

Temporary Contracts, Precarious Employment, Employees' Fundamental Rights and EU Employment Law

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Committee on Petitions, European Parliament,
Brussels, 22 November 2017

1. Basic concepts

- **Demutualisation of risks:** transfer from employer and the state to the worker
 - Shifting of the risk of a drop in demand through the use of atypical work (e.g. Zero-Hours Contracts, Flexi-Job Contracts and Fixed-Term Contracts)
 - Shifting of the operational risk through the use of franchise agreements
- Precarious work as a '**constantly moving target**'
- EU law supportive of a **rights-based approach against precarious work**

1. Protective gaps and precarious work

Type of gap	Indicators
Employment protection gaps	<p>Minimum standard gaps: minimum wages, maximum hours, paid holidays, sick pay, pension</p> <p>Eligibility gaps: employment status, age, length of job, hours or income thresholds</p> <p>Upgrading gaps: regulated pay progression in line with cost of living</p> <p>Integration gaps: fragmentation due to outsourcing: limited rights to move to stable contracts or change hours</p>
Representation gaps	<p>Institutional gaps: lack of unions, works councils at workplace, social dialogue at sector or inter-firm contracting</p> <p>Eligibility gaps: lack of access to institutions due to employment status, contract, hours, location</p> <p>Involvement gaps: lack of organising efforts or efforts to involve in institutions or access to managers as agents of the employer</p>
Enforcement gaps	<p>Mechanism gaps: gaps in access, process, inspections, sanctions, whistle-blower protection</p> <p>Awareness gaps: gaps in knowledge about rights, gaps in transparency</p> <p>Power gaps: fear of loss of job or residency rights, fear of exclusion from unemployment support, lack of access to employer</p> <p>Coverage gaps: extent of unregistered workplaces, information and illegal employment</p>

2. The individual dimension of precariousness: The problem

Types/levels of gaps	Zero-Hours Contracts (ZHCs)	Flexi-Job Contracts (FJs)	Fixed-Term Contracts (FTCs)
Employment protection gaps	Lack of employee/worker status (mutuality of obligation)	Exclusion of pay, overtime pay and annual leave from the concept of remuneration	No justification re first use of FTCs
Representation gaps	Limited scope for trade union representation due to employment fragmentation	Lack of application of collectively-agreed pay rates to FJs workers	Exclusion of fixed-term workers from collective agreements/representation of interests
Enforcement gaps	Lack of awareness Fear of victimisation	Limited access to information about working conditions (especially in the case of part-time FJs)	Nature and extent of sanctions regarding abuse of fixed-term contracts

2. The individual dimension of precariousness: The relevance of EU law

Levels of gaps/type of atypical work	Zero-Hours Contracts , Flexi-Job Contracts and Fixed-Term Contracts
EU primary law	<ul style="list-style-type: none">• Inclusive approach regarding working conditions : emphasis on human dignity and health and safety (see, in particular, Article 31 CFREU)• Constitutionalisation of the principle of equal treatment• But self-restraint by the CJEU: in contradiction to explicit EU competences and evolved EU primary law (e.g. protection from unjustified dismissal)
EU secondary law	<ul style="list-style-type: none">• Mixed protection afforded by the Atypical Work Directives:<ul style="list-style-type: none">• Inclusion, albeit incomplete, of casual workers in the personal scope of application• Problems related to the issue of the comparator and the scope for justification of unequal treatment• Relevance of equality legislation (but limited to protected characteristics)
EU Member State	<ul style="list-style-type: none">• National procedural autonomy in devising sanctions can be a practical disabling factor of effective sanctions for abuse of fixed-term contracts (e.g public education sector in Italy)

3. The Collective Dimension of Precariousness: The Case of Franchising

- ❑ The franchise structure may operate as a **restraining, or even disabling,** factor of workers' effective representation and therefore being a chief driver of **representational precariousness**.
- ❑ This effect is potentially attained by firms capitalizing on the associated fragmentation of workforce for either:
 - **'excluding'** workers from representation structures altogether
 - or **restraining** voice to **'ineffective' smaller sites**, while simultaneously weakening the strength of any part of the workforce enjoying representational rights
- ❑ Franchising should be considered as a high-risk enabler of representational precariousness only to the extent that **law fails to sufficiently dissociate business fragmentation from voice fragmentation**

Franchising and Protective Gaps

EU Primary Law

- Strong **Fundamental Collective Labour Rights Protection** (CFREU)
- **Competence social policy gaps** for freedom of association and industrial action (153(5) TFEU)

EU Secondary Law (Information & Consultation Directives)

- **‘Controlling undertaking’** and thresholds (EWCD)
- **‘Undertaking’** and **‘establishment’** and thresholds (*ICD*)
- **‘Establishment’** and numerical thresholds (*CRD*)
- Reference to direct employer and employee seems to generally preclude application of the information and consultation structures for transfers of the franchisor to the network employers (*TUD*)
- **Employment protection (status) gaps**
- **Enforcement Gaps**: absence of a right to verify data for EWC, lack of specific sanctions for violations of the Directives

Member States’ Level

- Secondary gaps **enable** Member States to affect the coverage of the Directive by means of national rules on employment status (subject to effectiveness)
- **National diversity of regulatory structures** of collective bargaining and industrial action could **negatively affect effective representation structures** in franchise networks (e.g prohibition of secondary strikes, collective bargaining thresholds)

4. Interplay between Different Policy Measures

- ❑ Working Time Regulation
- ❑ Right to Know of Employment Conditions
- ❑ Business fragmentation, atypical employment and representational precariousness

Call for an integrated policy approach to precarious work

- Need for **holistic work across boundaries within EU law** to tackle transfer of risk
- Socially-progressive goal of reducing precarious work:
 - **Inclusive** labour standards
 - Principle of **equality**
 - **Effectiveness** of labour standards
- Possible challenges
 - **Political challenge** for the EU institutions, EU Member States and the social partners
 - Urgency of action across different domains
 - **Division of competences** between EU and EU Member States
 - Articles 153(1)(a) and (b) TFEU on health and safety and working conditions and relevance of human dignity (Article 31 CFREU)

Matrix of policy recommendations

Principle	Recommendations
Inclusiveness	<ul style="list-style-type: none">- Extending employment protection<ul style="list-style-type: none">- EU definition of the notion of ‘worker’ that applies across EU labour law- Promotion of complementary means (e.g. multi-level collective agreements)- Mainstreaming franchising in the information and consultation directives
Equality	<ul style="list-style-type: none">- Promoting equality and limiting temporal and organisational control precariousness<ul style="list-style-type: none">- Address the issue of minimum hours of work (either through the Working Time Directive or the Part-Time Directive)- Obligation to pay the minimum wage or, where higher, the agreed contractual wage for all time spent on-call
Effectiveness	<ul style="list-style-type: none">- Developing more holistic mechanisms for ensuring the effectiveness of labour standards<ul style="list-style-type: none">- Improved access to information regarding employment conditions, including in the case of franchise networks- Access to justice, including effectiveness of remedies (e.g. application of general remedial rules to Directives on atypical work)- Workers’ right to verify data given by multi-national undertakings on the number and categories of employees for determining the possibility of setting a EWC

Thank you!

European Parliament (2017) Temporary contracts, precarious employment, employees' fundamental rights and EU employment law, Committee on Petitions

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