
- d) the initiation period of activities in new companies;
- e) occasional or extraordinary increases, be they periodical or not, of the activity of a determined section, department, project or establishment of the user company; or
- f) urgent, precise and undelayable activities which require immediate execution, such as repair works on the facilities and services of the user company.

Furthermore, the supply of transitory workforce is not permitted in the following cases²⁷:

²⁵ Article 183-F of the Labour Code.

²⁶ According to Article 183-R.

²⁷ Article 183-P.

- a) To perform tasks that entail the representation of the user Company, such as general manager, assistant manager or legal representative;
- b) To replace employees under legal strike declared during the collective bargaining process;
- c) To assign employees to other temporary employment agencies.

In the case of infringement of this provision, the employee will be considered as dependent in relation to the user company and his/her contract will become a contract of indefinite duration. Moreover, the user company will be subject to administrative sanctions on behalf of the respective Labour Inspection Office, corresponding to a fine of 10 monthly tax units for each employee recruited without compliance to the provision.

In addition to this rule, some others have been adopted in order to avoid abuse - the rules transform this type of temporary contract into an indefinite labour contract in the following cases:

- When the employee continues providing his/her services after termination of the scenario which originated his/her recruitment (Article 183-T²⁸)
- When the assumption under which the employee is recruited differs from the provisions contained in Article 183-Ñ or when the recruitment has the purpose to conceal a permanent labour relationship (Article 183-U²⁹)
- When the user company hires transitory services from companies which are not registered as temporary employment agencies with the Labour Office (Article 183-AA³⁰).

4. Final reflections.

In these lines we have tried to briefly described the regulations regarding the notion of employer under the Chilean labour law. As it can be observed, that the phenomenons that are present globally can also be found in the Chilean regulations.

Overall, the Chilean regulation has an overdetailed regulations regarding the liability of employer, as single employer or as one of the multi-employer structures, as explained

²⁸ Article 183-T establishes that in the case that the employee continues to provide services after expiration of the duration of his/her employment contract, this contract automatically turns into a contract of indefinite duration and the user company turns into his/her employer. For all legal purposes labour seniority starts to count from the date of the initiation of services provided for the user company.

²⁹ Article 183-U establishes that employment contracts celebrated under different assumptions than the ones justifying the contracting of transitory services according to Article 183-Ñ, or which have the purpose to disguise a permanent labour relationship with the user company, will be regarded as fraudulent practice under the law and will exclude the user company from the application of the standards of the second paragraph. Consequently, the employee will be considered as dependent on the user company, and his/her relationship with the company will be governed by the standards of common labour law, without prejudice to any corresponding sanctions.

³⁰ Article 183-AA establishes that any user company which recruits any transitory services employee from companies which are not registered with the Labour Office will be excluded from the application of the standards of the second paragraph. Consequently, the employee will be considered as dependent on the user company, and his/her relationship with the company will be governed by the standards of common labour law, without prejudice to any corresponding sanctions. Moreover, the user company will be subject to administrative sanctions from the Labour Office, corresponding to a penalty of 10 monthly tax units for each employee recruited.

subcontracting and temporary agencies of work. The case of the Multi RUT regulations clearly shows an abuse of the law to undermine individual and collective labour rights, as well as social security law.

Taking into account the context here presented the role of Labour Inspectorate Office and Labour Courts is vital to the effectiveness of the labour regulations. They can also bring certainty to the interpretation of elements which today are necessary to define the concept of employer, such as common management or economic unit. Certainly, administrative or judicial jurisprudence is key to understand how the development here presented are implemented and understood in practice by employer and employees in Chile. A study of the jurisprudences exceeds the purposes of this work but it can definitely complement what we have analysed.

As it may be observed the Chilean labour market is quite fragmented³¹, not only due to the existence of an important number of non-standard forms of employment contract but also by the diverse forms that the employer may take. The arrival of new business models using digital or other new technology may cause further changes to the regulatory frameworks as well as to the rights and benefits of employees. At present, it seems difficult to assess these effects, but they must be studied in detail in order to develop new regulations and/or policies to protect workers under these employment relationships.

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³¹ For a longer explanation on the structure of the Chilean labour market see: Arellano Ortiz P., *Chile: The tension between judicial principled interpretation and statutory overregulation*, forthcoming publication.

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