

SOCIAL PROTECTION OF WORKERS IN NON-STANDARD FORMS OF EMPLOYMENT IN SLOVENIA

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Summary

The article deals with legal position of individuals who work in various non-standard forms of employment in Slovenia. The author analyses labour law protection and social position of workers, carrying out the work in forms of temporary work (fixed-term employment, temporary and occasional work of students and retired people), in employment relationships with more than two parties (temporary agency work), and also the position of false self-employed and economically dependent persons. It is evident that these forms of work are not precarious on their own, since Slovenian legislation provides the workers with rather proper protection during the period, in which they work, and moreover, these workers are also entitled to rights from social insurance schemes (in narrower of broader scope). The situation is different in cases of abuse of these forms of work and in cases of false self-employed persons and other disguised employees, when workers are only entitled to a limited scope of rights in spite of working in relationships with elements of a standard employment relationship. In order to prevent these cases, not only additional legislation solutions and labour market measures are needed, but labour inspection will also have to be increased and furthermore, the awareness of employers and the society regarding long-term impacts of use of such non-standard forms of work will have to be raised.

Keywords: *non-standard forms of work; atypical employment contracts; student work; temporary agency work; false self-employed; economically dependent persons.*

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1. ABOUT NON-STANDARD FORMS OF EMPLOYMENT IN GENERAL

In the past decades, factors such as globalization, greater competitiveness, fast technological development, the expansion of services and consequentially modified forms of work organization, have affected employment relationships. New forms of work have started to develop (e.g. a zero-hour contract) and more flexible ones have started to grow (e.g. fixed-term employment contract, part-time employment contract). Moreover, the employers have started using outsourcing, franchising, subcontracting, supply chains, concessions, temporary agency work and similar business models, which caused (or possibly were the purpose of) externalization of employment relationships (transfer of employment relationships outside the company) or the so called avoidance of labour law obligations. This can take two courses of action: either the employer enters into a business cooperation with his former, now self-employed, employees (and other individuals), even though these individuals are in fact in a dependent relationship, or the employer (a leading company) transfers his/her formal obligations towards his/her employee to contractual partners, but in fact maintains a considerable influence over the employment relationships of those employees.¹

The so called non-standard forms of employment² have become a key characteristic of today's labour markets both in developed and underdeveloped countries. They represent different forms of employment, which deviate from the standard one – a dependent relationship between a worker and an employer, concluded for an indefinite term and for full-time. Considering their differences from standard employment forms, they can be divided into four groups – temporary employment (not for indefinite duration), part-time employments and on-call employments (not full-time), triangular employment relationships (not a direct relationship between the worker and the employer), and disguised employment relationships or economically dependent relationships (not an employment relationship).³

The spread of non-standard forms of employment affects the workers, the employers and also the labour market as a whole. Workers are often faced with precariousness – employment uncertainty and very poor working conditions. They receive low payment, work on unfavourable working hours, have few possibilities for internal training, are faced with the increased risk in relation to safety and health at work, they are also not included in worker representations and often not even in social

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- 1 See Reconsidering the notion of Employer in the Era of Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity, JILPT Report No. 15, The Japan Institute for Labour Policy and Training, Tokyo, 2016, p. 2.
 - 2 Different expressions are used in this regard (atypical form of employment, non-standard forms of work etc.). The use of the term non-standard forms of employment in this article covers atypical employment contracts as well as other non-standard forms of work, in which individuals carry out work for a contracting party for payment.
 - 3 Classification that follows from ILO study, Non-standard employment around the world: Understanding challenges, shaping prospects, International Labour Office, Geneva, 2016, pp. 7-8 (hereinafter: ILO, Non-standard...2016).

insurance schemes or are not entitled to all of the rights in those systems.⁴ Although the definitions of non-standard and precarious⁵ forms of employment cannot be considered equal, studies show that non-standard forms of employment are more often related to precariousness than standard forms.⁶ This is especially true for the abuse of atypical forms of employment or for the various forms of disguised employment relationships,⁷ in which workers end up because they have no other employment option. Even the employers, who choose non-standard forms of employment due to their flexibility and expenses benefits eventually figure out that these are only short-term advantages, while in the long run this means that the employer will lose specialized knowledge, creativity and loyalty, all of which can affect productivity and competitiveness of the employer. From the labour market perspective, the problem of non-standard forms of employment is the increased segmentation on the market and employment uncertainty, which mostly has an impact on the younger population, affects their credit capacity and consequentially their ability to become financially independent from their parents and to create their own family.⁸

The International Labour Organization⁹ therefore warns of the need for appropriate national legislation solutions in relation to the minimum rights of workers in non-standard forms of employment, prevention of abuses in these forms of employment, especially in disguised employment relationships as well as a proper sharing of obligations in triangular forms of employment. It also highlights the importance of trade union organizations in these forms of employment, which defend their interests before the employers, and the validity of collective agreements also for workers in those forms of employment. In order to grant social security rights to the workers in non-standard forms of employment, countries should accommodate social insurance schemes and enable all workers an easier transition between employments with proper social policies.

The European Union, which in general encourages the development of new forms of employment, innovative business models and self-employment, simultaneously alerts of the necessity to prevent their abuse. In its resolution adopted in 2010,¹⁰

4 These are all risks, of which ILO warns in relation to non-standard forms of work in its study, as well as other studies. See *infra*, the next footnote.

5 About precariousness see Rogers, G. and J., *Precarious jobs in labour market regulation: The growth of atypical employment in Western Europe*, International Institute of Labour Studies, Free University of Brussels, Brussels, 1989, p. 3; Koukiadaki, A., Katsaroumpas, I., *Temporary contracts, precarious employment, employees' fundamental rights and EU employment law*, study for the Committee on Petitions of European Parliament, 2017, pp. 20-22; ILO, *Non-standard...*, 2016, cit., p. 18; McKay, S. et al., 2012, p. 82ff; see also ILO, *Meeting the challenge of precarious work*, International Journal of Labour Research, 2013, Vol. 5, Issue 1, International Labour Office, Geneva.

6 ILO, *Non-standard...*, 2016, cit., p. XXIII.

7 More about this see Eurofound, *Exploring the fraudulent contracting of work in the European Union*, Publications Office of the European Union, Luxembourg, 2016.

8 ILO, *Non-standard...*, 2016, cit., p. XXIV.

9 See ILO, *Non-standard...*, 2016, cit., pp. XXIV, XV.

10 European Parliament resolution from 6 July 2010 on atypical contracts, secured professional paths, flexicurity and new forms of social dialogue, OJ C 351 E/39, 2. 2011.

the European Parliament condemned the replacement of regular employments with atypical forms of contracts, the latter leading to poorer and uncertain work conditions,¹¹ and it also stressed the need to ensure basic rights to all workers regardless of their employment status and pointed out the issue of false self-employment.¹² The European Commission issued a Communication in 2012,¹³ in which it invited the Member States to consider ensuring proper contractual regulations to fight labour market segmentation in their labour reforms, in which regard it also emphasized the need to stop excessive use of non-standard forms of employment and abuse of false self-employment.¹⁴ The European Pillar of Social Rights signed in 2017¹⁵ follows this direction and it applies to three areas (equal possibilities and labour market access, fair work conditions and social protection and inclusion) and includes 20 basic principles. It follows from the 5th principle that workers have the right to a fair and equal treatment with respect to working conditions, access to social security and training regardless of the form and duration of employment; it specifies that the transition to indefinite employment is encouraged (first paragraph). Fourth paragraph of the same principle states that the employment relationships, which lead to precarious work conditions, should be prevented and it prohibits the abuse of non-standard forms of employment contracts. As for the 12th principle, workers and self-employed individuals in comparable conditions must have the right to proper social protection regardless of the form and duration of their employment relationship.

2. NON-STANDARD FORMS OF EMPLOYMENT IN SLOVENIA

The Slovenian legislation tolerates and regulates different forms of paid work for an employer (contracting party).¹⁶ Apart from the employment relationship (carrying out the work based on an employment contract) there are also other relationships, which are based on civil law or commercial contracts. In practice, employers cover most of their work needs by employing employees, but also often include individuals,

11 They include part-time work, temporary work, occasional work, fixed-term work, work from home and on distance and part-time work which lasts 20 hours a week at most. See point A of the resolution.

12 See points 36, 6 in 26.

13 Commission Communication "Towards a job rich recovery", Brussels, 18. 4. 2012, COM (2012) 173 final.

14 In this regard see also Opinion of the European Economic and Social Committee on 'Threats and obstacles to the single market' (own-initiative opinion), OJ C 161, 6. 6. 2013.

15 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights, Brussels, 26. 4. 2017 COM (2017) 250 final; also the working document, appendix to the communication, Brussels, 26. 4. 2017 SWD (2017) 201 final.

European Pillar of Social Rights was announced on 17 November 2017 in Göteborg, at Social Summit for Fair Jobs and Growth by European Parliament, Council and European Commission. See <https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_sl>(20.06.2018).

16 See Senčur Peček, D., *Zakonite oblike opravljanja dela, Podjetje in delo*, 6-7/2013, Ljubljana, pp. 921-943.

employed by temporary work agencies, and students (who work through student referrals) into the work process or transfer the work to self-employed individuals (who work based on a service agreement or business cooperation contracts).

According to the Statistical Office of the Republic of Slovenia¹⁷ in 2017 there were 974.000 economically active individuals in Slovenia, most of whom were employees – 771.000 (individuals in an employment relationship),¹⁸ 14.000 were temporary agency workers, 44.000 were working based on student referrals, 14.000 were working based on other forms of employment (for example based on a service agreement, occasional and temporary service agreement for retired people etc.), 115.000 were self-employed (among whom 12,5% or 14.000 were working without employees and for a single client).

The data on the development of widely spread forms of employment paints an even clearer picture. They show that in the past ten years, while the percentage of employees (people with an employment contract) has decreased,¹⁹ the percentage of self-employed individuals and temporary agency workers has increased.²⁰ The structure of employment contracts is also changing, since the percentage of part-time employment contracts is increasing and new employment contracts are mostly concluded for fixed terms.²¹

Thus, Slovenia also witnesses an increasing growth of atypical employment contracts and an even stronger growth of other forms of work, which replace the typical employment relationships. Even though the employers and their trade unions often state that the Slovenian labour market is stiff and demand more flexible labour legislation, the research shows that this is not true (anymore).²² Quite the opposite – as the president of the largest trade union confederation claims, the “flexibility has gone wild in the past few years” and as a consequence thereof, more and more people have to work in precarious working conditions.²³

The problem of precarization of employment in Slovenia is not only highlighted

17 See Statistical office of the Republic of Slovenia, Active and inactive population, 3rd quarter 2017, available at <<http://www.stat.si/StatWeb/News/Index/7092>>(20.06.2018).

18 Regular employment workers prevail (indefinite duration, full-time), 16,9% of workers carried out work based on a fixed-term employment contract, 10,2% based on a part-time employment contract.

19 In the period from 2008 to 2016 it dropped by 7,6%. See Statistical office of the Republic of Slovenia, Database SI-STAT 2017, available at <<http://pxweb.stat.si/pxweb/Dialog/statfile2.asp>> (20.06.2018).

20 See Ministry of Labour, Family Social Affairs and Equal Opportunities, For Decent Work, 2016, p. 6.

21 loc.cit.

22 Kanjuo Mrčela, A., Ignjatović, M., Od prožnosti do prekarnosti dela: stopnjevanje negativnih sprememb na začetku 21. stoletja, Teorija in praksa, 13/2015, p. 361.

23 Statement of Lidija Jerkič, the president of The Association of Free Trade Unions in Slovenia, the largest trade union in the private sector; consultation on precariousness. See STA, Nova normalnost na slovenskem trgu dela, 18.4.2018, available at <https://cekin.si/clanek/izobrazevanje_in_zaposlitev/to-so-novi-trendi-dela-ki-se-jim-ne-bomo-mogli-izogniti-prekarnost-delo-samostojni-podjetnik-fleksibilnost-zaposlitev-delovno-razmerje.html> (20.06.2018).

by the trade unions²⁴ and nongovernmental organizations,²⁵ but also by the labour law theory, which has been dealing with the problem of growth of non-standard forms of employment, their abuses and possible solutions for years.²⁶ Some of them have been taken into account in the labour market reform that took place in 2013, and which, among other things, also aimed to decrease the segmentation of labour market.²⁷ In the new Employment Relationship Act (hereinafter: ZDR-1),²⁸ the amended Labour Market Regulation Act (hereinafter: ZUTD)²⁹ and in other regulations, amendments considering fixed-term employment, agency and student employment applied, and a new category of economically dependent persons was introduced. As the analysis of a special commission for following the impacts of the legislation reform³⁰ has shown, the direction of the reform was right and it has already begun to create the first impacts. However, we cannot expect that the reform will yield results immediately, which is why new challenges have started to arise. The Ministry of Labour, Family and Social Affairs has announced its willingness to deal with these challenges in its document *For decent work* issued in 2016.³¹ This also demonstrates the fact, that non-standard forms of employment and the precariousness related thereto are a growing problem of the Slovenian labour market.

The following part of the article presents the most common forms of non-standard forms of employment and the risks they represent for the social position of workers in Slovenia. It also analyses the already implemented measures and proposed solutions that are yet to be accepted.

3. TEMPORARY WORK

3.1. General facts

The requirement of greater flexibility, desired by the employers, often applies to the possibility of the simplest, fastest and cheapest adjustment of the number of workers to the work process needs. Considering the protection in regard to the

24 Also 'Sindikat prekarcev'. See <http://www.sindikat-prekarcev.si/>

25 As Movement for decent work and welfare society (see <https://socialna-druzba.si/about-us/>), Delavska svetovalnica (see <http://www.delavskasvetovalnica.si/>) and others.

26 For example, see Kresal, B., *Fleksibilne ali prekarne oblike zaposlitve, Delavci in delodajalci*, 2-3/2011, pp. 169-183; Kresal, B., *Primerljivost delovnopravnega varstva v različnih oblikah zaposlitve, Delavci in delodajalci*, 2-3/2012, pp. 245-262; Senčur Peček, D., *Zakonite ...*, cit., pp. 921-943.

27 See Senčur Peček, D., *Spremembe in novosti, ki jih prinaša ZDR-1, Podjetje in delo*, 3-4/2013, 39, pp. 414-445; Kresal, B., *Pravna vprašanja nove ureditve zaposlitve za določen čas in agencijskega dela, Delavci in delodajalci*, 2-3/2013, pp. 169-193.

28 Employment Relationship Act, Official Gazette of the Republic of Slovenia, no. 21/2013 with amendments (ZDR-1).

29 Labour Market Regulation Act, Official Gazette of the Republic of Slovenia, no. 80/2010 with amendments (ZUTD).

30 See Second report of the Working group for following the impacts of the legislation reform, 21. 5. 2015.

31 See Ministry of Labour, Family and Social Affairs, "Za dostojno delo", March 2016.

termination of employment contract which labour law guarantees the employees in standard employment relationships, such flexibility is only possible in an atypical, fixed-term employment contract. Furthermore, in different legal systems, employers can also opt for different forms of occasional and temporary work (the so called casual work), which represent short-term work with no employment contract.³² In Slovenia, these forms of employment mostly include student work – temporary and occasional work of secondary school students and university students, and less commonly temporary and occasional work of retired persons. Employers who are in need of short-term workers sometimes conclude service agreements or agreements for providing copyrighted work, according to which the contractor is obliged to produce a certain result³³ and which are often a cover-up for disguised employment relationships.³⁴

3.2. *Fixed-term employment contract*

A fixed-term employment contract has been a common form of non-standard employment in Slovenia for a long time.³⁵ It differs from a typical employment contract in the fact that its duration is decided in advance – either specifically (by indicating a deadline or a date) or by description, which is why it is terminated upon the lapse of time or after the reasons for which it was concluded cease to exist.

Since the employment contract establishes an employment relationship, the employee, who concludes a fixed-term employment contract is also guaranteed labour law protection. The Slovenian legislation complies with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Directive 1999/70/ES),³⁶ which is based on the non-discrimination principle. The purpose of the Directive is to ensure that the employees, who are employed for a fixed-term, cannot be treated less favourably than the ones who work based on employment contracts of indefinite duration, except

32 See ILO, *Non-standard...*, 2016, cit., p. 7.

33 The subject of contract on ordering a copyrighted work is the creation of a copyrighted work in accordance with Article 5 of Copyright and Related Rights Act (Official Gazette of the Republic of Slovenia, no. 16/2007 with amendments, ZASP – UPB-3), the subject of a service agreement is the completion of a certain job such as creation or repair of things, some physical or intellectual work (Article 619 of the Obligations Code, Official Gazette of the Republic of Slovenia, no. 97/07 with amendments, OZ UPB-1), by which the contractor does the work independently and guarantees success (see Kresal Šoltes, K., *Podjemna pogodba (pogodba o delu) in presoja elementov delovnega razmerja*, Gospodarski subjekti na trgu na pragu EU, Inštitut za gospodarsko pravo, Maribor, 2003, p. 409). None of the civil law contracts can be the legal basis for a more permanent, dependent work which contains elements of an employment relationship (see art.13(2) ZDR-1).

34 See *infra*, chapter 6.

35 In 2006, Slovenia was fourth among EU Member States regarding the percentage of fixed-term employment contracts (17,3%). See *Employment in Europe 2007*, Office for Official Publications of the European Communities, Luxembourg, pp. 284-315.

36 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Directive 1999/70/ES), OJ L 175, 10. 7. 1999.

where unequal treatment is justified due to objective reasons. Payment, working hours and other working conditions have to be the same as those granted to the employees with an employment contract of indefinite duration.

Insurance of equal level of safety and health at work is specifically covered by Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to improve health and safety in the workplace of temporary workers.³⁷ Slovenian ZDR-1 also imposes upon the employer (who must ensure safe and healthy work to all workers) a special obligation to inform the professional worker or the professional department, carrying out tasks in the field of safety and health at work, of employing employees for a fixed-term (thus ensuring that they are included in all activities in regard to safety and health at work).³⁸ The reason for such regulation is in the discoveries of different lines of international research suggesting that fixed-term workers (and also temporary agency workers and other workers in non-standard forms of work) were often less included in the measures in relation to safe work and other forms of training.³⁹

Directive 1999/70/ES emphasizes that the employees, employed for fixed-terms, have to be taken into account when calculating the threshold, which the national legislation determines as relevant for creating representative bodies of employees. The Slovenian legislation does not contain any special provisions in this regard, but the Employees Participation in Management Act (hereinafter: ZSDU)⁴⁰ mentions “employees” when stating the requirements of establishing a works council, which includes all employees, both those who concluded a typical employment contract as well as those in an atypical employment relationship. The same applies to trade union organizations, participation in a strike and other collective rights.

The Slovenian legislation also does not exclude fixed-term employees from regulations applying to the rights of employees (even those, based on EU directives), for example, the protection of employees in the case of transfer of undertaking.⁴¹

Working conditions during fixed-term employment are therefore in general not less favourable (or should not be) solely due to the fact, that this is a non-standard form of employment. The same also applies to the inclusion of those employees in social insurance schemes. An employee, who is only employed for a fixed term, is, similarly as the employee who works permanently for the employer, also included in all four social insurance schemes in Slovenia – pension and disability, health, unemployment and parental security insurance, and is entitled to the rights, deriving from these insurances upon fulfilling the conditions.

37 Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to improve health and safety in the workplace of temporary workers, OJ L 206, 29. 7. 1991.

38 See art. 45(2) ZDR-1.

39 See ILO, *Non-standard...*, 2016, cit., pp. 200 and 207. Even though Directive 1999/70/ES specifically imposes upon the employers an obligation to provide these employees with as wide access as possible to training and improvement, professional growth and mobility, the Slovenian ZDR-1 contains no special provisions in this regard.

40 Employees Participation in Management Act, Official Gazette of the Republic of Slovenia, no. 42/07 with amendments (ZSDU).

41 See Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 082, 22. 3. 2001.

The fundamental difference between a fixed-term employment contract and an employment contract of indefinite duration becomes apparent in regard to the termination of employment contract. The Slovenian labour legislation (which is harmonized with the ILO Convention no. 158 on Termination of Employment at the Initiative of the Employer) protects the employee, employed for an indefinite period of time from the termination of his/her employment contract by forcing the employer to prove one of the termination reasons prescribed by law and follow a number of procedural demands (give the employee an opportunity for defence and upon his request notify the employees' representatives) as well as by granting some categories of employees special protection from termination.⁴² On the other hand, a fixed-term contract is, according to law, terminated upon the expiration of the term for which it was concluded. This occurs without the employer having to do anything, regardless of the circumstances on employee's part (even if he/she is ill, on sickness leave, pregnant, etc.).⁴³ The employee therefore faces the possibility of losing employment for the entire term of the fixed-term employment contract, is insecure about finding a new employment after termination (with the same or other employer, on employment contract of an indefinite duration or again for a fixed-term). In the case of shorter duration of an employment contract, the employee must also face the issue of fulfilling the conditions for obtaining the right to unemployment cash benefit (and also other rights from social insurance schemes). The amended ZUTD has also introduced a more appropriate regulation regarding this issue, since it prescribes that the person obtaining unemployment cash benefits must have been insured at least 9 months prior to the entitlement to such benefits (in the case of an unemployed person, younger than 30 it even only requires 6 months of prior insurance in the past 24 months).⁴⁴

Both Directive 1999/70/ES and the Slovenian ZDR-1 derive from the proposition, that a fixed-term employment contract is rather an exception, while an employment contract of indefinite duration is a rule.⁴⁵ In accordance with the Directive, ZDR-1 encourages the transition of employees in a standard form of employment by imposing an obligation upon the employer to inform fixed-term employees of a vacant job position for an indefinite term.⁴⁶ An easier transition from the fixed-term employment to the one of indefinite duration is also enabled by the possibility, that a fixed-term worker can be employed without the employer having to post a public announcement

42 In case of regular termination, the employee is also entitled to a period of notice and in some cases also to severance payment.

43 Since this is not a termination, but a lapse of time, the employee is not entitled to a notice period, but ZDR-1 grants an employee whose fixed-term contract expires (in some cases) the right to severance payment. This way, the position of an employee whose employment contract expires is somehow more similar to the position of an employee with an employment contract of indefinite duration, and severance payment also makes conclusion of fixed-term contracts less attractive to the employers from the perspective of expenses.

44 Under provisions of Parental Protection and Family Benefits Act (Official Gazette of the Republic of Slovenia, no. 26/14 with amendments, ZSDP-1) to obtain the right to parental compensation, one must have been insured twelve months the past three years. See Article 41 ZSDP-1.

45 See Art. 12(1) ZDR-1.

46 See Art. 25(4) ZDR-1.

of vacancy for this position.⁴⁷

The practice often displays a different trend. Despite seeking employees for a permanent period of time, employers do not offer employment contracts of indefinite duration to employees but rather conclude (also several times in a row) fixed-term contracts. Even though according to Directive 1999/70/EC, the Slovenian labour law legislation has introduced measures for preventing such chaining of fixed-term employment contracts fifteen years ago,⁴⁸ the data on the widely spread fixed-term employment contracts in the past show, that the employers have managed to bypass legal limitations.⁴⁹ Scholars have been warning of this issue for a long time⁵⁰ and the legislator has also provided stricter conditions for concluding fixed-term contracts in ZDR-1 with the intention of preventing the abuses of those contracts (the reason for concluding a fixed-term contract must be specified in the contract itself;⁵¹ time limitation is further specified⁵²) and has tried to discourage employers from concluding fixed-term contracts by raising some of the expenses related to them⁵³ and encourage the conclusion of contracts of indefinite duration by eliminating some formal requirements for terminating such contracts and by implementing a more employer-friendly regulation for probationary periods.

47 This is an exception to otherwise compulsory public advertisement. See fifth indent of Article 26(1) ZDR-1.

48 An employment contract could be concluded only upon the existence of one of the legally specified reasons; it was only possible to conclude one or more fixed-term employment contracts which could sum up to two years at the most; in case of the conclusion of a fixed-term employment contract in breach of legal provisions, the employee could demand acknowledgement that the fixed-term employment contract was transformed into employment contract of indefinite duration. See provisions 52 to 54 ZDR (Official Gazette of the Republic of Slovenia, no. 42/2002 with amendments). There is also extensive case law regarding the claims with respect to the existence of employment contracts of indefinite duration.

49 Different ways to bypass legal provisions were for example the conclusion of consecutive fixed-term employment contracts for the same work position with different workers, at two formally different but actually the same work positions and with rotation of workers between an employer and an agency for providing work to users.

50 See Kresal, B., *Zaposlovanje za določen čas v luči domače sodne prakse in primerjalno-pravne ureditve, Delavci in delodajalci, 2-3/2008*, volume VIII, pp. 215-245.

51 If such a reason is not stated in the contract, it is considered that an employment contract of indefinite duration was concluded. See judgments of the Slovenian Supreme Court, no. VIII Ips 39/2016 and VIII Ips 87/2017.

52 An employer must not conclude one or several fixed-term employment contracts (with the same or a different worker!) for the same job, whose continuous duration would be longer than two years, except in extreme (legally specified) cases. It is also specifically stated that the time limitation for carrying out the work for a fixed-term at user's premise includes the time for carrying out work through an agency. According to the legal provision, the same work means work at the work position and the same kind of work, which is actually carried out based on a certain fixed-term employment contract. See Article 55 ZDR-1. All provisions state that if the employer needs workers permanently, an employment contract of indefinite duration must be concluded.

53 Implementation of severance payment after termination of a fixed-term employment contract and raising contributions for compulsory insurance for unemployment in case a fixed-term employment contract is concluded.

Most recent data show that the number of fixed-term employment contracts in Slovenia is not increasing.⁵⁴ Nevertheless, we cannot conclude that the practice of fixed-term employment contracts in cases where workers are needed for a permanent period of time, is abolished. As a matter of fact, more than 70% of all new employment contracts in Slovenia are still fixed-term.⁵⁵ It is also not surprising that the number of fixed-term employment contracts is the highest among the age group between 15 and 24 years, since this is the young population, who normally seeks new employment.⁵⁶ Young people and those who lost their employment are therefore exposed to the risk of being forced to accept fixed-term employment, even if they are needed for a longer period of time.⁵⁷

The employment contract in itself, if concluded for a range of justifiable reasons and for the time period of the existence of such reasons, is not problematic. What is problematic is the chaining of fixed-term contracts in cases where workers are needed permanently and where concluding an employment contract of indefinite duration should have been the employer's first choice.⁵⁸ Such employment relationships can be considered as precarious forms of employment. Their characteristics are consistent uncertainty with respect to one's future employment and the necessity of constantly having to prove oneself, which causes high stress and far-reaching effects upon one's health. Furthermore, employees work even if they are ill despite having an option to take sick leave (presenteeism),⁵⁹ in order to impress their employers and keep their job. Employers also often decide the future of the employment relationship (whether they will conclude a new fixed-term contract and with which employees) based on employees' personal circumstances (maternity leave, disability, age), which means that this form of employment is very much discrimination-related.⁶⁰

3.3. Temporary and occasional work of students and retired persons

Temporary and occasional work of university and secondary school students

54 See Eurostat, *Statistics Explained*, Employment statistics, August 2015, table 5, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics (20.06.2018)

55 In 2015 there were supposedly 72,7%. See second report of the Working group for following the impacts of the legislation reform, 21. 5. 2015, p. 17.

56 According to Eurostat data from 2015 the percentage was 69,1% and Slovenia supposedly stood in second place in the EU. See Eurofound: *New forms of employment*, Publications Office of the European Union, Luxembourg, 2015.

57 Considering the fact that after the implementation of legal amendments, a fixed-term employment contract was more expensive for the employer than an employment contract of indefinite duration, it is safe to assume that the key motive for these contracts is still the flexibility they grant the employers.

58 It is disguising the true nature of the relationship.

59 Regarding the connection between employment insecurity and presenteeism see Eurofound, *Report on Psychosocial risks in the workplace in Slovenia*, 2012, p. 13 and Kanjuo Mrčela, A., Ignjatović, M., *Od prožnosti...*, cit., p. 372.

60 See also Kresal, B. v Bečan, I. et al., *Zakon o delovnih razmerjih s komentarjem*, Ius Software, GV Založba, Ljubljana, 2016, p. 294.

(the so called student work) is a well established form of work in Slovenia,⁶¹ while temporary and occasional work of retired persons has not been regulated until the 2013 amendment of ZUTD.

What both forms of work have in common, is that they can only be carried out by a certain group of people (persons with secondary school and the ones having university student status⁶² and retirement status in the Republic of Slovenia⁶³) and they are both based on a civil law contract. Students carry out work based on a special referral, issued by an intermediary (normally student service)⁶⁴ and retired persons based on the contract for temporary or occasional work as a special contractual relationship between an employer and a beneficiary.⁶⁵ The employer can easily include a student or a retired person in the work process for an agreed period.

Neither student work nor occasional and temporary work carried out by retired persons is an employment relationship. Nonetheless, students and retired people who carry out work on this basis, are granted limited labour law protection.⁶⁶ Namely, provisions of ZDR-1 regarding the prohibition of discrimination, sexual and other harassment, equal treatment of men and women, limitations with respect to the working hours, breaks and rests as well as civil liability,⁶⁷ and provisions regarding safety and health at work still apply. There is also a provision prescribing the minimum wage per hour, which in 2018 amounted to 4,53 EUR gross for retired persons and 4,73 EUR gross for students. Possible disputes between the employer and secondary school/university students or retired persons in relation to such work fall under the jurisdiction of labour law courts.⁶⁸ When carrying out temporary or occasional work, students and retired persons are entitled to the same working conditions as the employees (working hours, safety and health at work, etc.), as well as to minimum payment. However, in

61 Currently covered by the Employment and Insurance Against Unemployment Act (Official Gazette of the Republic of Slovenia, no. 107/2006, ZZZPB – UPB-1). It is a regulation that was cancelled and replaced by ZUTD, except for provisions from Articles 5 to 8, which regulate student work. These remain valid until the implementation of another special law covering student work.

62 Also, participants in adult education (who study according to the curricula of grammar, vocational, secondary and higher vocational education) younger than 26.

63 It does not include people who exercised the right to partial old-age or preliminary pension (and are still included in compulsory insurance for part-time).

64 The activity of providing work (which includes providing temporary and occasional work to secondary and university students) can be carried out by organizations, which meet requested staff, organizational and other requirements and obtain concession from the Ministry of Labour, Family, Social Affairs and Equal Opportunities.

65 ZUTD allows that the contract with a retired person is concluded for the provision of work, which has elements of an employment relationship (when normally an employment contract should be concluded). This is an allowed exception to the general rule, deriving from Article 13 ZDR-1. This Article stipulates that work containing elements of an employment relationship cannot be carried out based on civil law contracts, unless otherwise specified by a special law.

66 This is specifically allowed by Art. 211(7) ZDR-1 as well as by Art. 27a. ZUTD.

67 For secondary and university students, provisions of ZDR-1 on the special protection of workers, who have not yet reach the age of 18 also apply.

68 See Art. 5 of the Labour and Social Courts Act (Official Gazette of the Republic of Slovenia, no. 2/2004, ZDSS-1) and Art. 27a(3) ZUTD.

general their position is not entirely equal to the one of employees.⁶⁹

The purpose of temporary and occasional work is to enable students and retired people to earn extra money and the employer to easily fill his/her short-term need for workers. In order to prevent abuse of this form of work, which would substitute employment contracts,⁷⁰ ZUTD has imposed limitations on retirement work both for retired persons and for the employer. A retired person can only carry out work in the amount of 60 hours per calendar month⁷¹ and his/her income cannot exceed the sum of 6.775,36 EUR in a calendar year. Limitations with respect to the working hours also depend on the number of employees – the more employees an employer has, the greater the number of hours of occasional and temporary work can be carried out by an individual employee (from 60 hours per month if the employer has no employees to 1.050 if the employer has more than 100 employed workers).⁷²

Due to the stated limitations as well as the expenses required for this form of work,⁷³ retirement work has not been widely used in practice, which points to the fact it is indeed used in line with its purpose – when employers wish to fill temporary job positions.

The situation is entirely different with respect to student work. Despite the fact that this form of work is defined as occasional and temporary, no regulation prescribes its range neither for the student nor for the employer. Considering the fact that until 2015 this extremely flexible form of work has also been most favourable in terms of costs/expenses (due to low contributions), it is clear why student work in Slovenia is so common.⁷⁴ It has in fact become a form of regular, permanent employment for systemized work positions and has started to replace employment relationships. Even in these cases, when students are employed permanently and are in a dependent

69 Employees offer the employer their work permanently and exclusively and thus ensure their own existence; so labour law has to fully protect their position (by protection payment, the right to compensation in case of justified absences from work, protection from termination, etc.). For students and retired people carrying out occasional and temporary work is not their main activity. The legal position of students and retired people is therefore regulated by other regulations (not in the framework/scope of labour law).

70 Especially since based on a contract for temporary or occasional work of retired people it is allowed to carry out work, for which normally employment contracts should be concluded.

71 This limitation applies regardless of whether he/she works for only one employer or several employers (in this case the sum of the hours of work for all employers cannot exceed 60 hours). Furthermore, unused hours cannot be transferred into the next calendar month.

72 See Art. 27b (4, 5, 6 and 7) ZUTD.

73 The employer must pay the tax authority a special contribution in the amount of 25% (of the gross payment) as well as calculate and pay at his own burden the contributions for special cases of insurance under the Pension and Disability Insurance Act (Official Gazette of the Republic of Slovenia, no. 109/06 with amendments, ZPIZ-2) in the amount of 8,85% (of the gross payment) and a lump sum for insurance for injury at work or work illness (in the year 2018 this costed 4,86 EUR) and at the burden of the retired person he must also pay a contribution for health insurance under the Health Care and Health Insurance Act (Official Gazette of the Republic of Slovenia, no. 72/06 with amendments, ZZVZZ) in the amount of 6,36% (of his/her payment).

74 While in 2000, student work only accounted for 0,9% of economically active persons in Slovenia, in 2010 this percentage was 3,8%. See Kanjuo Mrčela, A., Ignjatović, M., *Od prožnosti...*, cit., p. 369.

relationship (similarly as employees), because they work based on student referrals, they are only granted limited labour law protection (they are not entitled to annual leave, reimbursement of expenses related to work, paid absence, etc.). This is a form of disguised employment relationship⁷⁵ and can be categorized as a precarious form of work.⁷⁶

Student work should undoubtedly undergo a thorough reform,⁷⁷ by taking into account the regulation of occasional and temporary work carried out by retired people. Albeit there have been certain attempts in this direction, a reform has not yet happened. Employers have temporarily lost interest in this form of work⁷⁸ due to their obligation to include student workers in social insurance schemes⁷⁹ and, consequently due to the increase of expenses for this form of work.⁸⁰

Under new legislation, apart from the rights entitled to for work injuries and illness insurance, students are also entitled to a proportional pension insurance period. This is calculated based on the payment they received for student work, so for every 60% of average monthly salary in the Republic of Slovenia⁸¹ that the student earns, they are granted one month of insurance period (but not more than 12 months for a single calendar year).

The latest data show that the number of student workers is slowly increasing again.⁸² Even though student work is burdened by the payment of contributions, it is still

75 Case law also includes cases when students, who formally carried out work based on student referrals (as student work), managed to prove the existence of elements of an employment relationship and, thus also recognizing their employee status. The first case, where the Supreme Court of the Republic of Slovenia has made such a decision (in relation to students who worked as stewardesses), was the judgment in case no. VIII Ips 129/2006 from 18. 12. 2007; the later judgments referring to student work are, for example, judgments VIII Ips 266/209 from 5.9.2011; VIII Ips 82/2013 from 14. 10. 2013, VIII Ips 54/2014 from 13. 5. 2014; VIII Ips 145/2014 from 17. 2. 2015; VIII Ips 16/2015 from 8.6.2015.

76 More on this, see *infra*, chapter 6.

77 Slovenia has already been warned by the European Commission about the need to reform student and contractual work as factors of segmentation of the labour market, which do not offer workers proper social insurance schemes and labour rights.

78 In 2014, student work accounted for 2,6% of economically active persons. See Kanjuo Mrčela, A., Ignjatović, M., *Od prožnosti*, cit., p. 369.

79 See the Act Amending the Fiscal Balance Act (Official Gazette of the Republic of Slovenia, no. 95/14, ZUJF-C).

80 Based on the amount on the referral, the employer is obliged to pay contributions for pension and disability insurance in the amount of 8,85%, a contribution for health insurance in the amount of 6,36%, contribution for work injuries and work illness in the amount of 0.53% and also the concession duty in the amount of 16,00% and an extra concession duty of 2,00% (money, raised on this account is used for scholarships, student housing and student organizations). The contribution for pension and disability insurance is also covered by students (in the amount of 15,50% of the amount stated in the referral). If, for instance, the amount stated in the referral is 100,00 EUR, the employer's expense amounts to 133,74 EUR and the amount paid to the student to 84,50 EUR. See also Scortegagna Kavčnik N., *Plačilo in drugi pravni vidiki študentskega dela, Delavci in delodajalci*, 2-3/2017, pp. 243-262.

81 In the year 2017 it equaled 1.626,95 EUR gross, which means that 60% of that amount was 979,17 EUR.

82 See UMAR, Report on development 2017, p. 33, available at <<http://www.umar.gov.si/>

one of the most flexible and cheapest forms of employment. Substituting employment contracts with student referrals therefore remains an issue on the Slovenian labour law market, which is why revealing disguised employment relationships remains an important task of the labour inspectorate.⁸³

4. PART-TIME WORK

4.1. General facts

The employer's demand for flexibility also applies to the adaption of working hours to the work process needs. The demand for including the work of workers only when is needed and for the needed time is often in breach of rules of labour law in regard to working time, which protect employees (mostly those in a standard employment relationship). This is also one of the reasons for the expansion of non-standard forms of employment and for the occurrence some of them. These are different types of contracts, by which the employer is not obliged to offer a certain amount of work to the other party, since the amount of work depends on the actual need, whereas the other party is obliged to address the need of the employer and accept the offered work (the so called zero hour contracts in English law or on-call contracts in some other legal systems).⁸⁴

Even in countries, where these special contractual forms have not yet been implemented (Slovenia being among them), there seems to be a practice of including short-term and part-time workers (even for very short hours) in the work process, whereby their working time is adjusted to the needs of the employer. What all these forms of work have in common is a short (often minimum) number of hours, which brings a low income; and also a variation in the number of hours and unpredictable working hours, all of which has a negative effect on both professional and personal life. This comes especially to the foreground with lower paid workers, who are not members of trade unions, which further decreases their power to exert influence over their working hours.⁸⁵

The data on the prevalence of on-call work in the EU for the year 2004⁸⁶ are also interesting. While on average this percentage has amounted to 2,5% of total workers, it was the highest in Netherlands⁸⁷ and in Slovenia (more than 5%). It can be assumed that this percentage in Slovenia can be attributed to working under a service agreement, but also under a self-employed (false) contractor agreement as well as to

fileadmin/user_upload/razvoj_slovenije/2017/POR_2017.pdf>, also Kanjuo Mrčela, A., Ignjatović, M., p. 370.

83 See *infra*, chapter 6.

84 See Tičar, L., Vpliv digitalizacije na pojav novih oblik dela, Delavci in delodajalci, 2-3/2016, p. 243ff. See also ILO, Non-standard..., 2016, pp. 8, 29.

85 ILO, Non-standard..., 2016, cit., p. 227. See also Eurofound, Sixth European Working Conditions Survey – Overview report, Publications Office of the European Union, Luxembourg, 2016, p. 56.

86 See ILO, Non-standard..., 2016, p. 85.

87 Where the percentage of part-time workers is also the highest.

student work. It may also be assumed (considering the substitution of employment with these forms of work) that the percentage is much higher today.

4.2. Part-time employment contract

For years, the Slovenian labour law legislation has regulated two forms of part-time employment contracts among atypical employment contracts.

The first form includes contracts, where special laws determine the right of an employee to work part-time due to disability, health reasons or parenthood. Apart from being entitled to remuneration (which depends on the employee's actual obligations) and work breaks (which is regulated differently in the 2nd paragraph of Article 154 ZDR-1),⁸⁸ according to these special regulations a part-time worker has equal rights and obligations under this employment relationship as an employee working full-time.⁸⁹ Normally, an employment contract in these cases is concluded for half-time and the employer is forbidden to overload the employee, much less instruct him to work overtime,⁹⁰ since this would be in contrast with the purpose according to which the employee is entitled to part-time employment. Special laws – the Pension and Disability Insurance Act (ZPIZ-2), the Health Care and Health Insurance Act (ZZVZZ), and the Parental Protection and Family Benefits Act (ZSDP-1) – cover the rights of employees for the remaining time (to full-time), hence, while the employee is not working (partial pension, partial sickness cash benefit, payment of contributions). In this form of part-time employment, which is quite common in Slovenia, the employees are properly protected both from the labour law and from the social security perspective.

The other form of employment relationship is a classical part-time employment,⁹¹ which occurs when the employer announces the need for part-time work and the employee accepts such employment, either because such form of work suits him or because he/she is unable to obtain full-time employment. Entering into a part-time employment contract can therefore either be his/her preference or merely an emergency exit. Special regulations of the position of part-time workers are covered in ZDR-1 in line with the ILO Part time Work Convention no. 175 (hereinafter: ILO Convention no. 175)⁹² and Council Directive 97/81/EC of 15 December 1997, concerning the Framework Agreement on part-time work, concluded by UNICE, CEEP and the ETUC; Annex – Framework Agreement on part-time work (hereinafter Directive 97/81/EC).⁹³

Similarly as in fixed-term employment contracts, a transition to a standard form of full-time employment is also encouraged in part-time employment contracts, which ZDR-1 ensures by obliging the employer to inform part-time employees of full-time

88 It is granted to them in proportional duration, but only if they work at least four hours a day.

89 See Article 67 ZDR-1.

90 See the last indent of Art. 146(2) ZDR-1.

91 The article only further explains this form of part-time employment.

92 Which was also ratified by Slovenia. See Official Gazette of the Republic of Slovenia – International Contracts, no. 4/2001.

93 OJ L 14, 20. 1. 1998, pp. 9 – 14.

job vacancies and grants them the possibility to apply for these job positions without having to publicly announce those vacancies.⁹⁴

It thus follows from Directive 97/81/EC, that part-time employees cannot be treated less favourably in regard to employment conditions than full-time employees merely due to the fact that they work part-time. A different treatment is only permitted when justified by objective reasons. The principle of proportionality should be used where appropriate. Moreover, ILO Convention no. 175 also emphasizes the equal treatment principle regarding the right to organize and represent employees with respect to professional safety and ZDR-1 stipulates that a part-time employee has equal rights and obligations as a full-time employee but can enforce them proportionally with the term for which the employment relationship was entered into, unless otherwise specified by the law (Art. 65(3) ZDR-1). The principle of proportionality mostly applies to wages and compensation for wages, but also to annual leave payment and severance pay at retirement.⁹⁵ A different regulation of some of the rights and obligations of a part-time employee is found in the provisions:

- which regulate the rights to which the principle of proportionality does not apply and grant full rights to part-time workers (e.g. the right to participation in management, annual leave)⁹⁶
- which state that some rights are not granted to the employees working less than a certain number of hours per day (e.g. breaks during work)⁹⁷ or are not granted to part-time employees at all (e.g. breastfeeding breaks)⁹⁸
- which enable consideration of the nature of part-time work in regard to certain working conditions (prohibition of overtime, if this is not yet agreed in the employment contract,⁹⁹ the possibility of prolonging internship).¹⁰⁰

Due to implementing the equal treatment principle and proportionality principle, the employer in Slovenia must reimburse the employee's expenses for his/her travel to and from work and if he/she works at least four hours a day, the employer must also ensure a paid break during employee's working hours and reimburse the meal expenses. This financial aspect could be the reason why employers mostly refrain from hiring part-time employees. The percentage of part-time employment in Slovenia is therefore constantly below the EU average.¹⁰¹

94 See Art. 25(4) and seventh indent of Art. 26(1) ZDR-1.

95 See provisions of Art. 131(5) and Art. 132f(4) ZDR-1.

96 See Art. 65(4 and 5) ZDR-1. The principle of proportionality cannot be used with some other rights such as the right to safety and health at work, the right to education, the right to the reimbursement of expenses for transfer to work and home and others. Only the principle of equal treatment can be applied to those rights, which means that these rights must also be granted to part-time workers. See Senčur Peček, D., *Pogodba o zaposlitvi s krajšim delovnim časom, Podjetje in delo*, 6/7/2005, p. 1678.

97 See Art. 154(2) ZDR-1, which states that the worker is entitled to a (proportional) break during working hours only if he/she works at least four hours a day.

98 See Article 188 ZDR-1.

99 See Art. 65(6) ZDR-1.

100 See Art. 122(2) ZDR-1.

101 See Eurofound, *the European Company Survey 2009: Part-time work in Europe*, Luxembourg:

However, in the past years, the situation in regard to this non-standard form of work has begun to change. Different strands of research¹⁰² show that most European countries witness an increase in employing part-time workers, especially on less paid job positions (for example, in shops or cleaning industry). In Slovenia, this number is still below the European average (which is approximately 20% of all workers), but has been increasing faster than in the EU in the past few years.¹⁰³ It also needs to be pointed out that Slovenia also has the highest percentage of these kinds of employments among new EU Member States.

Some employers in Slovenia (larger retail chains) state that the reason for concluding more and more part-time employment contracts lies mostly in the fact that they enable adjustment to the needs of the employer.¹⁰⁴ It has been noted that in practice the working hours of part-time workers often differ, hence, they often also work over the contractually agreed working hours (or sometimes even full-time).¹⁰⁵ Labour inspectors also warn of these kinds of occurrences¹⁰⁶ which have also been the subject of recent case law.¹⁰⁷ If employees conclude a part-time employment contract, but permanently carry out work in addition to the employee's agreed working hours, this represents a misuse of the part-time employment institute.¹⁰⁸ In such cases the true nature of the contract is disguised with the purpose of depriving the employees of the rights deriving from full-time employment contracts.

Part-time employment contracts concluded for very short hours (only a few hours a week), based on which employees work full-time (or even overtime) and the employers pay them the extra hours in cash in net amount, are especially problematic.¹⁰⁹

Publications Office of the European Union, p. 12.

102 Loc. cit., ILO, *Non-standard...*, 2016, p. 78, Eurostat, *Statistics Explained, Employment statistics*, 2015. See also Eurofound, *Upgrading or polarisation? Long-term and global shifts in the employment structure: European Jobs Monitor 2015*, Publications Office of the European Union, Luxembourg, 2015, p. 26.

103 According to ILO data, 2016, from 12% in 2004 to 17% in 2014, according to Eurostat data from 5,8% in 2003 to 10% in 2014.

104 See Answers to the questions of editorial board of the show *Tarča*, TV Slovenija, 26. 11. 2014, available at: <<http://www.lidl.si/sl/6262.htm>> (20.06.2018).

105 An additional issue is the non-payment for these hours or the question of the amount of payment. If the employer does not pay the extra hours to part-time employees who worked over the agreed working time (which is pointed out by employees on online forums), this means that these employees work full-time for the payment proportional to their reduced working hours. If this holds true, it is also clear why employers benefit from employing part-time workers.

106 See Labour Inspectorate of the Republic of Slovenia, Public notice on 26. 2. 2013 (Employers also order the employees to work over the agreed working time); see also Labour Inspectorate of the Republic of Slovenia, *Annual Report 2016*, page 64, where it is stated that 42 breaches have been noted when the employer ordered a part-time worker to work over the agreed working time, despite the fact that this possibility was not foreseen in the employment contract.

107 For example, see judgment of the Supreme Court of the Republic of Slovenia, no. X Ips 41/2013 on 18. 12. 2014 and judgment of the Higher Labour and Social Court no. Pdp 598/2014 on 17. 7. 2014.

108 The fact that this represents an abuse of the situation also follows from the judgment of the Supreme Court of the Republic of Slovenia, no. X Ips 41/2013 on 18. 12. 2014.

109 These cases are referred to in the Labour Inspectorate of the Republic of Slovenia, *Annual Report 2016* (p. 64), and also in the latest *Annual Report for 2017* (pp. 60 and 61).

A part-time employee is only protected by a proportional minimum wage,¹¹⁰ entitled to a proportional payment for annual leave and to proportional retirement severance pay. The employee is especially deprived of his/her rights specified in social insurance schemes. The level of cash benefits deriving from these schemes (sickness cash benefit in case of sick leave, parental leave etc.) depends on the basis for the payment of contributions (which is minimal in the case of part-time employment for only a few hours per week). According to ZPIZ-2 part-time employees are also entitled to a proportional insurance period¹¹¹ and their pension base is calculated separately.¹¹² A part-time employee who wishes to avoid the risk of an extremely low pension, can cover the difference to full-time by voluntarily entering into the compulsory disability and pension insurance,¹¹³ but is in this case obliged to cover the contributions of employer as the insured person himself.¹¹⁴

Similarly as fixed-term employment, part-time employment (according to the Slovenian regulation) is not problematic in itself, especially if this form of employment is chosen by the employee himself. The situation is different if employees conclude a part-time employment contract because they have no other choice (this is mostly the case with young people),¹¹⁵ especially when this contract is false and the employees in fact work full-time. Since this represents a disguise of the true nature of the relationship, the employees should have the possibility to prove the existence of a full-time employment contract and the corresponding rights before the court. Possible labour inspection measures in such cases should also be regulated by law.¹¹⁶

5. EMPLOYMENT RELATIONSHIPS WITH MORE PARTIES

5.1. General facts

Non-standard forms of employment are also a consequence of a phenomenon called a vertical disintegration of companies,¹¹⁷ fragmentation of work¹¹⁸ or

110 See Article 2 of the Minimum Wage Act (Official Gazette of the Republic of Slovenia, no. 13/2010 with amendments).

111 See Art. 130(3) ZPIZ-2.

112 See Art. 33 ZPIZ-2.

113 See Art. 25(3) ZPIZ-2.

114 In year 2018 the contributions from a minimum wage amount to (60% of the last known average wage in Slovenia) 237.70 EUR. See Art. 149 and Art. 410(7) ZPIZ-2.

115 The percentage of part-time employments is up to five times higher among younger people than the percentage of these employments among all employees. They resemble fixed-term employments, which is why scholars already suggest that this we are facing the so called ghettoization of young people in these flexible forms of employment. See Kanjuo Mrčela, A., Ignjatović, M., *Od prožnosti...*, cit., p. 367.

116 Labour inspectors warn about this and suggest certain solutions. See Labour Inspectorate of the Republic of Slovenia, Annual Report 2017, pp. 59 and 60.

117 See Collins, H., *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Law*, Oxford Journal of Legal Studies, 3/1990, pp. 353-380.

118 See Fudge, J., *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, Osgoode Hall Law Journal, 4/2006, p. 216.

fissurization.¹¹⁹ Employers (contracting entities), instead of employing employees themselves, outsource certain jobs based on various contracts and different contractual models (outsourcing, subcontracting, franchising, temporary agency work) to contractual partners and their employees, but to a certain degree maintain influence over these employees. By doing so, the contracting entities reduce the expenses and simultaneously avoid employer's duties, since workers are (formally) employed by contracting partners. Given the fact that these partners often represent smaller, less stable subjects functioning under high competition conditions and under actual pressure of the leading companies (contracting entities), the position of employees of the contracting partners, is often worse than the position of employees employed by the contracting entities.¹²⁰

With these so called "triangular" (or multi-party) relationships, where more than one subject is present next to the official employer and which influence the working conditions of employees, it is important, whether law imposes obligations upon the employees only towards the official employer (the one who concludes an employment contract with the employee) or also (or instead of towards him) towards these subjects (for example, the contracting entity, the main contractor, the user of temporary agency workers). The problem of appropriate protection of employees in triangular relationships is also pointed out by ILO in its Recommendation no. 189 (2006) and the preparatory material, which emphasizes that the cases where the identity of the true employer is disguised (so that the one listed as the employer is in fact only an intermediary and the true employer is relieved of any responsibilities towards employees) are a form of disguised employment relationships.¹²¹

Slovenia regulates only one type of a triangular relationship, namely, temporary agency work. Similarly as in other EU countries, the valid regulation is harmonized with Directive 2008/2014/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (hereinafter: Directive 2008/104/EC),¹²² the purpose of which is, among other things, to ensure protection for workers employed by these agencies by applying equal treatment principle.¹²³

There are also other relationships in the practice of Slovenian labour market, which include several parties (outsourcing, subcontracting, franchising etc.), but are (with a few exceptions)¹²⁴ not specifically covered by labour law legislation with

119 We owe the term "fissured working place" (divergent, broken work places) to professor David Weil, who defined this term in his work *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

120 See *ibid.*, p. 9; see Fudge, J., *The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection*, and Davidov G., Langille B (Eds), *Boundaries and Frontiers of Labour Law*, Oxford and Portland, Oregon, 2006, p. 297.

121 See Report V (1), 2006, International Labour Conference, 95th Session, 2006, p. 12.

122 OJ L 327, 5.12.2008, pp. 9–14.

123 See Article 2, which states the goals of the directive and Article 5, which applies to the equal treatment principle.

124 An exception is the Health and Safety at Work Act (Official Gazette of the Republic of Slovenia, no. 43/2011, ZVZD-1), which pursuant to ILO Convention no. 167 concerning Safety and Health at Work (1988) does not only define an employer as the person, who has an employment contract with the worker, but also with other subjects, who in fact organize work and should

respect to the definition (division) of employer's obligations. Slovenian scholars, who have been warning of the issue of triangular relationships and disguised employment relationships for a while,¹²⁵ have recently been intensively dealing with the question of distributing employers' duties as a possibility for a more accurate protection of employees.¹²⁶

5.2. *Temporary agency work*

The purpose of temporary agency work is that the worker concludes an employment relationship with an agency for providing temporary work services,¹²⁷ and carries out work temporarily in time periods needed to complete certain assignments required by the user, while being supervised and receiving his/her instructions.¹²⁸

This form of employment represents a possibility for employers to obtain workers quickly and easily (which is especially important if the workload increases), but at the same time also to dismiss them easily. For workers, this form of employment is normally only an emergency exit and an opportunity for potential regular employment with one of the users. The fact remains, however, that the legal position of employees employed by agencies is less favourable than the position of employees with other employers, even if we only consider the uncertainty of employment and the constant changing of work environment. This especially applies to cases where users treat temporary agency workers less favourably than their own employees and in cases of breaches of their rights by the agency.¹²⁹

The purpose of the legislation amendment in Slovenia in 2013 and 2014 was therefore to ensure the stability of agencies,¹³⁰ to properly regulate labour law position

ensure safe working conditions – apart from the user in case of temporary agency workers also the contractor in case of subcontractors' workers. See first indent of the Art. 3 ZVZD-1 and judgement of the Supreme Court of the Republic of Slovenia no. VS RS II Ips 210/2010 from 25. 7. 2013.

125 Senčur Peček, D., *Delavci - zunanji izvajalci?*, *Delavci in delodajalci*, 2-3/2012, pp. 223-244. See for examples Article 2, which applies to goals of directive and Article 5, which applies to equal treatment principle.

126 A plenary session on the most important labour law congress "Days of labour law and social security" was devoted to this topic on 31. 5. and 1. 6. 2018 in Portorož. See <http://www.planetgv.si/dnevi-delovnega-prava-socialne-varnosti>. See also Senčur Peček, D., *Franšizing in delovna razmerja*, *Delavci in delodajalci*, 2-3/2018, pp. 233-252 and Kresal Šoltes, K., *Razmejitev obveznosti med agencijo in podjetjem uporabnikom ter načelo enakega obravnavanja – je lahko model tudi za druge nestandardne oblike dela?*, *Delavci in delodajalci*, 2-3/2017, pp. 199-220.

127 ZDR-1 uses the term "employer, who carries out the activity of providing work to other users" (see Article 59 and the following). Article uses the term "agency".

128 See Schlachter, M., *Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide?*, *The International Journal of Comparative Labour Law and Industrial Relations*, 2/2012, p. 179. See also Article 1 of the Directive 2008/104/EC on Temporary Agency Work, OJ L 327, 5. 12. 2008.

129 This is shown by studies, carried out within the framework of ILO (see Meeting the challenge of precarious work, *International Journal of Labour Research*, 2013, Vol 5, Issue 1, International Labour Office, Geneva, p. 17), and also cases in Slovenia.

130 The activity of providing work to other employers (users) can only be carried out by those

of workers in agencies and to improve their position towards the users (also by imposing greater responsibilities upon users) as well as to prevent using temporary agency work as a replacement for employment contracts.¹³¹

Due to the inappropriate practice of agencies, which only employed workers for fixed terms,¹³² ZDR-1 now clearly states that an employment contract between the agency and the worker is normally concluded indefinitely. Fixed-term employment is only allowed, if the user¹³³ demonstrates any of the general reasons for a fixed-term employment.¹³⁴ Even if the agency concludes a fixed-term employment contract with the worker and the need for workers at user's premises ceases to exist before the contract expires, the employment contract cannot be terminated on these grounds and the worker is entitled to a wage compensation in the amount of 80% of his average wage for the past three months.

ZDR-1 considers the fact, that with temporary agency work a portion of employer's powers (instructions, supervision) is transferred to the user, when dividing the obligations and responsibilities of the agency and the user towards the worker.¹³⁵ Article 62 therefore states that the user is obliged to respect the provisions on working hours, rests and breaks and ensure safety and health at work to agency workers;¹³⁶ he is also subsidiarily responsible for payment and other benefits arising out of the employment relationship during the time period for which the worker was carrying out work for him.¹³⁷ Ensuring education, improvement and training is primarily an

natural and legal persons (agencies) who meet certain requirements obtain a license to carry out this activity and are entered into a special register, kept by the Ministry of Labour, Family, Social Affairs and Equal Possibilities. With 2014 amendments to ZUTD extra conditions were implemented – a physical or a legal person can carry out the activity of providing work only if they were not punished for a breach of labour law provisions in the past two years and if they did not have any unsettled obligations towards workers and were not on the list of tax non-payers. Further conditions are an obligation to register the activity of providing work as a main activity, a submission of a bank guarantee in the amount of 30.000,00 EUR; for a legal and physical person with a seat in another EU Member State, EEA or at Swiss Confederation there is also an obligation of establishing a branch. An agency and the user must not be connected companies.

131 For this purpose, there is a legal maximum percentage of temporary agency workers at user's premises (25% with some exceptions). See Art. 59(3) ZDR-1.

132 Normally for the time period of assignment to the user.

133 Even though the employment contract is concluded between the agency and the worker, the admissibility of a fixed-term contract is related to the existence of reasons on the part of the user. With such (improper) regulation, the difference between agency employment and the assignment of worker to the user is actually disappearing, given the fact that the duration of employment depends upon the user's need for work.

134 See Art. 60(2). The user is also responsible for the adequacy and completion of data on the existence of conditions for the conclusion of fixed-term employment contracts (Art. 62(5)).

135 The law follows the Directive. See Končar, P., *Ureditev zagotavljanja začasnega dela in vpliv Direktive 2008/104/ES, Delavci in delodajalci*, 2-3/2012, pp. 143-159.

136 According to Article 45 ZDR-1 the employer is also obliged to notify the professional worker or the department, who handle the tasks regarding safety and health at work, of the beginning of temporary agency work.

137 Primarily, the payment of wages is the responsibility of the agency, which considers the data forwarded to it by the user (and is also responsible for their correctness). If the agency does

obligation of the agency, but during the time when the worker works for the user, this is subject to discussion between the agency and the user.¹³⁸

ZDR-1 also emphasizes equal treatment of agency workers, who must be granted the same working and employment conditions as the workers of the user. According to the 3rd paragraph of Article 63 this also applies to the benefits, which the user provides to his workers (for example, the use of cafeteria).

Similarly as in other non-standard forms of employment, ZDR-1 also encourages transition to regular employment, within the framework of temporary agency work by imposing the obligation upon the user to notify temporary agency workers about vacant job positions. Additionally, ZUTD specifically obliges the agency to allow the assigned worker to conclude an employment relationship with the user after completing the work and without imposing any limitations and forbids the agency to request payment from the worker for concluding an employment contract with the user.¹³⁹

This is also in accordance with Directive 2008/104/EC which is based on a temporary nature of the assignment provided to the user¹⁴⁰ and one of its goals is encouraging temporary agency work as a step towards regular employment with the user.¹⁴¹ This goal is accomplished if (in the case of user's permanent need for work) the temporary agency worker is hired directly by the user after completing his assignment. This does not happen if the worker is consecutively (or permanently) assigned to the same user. The Directive therefore compels the Member States to implement appropriate measures in order to prevent consecutive assignments, whose purpose is to circumvent the provisions of the Directive.¹⁴²

Several European countries thus determine the longest allowed period of assignment or a maximum number of consecutive assignments.¹⁴³ Slovenia was also among those countries, since ZDR¹⁴⁴ stipulated a (one year) time limitation for carrying out work for the user. New ZDR-1 does state that the work carried out through an agency is temporary,¹⁴⁵ but does not include the exact time limitation of

not pay the worker his wage or other benefits, the worker can demand them from the user. See provision in Article 62 ZDR-1.

138 On the other hand, Slovenian legislation does not cover the possibility of temporary agency workers to participate in management at the user. The general regulation which enables the worker to participate in the management of their employer, also applies to temporary agency workers, who can participate in management of the agency. But in practice they rarely use this possibility.

139 See Art. 165(1 and 3).

140 See Article 1; and also definitions of terms in Article 3, 1b, c and d.

141 See Art. 6(3).

142 See Art. 5(5) of the Directive.

143 See Voss, E. et al., *The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue* Final Report for the Joint Eurociett / UNI Europa Project: "Temporary Agency Work and Transitions in the Labour Market" Hamburg, 2013, pp. 35, 36.

144 Employment Relationship Act, Official Gazette of the Republic of Slovenia, no. 42/2002 with amendments (ZDR), valid before ZDR-1. See Article 59.

145 See Article 61 para. 1.

such work anymore, which is also highlighted by some scholars.¹⁴⁶

Even though in the time of validity of ZDR it was still possible to avoid the time limitation (for instance, by means of rotation of the worker between two agencies, the agency and the user), the path towards employment relationships, in which the worker is formally employed by the agency, but carries out work for the user for a longer period (permanently), is now easier. In such relationships the user has all the benefits of an employment relationship (regular, competent workers), but has no employer obligations.¹⁴⁷ Considering the principle of the primacy of facts¹⁴⁸ such relationship that does not have the characteristics of a temporary assignment despite being manifested as one, and should be considered as an employment relationship between the worker and the user.¹⁴⁹

5.3. Business cooperation contract (outsourcing, subcontracting)

Unlike temporary work, where the agency assigns the workers to the contracting party and who then carry out work under the supervision of that contracting party, carrying out work and providing services to clients means the contractor uses his/her own workers and equipment to carry out the work or the service for his client.¹⁵⁰ These workers carry out work under the instructions and supervision of their employer – the contractor. In this case it is clear who the employer is even though the workers carry out work at the client's premises.

There are cases in practice, where the relationship only seems to be based on providing services (for example, a business cooperation contract), although what is carried out is the assignment of the workers to the contractor (although legal requirements for temporary agency work are not fulfilled). These sometimes include short-term contractual relationships of smaller scope, but also cases of forwarding an important part of the business to "outside contractors". The most famous case, revealed by the media in Slovenia, was the case of a Slovenian company which forwarded a reloading job to 40 subcontractors, who employed more than 500 workers. These workers, who all had employment contracts with those subcontractors had actually carried out work exclusively for the contracting party (client). The subcontractor

146 See Končar, P., Ureditev..., cit., p. 157; Kresal, B., Pravna ..., cit., p. 187; Senčur Peček, D., Zakonite..., cit., pp. 939-940.

147 Except those, which ZDR-1 and ZUTD impose upon him as the user.

Despite the generally adopted equal treatment of temporary agency workers and workers of the user, temporary agency workers are not in equal position as the workers of the user in practice, mostly in regard to the security of employment, education, trade union participation, etc. In case of permanent assignment to a single user, they are also not given the possibility of transition to the regular employment with this user.

148 See *infra*, chapter 6.

149 These kinds of solutions can be found in other legal systems. See ILO, Meeting..., 2013, cit., p. 18.

150 See Report V (1), 2006, International Labour Conference, 95 th Session, 2006, pp. 42, 43; available at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>> (20.06.2018). See also Schlachter, M., Transnational..., cit., p. 179; Končar, P., Ureditev..., cit., p. 152.

ordered them to work at the premises of the contracting party, hence, the workers had no further contact with him, since both the work and the working hours were determined by the contracting party. The pay check was actually given to them by the subcontractor, but instead of getting reimbursements for food expenses during work they got coupons for food in the cafeteria at the premises of the contracting party.¹⁵¹

The Slovenian legislator has reacted to these and similar cases of disguising the true nature of the relationship by defining the term “the activity of providing work of workers (temporary agency work)” and other terms in Article 163 ZUTD more specifically (where it is emphasized that temporary agency work means that “the worker carries out work under the supervision and in line with the instructions of the contracting party or mostly uses the equipment, which is part of the work process of the contracting party”), which clearly separated this activity from providing services for the contracting party.¹⁵² It also raised penalties with respect to the breaches of obligations applying to temporary agency work. If the employer (the manifested contractor) carries out the activity of assignment of workers without having a licence to carry out this activity (which is demanded for agencies), he/she will be charged with an offence and will have to pay a 10.000,00 to 50.000,00 EUR penalty, whereas the contracting party, who accepts the assigned worker in such cases will have to pay a 10.000,00 to 30.000,00 EUR penalty.¹⁵³

Nonetheless, the question of the legal status of workers, who concluded an employment contract with the (apparent) contractor, but are actually included in the work process of the (apparent) client, in accordance with his instructions and under the client supervision, remains open. Obviously, the contracting party wishes to avoid having an employer status in these cases, which is why he/she gives an impression that the real employer is the contractor. When defining the term ‘employer’, the principle of the primacy of facts should be considered, similarly as when defining the terms ‘worker’ and ‘employment relationship’.¹⁵⁴ Since the courts consider a person to be a worker regardless of the name of the relationship the parties chose, they should also consider that the employer is the subject, which manifests the characteristics of an employer.¹⁵⁵ The one who organizes the work process, gives the instructions to workers and supervises them, and gains profit from their work should also bear obligations and responsibilities with respect to those workers. In this regard, an amendment to the

151 The data is taken from the report of Labour Inspectorate of the Republic of Slovenia from 2. 8. 2011, published on website *Nevidni delavci sveta*, available at <<http://www.njetwork.org/Prijava-Republikemu-inspektoriatu>> (20.06.2018).

152 See Draft law on amendments to ZUTD, EVA 2013-2611-0073, from 2. 10. 2013.

153 In 2016 labour inspectors have recorded 112 breaches of ZUTD, applying to providing employment to users, of which 49 applied to the fact that the user accepted the assigned workers from an employer who did not have a license to carry out this activity, followed by 51 breaches where the employer was providing the employment activity to users without obtaining a proper permission and other breaches. The number of indicated breaches in 2014 does not essentially deviate from the findings in 2013, when 110 breaches were recorded in this area. See also Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, p. 64.

154 See *infra*, chapter 6.

155 See in this regard also Kresal, B., *Primerljivost...*, cit., p. 258.

existing legislation is definitely needed.¹⁵⁶

6. FALSE SELF-EMPLOYED (AND OTHER DISGUISED EMPLOYMENT RELATIONSHIPS) AND ECONOMICALLY DEPENDENT PERSONS

6.1. General facts

Outsourcing, subcontracting and other contractual relationships, in which the employers outsource certain jobs to outside contractors also account for the increase in the percentage of self-employed workers, who do not employ any workers (but carry out the work themselves). These include not only people, who carry out work on the market at their own risk and independently, but also the ones who are only officially self-employed, but in fact work in a relationship which has the elements of an employment relationship. We can claim that the latter are false self-employed workers, who are in fact employees (a disguised employment relationship).¹⁵⁷ The other group are the real self-employed, who are in an economically dependent relationship with the client (the so called economically dependent persons).¹⁵⁸

False self-employment and disguised employment relationships are a general problem, about which the scholars in Slovenia have been warning for a while.¹⁵⁹ Additionally, such relationships are also revealed by labour inspectors,¹⁶⁰ and their existence is also evident in extensive case law in relation to determining the existence of employment relationships.¹⁶¹ The situation is different with economically dependent persons. The Slovenian ZDR-1 does define economically dependent persons and grants them a limited scope of protection, but it seems that this institute has not yet come into existence in practice.¹⁶²

156 Both in cases of false business cooperation contracts as well as in cases of permanently assigned workers (see *supra*, chapter 5.1.).

157 A disguised employment relationship occurs when the relationship between a worker and an employer is manifested differently as it really is, with the purpose of elimination or decreasing the protection granted to workers or for the purpose of the evasions of taxes and contributions. See Report V (1), 2006, International Labour Conference, 95th Session, 2006, available at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>> (20.06.2018), p. 12.

158 More about this Senčur Peček, D., Samozaposleni, ekonomsko odvisne osebe in obstoj delovnega razmerja, Delavci in delodajalci, 2-3/2014, pp. 201-220.

159 See Kresal, B., Prikrita delovna razmerja – nevarno izigravanje zakonodaje, Delavci in delodajalci, 2-3/2014, pp. 177-199; Senčur Peček, D., Prikrita delovna razmerja: ali bodo “samozaposleni” nadomestili delavce?, Lexonomica: revija za pravo in ekonomijo, 1/2015, pp. 1-17.

160 See Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, pp. 64-66.

161 See Robnik, I., Sodna praksa v zvezi z obstojem delovnega razmerja in fleksibilnimi oblikami zaposlitve, Delavci in delodajalci, 2-3/2012, pp. 405-421; Mlakar Sukič, N., Franca, V., Sodna praksa na področju prikritih delovnih razmerij, Pravna praksa, 15/2017, appendix, pp. II-VIII

162 See, for example, a parliamentary question to the minister of labour, available at <<http://imss.dz-rs.si/imis/f57f10f0d1c2e13eb36a.pdf>> (20.06.2018).

6.2. *Disguised employment relationships*

Labour law mostly protects only employees, persons who carry out work based on an employment relationship. The Slovenian legislation defines an employment relationship in Article 4 ZDR-1. The fact that the employer makes decisions about pursuing the activity (about work process) and also bears the responsibility for business success is the very essence of the employment relationship. An employee is only part of this organized work process and he/she is subordinated to the employer and dependent on him. In return for this subordination, the employee, as a weaker party in the relationship, is granted labour law protection.

If there are elements of an employment relationship¹⁶³ in the relationship between the employer and the worker, where the worker carries out a dependent work for the employer, the contractual parties cannot freely choose the legal definition of this relationship. According to the established principle of the primacy of facts,¹⁶⁴ such relationship is considered an employment relationship. This also follows from Art. 13(2) ZDR-1, which stipulates that, if there are elements of an employment relationship (in accordance with Article 4 and in regard to Articles 22 and 54 ZDR-1), the work must not be carried out based on civil law contracts unless this is expressly specified by law.¹⁶⁵

Despite legal prohibition such cases still occur in practice. Individuals, who are included in the work process and who regularly carry out work in accordance with the instructions and under the supervision of the employer, formally have contract for services or a contract for copyrighted work, work based on a student referral and more recently often as self-employed persons based on business cooperation contracts. These contractual relationships are formally regulated by civil and commercial laws (mostly by the Civil Obligations Code), which are based on freedom of contract and equality of the contractual parties. The contractual parties are thus free to regulate their mutual relationships. They are not limited by labour legislation, which otherwise determines minimum standards (regarding minimum wage, maximum working hours, periods of notice, termination protection, etc.), since these normally only apply to workers,¹⁶⁶ they are also not included in trade unions, and collective agreements do

163 According to Article 4 ZDR-1 these include: bilateralism (relationship between the worker and the employer), voluntary work, payment, personal and continuous work and inclusion of the worker in the organized work process of the employer and work according to the instructions and under the supervision of the employer.

164 The principle of the primacy of facts (content of relationship) over the form of contract is implemented in the legislation of most countries. See *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*, available at <<http://www.ilo.org/public/english/dialogue/ifpdial/downloads/guide-rec198.pdf>> (20.06.2018), p. 32.

165 A case in point may be illustrated by Article 27.a ZUTD, which states that retired people can carry out work containing the elements of an employment relationship based on a temporary or occasional work contract.

166 Two exceptions are discrimination, from which even the self-employed are protected, and safety and health at work, where some international and national regulations (even Slovenian ZVZD-1) provide special provisions for the self-employed too. Moreover, limited legal protection also applies to the self-employed who fulfil conditions for economically dependent persons (see

not apply to them.¹⁶⁷ As a consequence, these self-employed persons often face low earnings and irregular payments, long and non-standard working hours, uncertainty about the duration of employment, stress in relation to work and health problems related thereto.¹⁶⁸

In connection with ensuring health care and other rights from social insurance schemes, self-employed workers also have a different position than the employees.

Persons, carrying out work based on civil law contracts (contracts for services or contracts for copyrighted work) are actually included in compulsory pension and disability insurance in Slovenia and are entitled to a proportional insurance period based on the payment of contributions.¹⁶⁹ Contributions for health insurance also have to be paid out of one's payment, received on the basis of contracts for services or contract for copyrighted work, but only grant the person carrying out work a reimbursement of expenses in relation to a work accident. To obtain all other health care services a person can voluntarily be included in compulsory health insurance.¹⁷⁰ However, even in this case the person is not entitled to sickness cash benefit (wage compensation during temporary absence from work due to illness or injury). Based on a civil law contract the person is also not included either in parental security insurance or in unemployment insurance.

Persons, carrying out work based on business cooperation contracts and having a self-employed person status, are on this basis included in all four social insurance schemes in the Republic of Slovenia (pension and disability, health, parental and unemployment). For them, this means an obligation to pay minimum contributions for social insurance determined by the legislation (regardless of one's actual income).¹⁷¹ This way the self-employed are also granted minimum rights (minimum pension, unemployment cash benefit etc.), but only if they actually pay these contributions.¹⁷² In a situation when self-employed persons often do not have a constant source of work and receive low and irregular payments, this can be a big problem. Due to insufficient income (from which they must also pay contributions), self-employed

infra, chapter 6.3.).

167 Regarding this see Kresal Šoltes, K., *Nestandardne oblike dela in kolektivne pogodbe*, Delavci in delodajalci, 3-4/2018, pp. 253-266.

168 See the study 'Precarious workers and health' by the National Institute for Public Health, available at <http://www.skupajzdravje.si/media/posvet_prekarni_knjizica_koncno.pdf> (20.06.2018).

169 This is calculated based on the payment received on the basis of a contract for services or a contract for copyrighted work, in a way that for every reached 60% of the average monthly wage in the Republic of Slovenia, one month of insurance period is granted. See Article 130 ZPIZ-2.

170 Payment of the contribution for compulsory health insurance and the premium for supplementary health insurance is a condition for obtaining the rights.

171 The law also specifies the amount of the contribution (in a percentage of the basis). Self-employed persons pay contributions in the same amount as employers and insured persons in case of an employment relationship, but the self-employed needs to contribute both.

172 If contributions are not paid, they are not entitled to the rights. Health insurance is an exception – in the case of non-payment of contributions the insured person is still entitled to an emergency treatment. See Article 78 ZZZVZ.

persons therefore often fall below the poverty line.¹⁷³ When contributions are paid and conditions are fulfilled, self-employed persons are generally entitled to equal rights from social insurance schemes as the employees. Despite this fact, a self-employed person is in a less favourable position than an employee in case of absence from work due to illness or injury. On account of health insurance both employees and self-employed are entitled to sickness cash benefits only from the 31st day of sick leave onwards, which means that during the first 30 days of sick leave self-employed persons have no income at all (while employees are paid the compensation by the employer).¹⁷⁴

In order for the self-employed (and also other disguised employees) to be guaranteed labour law protection and the rights from social insurance schemes granted to the employees, their employment relationship must be recognized. Claims for determining the existence of an employment relationship are resolved by labour courts. Considering Article 18 ZDR-1, which determines an assumption of the existence of an employment relationship,¹⁷⁵ a disguised employee does not have to prove the existence of an employment relationship, but only has to prove the elements of an employment relationship (which derive from Article 4 ZDR-1).¹⁷⁶ If he/she manages to prove them, the court finds that the relationship, which was formally established by concluding a civil or commercial contract,¹⁷⁷ is an employment relationship, and can on these grounds grant the employee the rights requested in the lawsuit.¹⁷⁸

Given the fact that persons, who formally carry out work based on civil law or commercial contracts, they are often afraid to file a lawsuit and claim their rights from an employment relationship before the court, labour inspection plays the main role in revealing disguised employment relationships. If the inspector finds that the Art. 13(2) ZDR-1 was breached (and that despite the existence of the elements of employment relationship the work is carried out based on a civil law contract), he/she can impose a penalty on the employer. Furthermore, according to the amended Labour Inspection Act¹⁷⁹ the labour inspector can order the employer to issue a written

173 A quarter of self-employed persons in Slovenia are below poverty line. See Zabukovec, M., *Samozaposlovanje: Podjetno v siromaštvo*, Delo from 11. 3. 2014, available at <<http://www.delo.si/novice/slovenija/samozaposlovanje-podjetno-v-siromastvo.html>> (20.06.2018).

174 See Article 29 ZZVZZ and Article 137 ZDR-1.

175 It stipulates that in case of disputes regarding the existence of an employment relationship it is presumed that the employment relationship exists, if the elements of an employment relationship are evident.

176 A worker can prove these elements (work under instructions, carrying out the work personally, permanent work, etc.) using different evidence (registers, witnesses, etc.).

177 As follows from the case law of the Slovenian labour courts, a disguised employment relationship mostly takes the form of a contract for services, contract for copyrighted work, occasional and temporary work of students (student referrals), business cooperation contracts with sole traders, business cooperation contracts with freelance journalists, etc.

178 Since workers normally file lawsuits only after the termination of a contractual (disguised employment) relationship, they request the establishment of illegal termination of an employment relationship, reintegration and monetary claims.

179 See the Act Amending the Labour Inspection Act, Official Gazette of the Republic of Slovenia, no. 55/17, which came into force on 21. 10. 2017.

employment contract within three days to the person who carries out work based on a civil law contract.¹⁸⁰ This is an appropriate measure for fighting disguised employment relationships. However, to make this measure effective, Slovenia would need a larger number of labour inspectors.¹⁸¹

6.3. Economically dependent persons

Unlike false self-employed persons who are only formally self-employed but actually carry out work in a dependent relationship (as employees), economically dependent persons are actually self-employed. There are no elements of an employment relationship in their relationship with the client. But since they are economically dependent on their client, they are in need of certain protection.¹⁸²

By implementing ZDR-1, Slovenia has joined the European countries¹⁸³ which regulate this category of people and grant them a limited labour law protection.¹⁸⁴ Article 213 ZDR-1 stipulates that an economically dependent person is a self-employed person, who fulfils the following legal conditions – that he/she is in a long-lasting relationship with a client, that he/she carries out work for payment personally (does not employ other workers), and that he/she is economically dependent on his/her client (which means that at least 80% of his yearly income comes from the same client).

Since economically dependent persons are not employees, the entire labour law protection does not apply to them, but since due to their economic dependence they need a similar protection as employees, the law grants them a certain range of protection in Article 214. The provisions of ZDR-1 regarding discrimination prohibition, minimum periods of notice, prohibition of terminating a contract without a justified reason, ensuring payment comparable to the payment the client ensures for comparable work¹⁸⁵ and civil liability, also apply to economically dependent

180 If the employer does not impose this obligation, the worker has the right to judicial protection and a labour inspector can additionally punish the employer by imposing another penalty. See Article 19 ZID-1.

181 The current number of labour inspectors (around 40) does not enable the effective control of employers, considering the number of employers (around 200.000). The Labour Inspectorate itself also warns about this. See Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, p. 14.

182 This group of self-employed and the need for their protection has already been addressed/discussed several years ago within the framework of the EU and ILO. See Supiot, A., Transformation of labour law and future of labour law in Europe, European Commission, 1999; Report V (1), International Labour Conference, 95th Session, 2006. See also Perulli, A., Economically dependent/quasi subordinate (parasubordinate) employment: legal, social and economic aspects, a study for European Commission, 2003.

183 For example, Germany, Austria, Netherlands, Spain and others. See Perulli, A., Economically..., 2003, cit.; Thematic Report 2009, Characteristics of the Employment Relationship, European Network of Legal Experts in the field of Labour Law, 2009, pp. 34 -37.

184 More about this see Tičar, L., Delovnopravno varstvo ekonomsko odvisnih oseb – novost ZDR-1, Delavci in delodajalci 2-3/2013, pp. 151-165.

185 The amount of payment under collective agreements, general acts obliging the clients as well as the obligation to pay taxes and contributions (which economically dependent person must pay)

persons.¹⁸⁶ It mostly protects the self-employed from the client being able to one-sidedly determine disproportionately low payment or to cancel a contract without a notice period.

The client can only ensure such protection to economically dependent person, if by the end of the calendar or business year, economically dependent person notifies them of the conditions under which he/she operates (about the existence of economic dependence) and provides the client with all information and proofs, based on which the client can determine the existence of economic dependence.

It seems that self-employed persons in practice almost never request protection, which is granted to them by ZDR-1 in case of economic dependence. Since there is no research in this regard yet, it is only possible to assume why this is so. On one hand, the legal criteria limit the range of potential economically dependent persons, since they only include persons working alone (without employees) and for practically one client but at the same time independently. Even if a self-employed person fulfils these conditions, they must notify their client about it, which they often do not want to, because they are afraid of losing the client. Another reason might lie in the fact that there are many self-employed persons who work for a single client, both economically and personally depend on the client and fulfil the criteria of an employment relationship.¹⁸⁷ In such cases, the self-employed can demand a recognition of their employment relationship and protection as an employee (not just limited protection as an economically dependent person).

Hopefully, a special law, which is supposed to extensively regulate the legal position of economically dependent persons,¹⁸⁸ will contribute to the implementation of this institute in practice.¹⁸⁹ Contractual rights of self-employed persons, who do not request their protection despite their economic dependence, are subject to the will of their only client.¹⁹⁰

7. CONCLUDING REMARKS

The Slovenian labour legislation grants the employees in non-standard forms of employment (fixed-term, part-time, agency) principally equal protection as to the employees with a similar status in standard forms of employment and also provides minimum protection (mostly in regard to payment for work, working

are also considered.

186 More about this see Senčur Peček, D., Bečan I. et al., *Zakon o delovnih razmerjih s komentarjem*, Ius Software, GV Založba, Ljubljana, 2016, pp. 1120-1124.

187 This is also indicated in the findings of labour inspections and case law regarding the identification of an employment relationship.

188 Pursuant to Article 223 ZDR-1, provisions in Article 213 and 214 ZDR-1 should only be applied until the implementation of law that would regulate work and protection of economically dependent persons. To this day, not even a draft law has been proposed.

189 A law should regulate several issues, arising in regard to requesting protection, sanctions for clients not ensuring this protection, jurisdiction for determining the rights of economically dependent persons etc.

190 Regarding the inclusion of the self-employed in social insurances and the rights they are entitled to see *supra*, chapter 6.2.

hours, discrimination prohibition, safety and health at work) to students and retired people, who work temporarily or occasionally; it also grants limited protection (regarding discrimination prohibition, payment for work and termination of contract) to economically dependent persons. Only false self-employed persons and other disguised employees are excluded from labour law protection.

Individuals who carry out work in any of the considered non-standard forms of work are (to various extents) also included in compulsory social insurance. While employees in non-standard forms of employment and self-employed persons (including false self-employed and economically dependent persons) are included in all four social insurance schemes and are based on the payment of contributions also entitled to all rights deriving from these insurances, individuals who carry out work based on civil law contracts and student referrals are only included in pension and health insurance and are only entitled to a limited scope of rights despite the payment of full contributions.

Considering all of the stated facts, it cannot be concluded that individuals in Slovenia who work based on non-standard forms of work are in a precarious position. However, this only applies if non-standard forms of employment are used when the conditions for them are met (for example for the conclusion of a fixed-term employment contract), certain limitations are considered (with fixed-term, occasional and temporary work of retired people), and the workers can make a transition into a standard form of employment. If these limitations are not applied (for example with student work) and these forms of employment (part-time, temporary agency work) are abused, thus disguising the true nature of the employment relationship (in triangular relationships, with false self-employed), the position of (mostly younger) workers, trapped in these forms of employment, is completely different.

To ensure decent work to all workers, apart from adopting and implementing additional legal solutions and measures in the labour market, we will also have to promote the inspection supervision and raise awareness among the employers and the society of the long term consequences of non-standard forms of employment.

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Sažetak

SOCIJALNOPRAVNA ZAŠTITA RADNIKA U NESTANDARDNIM OBLICIMA RADA U SLOVENIJI

Članak se bavi pravnim položajem osoba koje obavljaju rad u različitim nestandardnim oblicima rada u Sloveniji. Autorica analizira radnopravnu zaštitu i socijalnopravni položaj radnika koji rade u nekom od oblika privremenog rada (radni odnos na određeno vrijeme, privremeni i povremeni rad studenata i umirovljenika), s nepunim radnim vremenom (ugovor o radu s nepunim radnim vremenom), u radnim odnosima u kojima se javljaju više od dvije stranke (privremeni agencijski rad), kao i položaj prividno samozaposlenih osoba i ekonomski ovisnih osoba. Očito je da ovi oblici rada nisu prekarni sami po sebi jer slovensko zakonodavstvo jamči radnicima zaštitu tijekom razdoblja u kojem rade te ovi radnici imaju prava (u užem ili širem opsegu) iz sustava socijalnog osiguranja. Situacija je drukčija kod zloupotrebe ovih oblika rada i prividno samozaposlenih osoba ili drugih prikriivenih posloprimaca, kada radnici uživaju samo ograničeni opseg prava, iako rad obavljaju u odnosima koji imaju elemente standardnoga radnog odnosa. Kako bi se spriječili takvi slučajevi, potrebna su ne samo dodatna zakonska rješenja i mjere tržišta rada, već i jačanje inspekcije rada te svjesnosti poslodavaca i društva o dugoročnim učincima korištenja takvih nestandardnih oblika rada.

***Ključne riječi:** nestandardni oblici tada; atipični ugovori o radu; studentski rad; privremeni agencijski rad; prividno samozaposlena osoba; ekonomski ovisne osobe.*

Zusammenfassung

SOZIALER SCHUTZ VON ARBEITERN BEI NICHTSTANDARDARBEITSVERHÄLTNISSEN IN SLOWENIEN

Dieser Beitrag setzt sich mit der rechtlichen Position von Personen, welche in unterschiedlichen Nichtstandardarbeitsverhältnissen in Slowenien stehen, ein. Der arbeitsrechtliche Schutz und die rechtliche Position der Arbeiter in unterschiedlichen temporären Arbeitsformen (befristetes Arbeitsverhältnis, befristete Beschäftigung

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von Studenten und Rentnern) sowie auch in den Arbeitsverhältnissen, welche mehr als zwei Parteien betreffen (befristete Leiharbeit), werden in diesem Beitrag analysiert. Ebenfalls bespricht der Beitrag die Position der scheinselfständigen und wirtschaftlich abhängigen Personen. Es ist offensichtlich, dass diese Arbeitsformen per se nicht prekär sind, weil die slowenische Gesetzgebung den Arbeitern während solcher Arbeitsverhältnissen einen angemessenen Schutz bietet. Gleichzeitig haben sie Recht auf Sozialversicherung (in unterschiedlichem Umfang). Die Situation ist anders, wenn es sich um Misshandlungen dieser Arbeitsformen, Scheinselbstständigkeit, und um verschleierte Arbeitsverhältnisse handelt, bei welchen die Rechte der Arbeiter eingeschränkt sind, ungeachtet der Tatsache, dass ihre Arbeitsverhältnisse die Elemente der Standardarbeitsverhältnisse aufzeigen. Um solche Fälle vorzubeugen, ist es notwendig, nicht nur zusätzliche Gesetzesbeschlüsse und Maßnahmen bezüglich des Arbeitsmarktes zu verabschieden, sondern auch den Einfluss der Arbeitsinspektion zu erhöhen. Nicht weniger wichtig ist es, das Bewusstsein der Arbeitgeber und der Gesellschaft für die Langzeitwirkung solcher Nichtstandardarbeitsverhältnisse zu steigern.

***Schlüsselwörter:** Nichtstandardarbeitsverhältnisse; atypische Beschäftigungsverhältnisse; Beschäftigung von Studenten; befristete Leiharbeit; Scheinselbstständigkeit; wirtschaftlich abhängige Personen.*

Riassunto

LA TUTELA GIURIDICA DEL LAVORATORE NELLE FORME DI LAVORO ATIPICHE IN SLOVENIA

Il contributo tratta della posizione legale dei singoli che prestano attività lavorativa sotto varie forme di impiego atipiche in Slovenia. L'autrice analizza la protezione giuslavoristica e la posizione sociale dei lavoratori, mettendo in rilievo il lavoro nelle forme del lavoro temporaneo (impiego a tempo determinato, lavoro temporaneo ed occasionale degli studenti e dei pensionati), dei rapporti di lavoro con più di due parti (lavoro interinale temporaneo), come pure la posizione dei falsi lavoratori autonomi e delle persone economicamente dipendenti. E' evidente che queste non sono forme di lavoro precario di per sé in quanto il legislatore sloveno tutela i lavoratori con standard di protezione piuttosto appropriati durante il periodo in cui lavorano e, per di più, questi lavoratori vantano i diritti previsti dalle strutture della previdenza sociale. La situazione è differente nel caso di abuso di queste forme di lavoro e in caso di falsi lavoratori autonomi e di altri impiegati camuffati, quando i lavoratori vantano diritti limitati benché svolgano mansioni che hanno elementi di lavoro tipico. Al fine di evitare tali situazioni, sono necessarie non soltanto ulteriori soluzioni giuridiche e misure di tutela del mercato del lavoro, ma occorre anche un rafforzamento dell'ispezione del lavoro ed uno sviluppo della consapevolezza dei

datori di lavoro e della società circa gli effetti a lungo termine dell'utilizzo di tali forme di lavoro atipico.

Parole chiave: *forme di lavoro atipiche; contratti di lavoro atipici; studenti lavoratori; agenzie di lavoro interinale; falsi lavoratori autonomi; soggetti economicamente dipendenti.*

