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**Raising the standard**

**2010 Update  
of the OECD Guidelines for  
Multinational Enterprises**

# UPDATE OF THE MNE GUIDELINES EMPLOYMENT AND INDUSTRIAL RELATIONS WORKER V EMPLOYEE

TUAC BRIEFING NOTE

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## Introduction

**1** This briefing note sets out TUAC's arguments for why the Update of the OECD Guidelines should change the word 'employee' to 'worker' in the Chapter on Employment and Industrial Relations.

**2** The note is structured as follows. It first describes the changing world of work before looking at the use of the words 'employee', and 'worker' by the OECD Guidelines, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the ILO, other instruments for promoting responsible business conduct and the law.

## The changing world of work

**3** In industrialised countries work used to be, for the most part, performed under a recognised employment relationship, which was a relationship with a single employer on a permanent basis (an indefinite or open-ended contract) with the protection that stemmed from that legal status of being an 'employee'. In general this was a full-time job with a regular working week. This is no longer the case.

**4** In the thirty-five years since the drafting of the OECD Guidelines in 1976, the intensification of globalisation and global competition have resulted in new forms of global production that have spawned increasing levels of subcontracting, franchising and outsourcing. These have led to profound changes, with work increasingly being performed under a variety of relationships, outside the recognised employment relationship.

**5** Today, enterprises use an array of contractual and non-contractual arrangements, which include: direct hire on temporary labour contracts for fixed or limited term, or fixed task; hiring in labour via employment agencies or labour brokers; contracting out functions to other companies (off-site or on-site); personal labour contracts (bogus 'self-employed' workers); on call/daily hire.



**6** In developing countries, where the majority of workers perform work on an informal basis, the level of precariousness in the formal economy is also increasing. Data collected by the International Union of Food workers (IUF) on factories owned by OECD multinational companies in Indonesia and Pakistan show that employees often represent a minority of the workforce, including in the production of global brands such as Lipton tea and Walls Ice Cream (see TABLES 1-4).

**TABLE 1:**  
**INDONESIA: 4 FACTORIES<sup>1</sup>, NESTLE**

Category of Worker	Number	Percentage
Employees	1006	43.74
Agency/intermediary supplied casual workers	1294	56.26
	2300	100

**TABLE 2:**  
**PAKISTAN, LIPTON TEA, UNILEVER<sup>2</sup>**

Category of Worker	Number	Percentage
Employees	22	2.93
Agency/intermediary supplied casual workers	729	97.07
	751	100

**TABLE 3:**  
**PAKISTAN, WALLS ICE CREAM, UNILEVER**

Category of Worker	Number	Percentage
Employees	89	10.61
Agency/intermediary supplied casual workers	750	89.39
	839	100

**TABLE 4:**  
**COLOMBIA, TUNA PROCESSOR, SEATECH**

Category of Worker	Number	Percentage
Employees	13	0.9
Agency/intermediary supplied casual workers	1487	99.1
	1500	100

**7** And this is not just the case for the food sector. The International Federation of Chemical, Energy, Mine and General Workers' Union (ICEM) reports that 40-60% of the workforce in Asian cement factories are contract workers earning an average of 20-25% of the wage of permanent workers, and with no social protection.

**8** Similarly, Oxfam<sup>3</sup> reports that in Indonesia it is common for factories to have 50% of their workers on short-term contracts in a range of industries that were neither temporary nor seasonal. And in Bangladesh, Oxfam found that 75% of waged workers in the garment industry did not have a written contract.

**9** In 2011 millions of men and women around the world find themselves in precarious work outside the recognised employment relationship and the legal and institutional frameworks designed to protect them – in jobs that are characterised by atypical employment contracts, limited or no social benefits and statutory entitlements, high degrees of job insecurity, low job tenure, low wages and also high risks of occupational injury and disease. Women are disproportionately represented. And the risks for society are high, with rising insecurity fuelling growing inequality and poverty.

1 Figures provided by the Global Union Federation, the IUF. This was a successful OECD Guidelines case submitted to the UK NCP.

2 Figures provided by the Global Union Federation, the IUF.

3 Better jobs in better supply chains, Briefings for Business No.5, Oxfam International, 2010.



**FIGURE 1:**  
**WOMEN WORKERS: PRECARIOUS WORK IN ELECTRONICS**



Are these workers precarious workers? Only 5% are permanent employees; 13% are employed on contractors of typically 6 months or a year in length and 82% are dispatch workers. All the permanent workers are men and all the precarious workers are women.<sup>4</sup>

#### BOX 1:

#### WOMEN WORKERS: THE IMPACT OF FACTORY CLOSURES<sup>1</sup>

‘It is a common problem across Asia that factory owners have fled, paying no or only partial compensation to workers they have made redundant... Normally there is arbitration from the labour ministry but this seems to have disappeared – governments are just letting things happen.’ Niza Concepcion, Committee of Asian Women (a regional network for female workers).

“In Brazil, women tend to work in the most precarious sectors and in the informal economy. The crisis is set to accentuate this trend, as women are the first to be laid off... Women workers are the backbone of industries that have been hit hard by the global economic crisis and women tend to be concentrated in insecure jobs with meagre earnings and few rights.” Rosane Da Silva, Brazil (trade union).<sup>2</sup>

1 The Price for the Economic Crisis, Bethan Emmett, Oxfam GB, Oxfam, March 2009.

2 Interview with trade unionist Rosane Da Silva (CUT - Brazil); [www.ituc-csi.org/spip.php?article2807](http://www.ituc-csi.org/spip.php?article2807).

#### Employee v worker

**10 OECD MNE Guidelines:** The use of the term ‘employee’ in the OECD MNE Guidelines dates back to 1976, a period when the recognised employment relationship was predominant and before the development of the complex global production chains of today. The 2000 Review, to some extent, reflected these changes in its description of the blurring of the boundaries of the enterprises<sup>5</sup> in the Preface and in the inclusion of modest supply chain provisions<sup>6</sup>. It also committed to promoting the principles of the 1998 ILO Declaration on Fundamental Principles and Rights, “the first explicit and comprehensive statement of a commitment to human rights since the Declaration of Philadelphia in 1944”<sup>7</sup>, which marked a new era of ‘workers’ rights. But there was no discussion of changing the term from ‘employee’ to ‘worker’.

4 Photograph taken from a publication of the Global Union Federation, the International Metalworkers Federation (IMF).

5 The Preface states that “multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organizational forms. Strategic alliance and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise”.

6 Chapter II, General Policies, paragraph 10: “Encourage where practicable business partners including supplies and sub-contractors to apply principles of corporate conduct compatible with the Guidelines”.

7 Extract from “The ILO and the quest for social justice, 1919 – 2009”, by Lee, Rodgers, Swepston and van Daele, published by the ILO in 2009.



# 11 ILO Tripartite Declaration of Principles Concerning Multinationals

**Enterprises and Social Policy:** The ILO MNE Declaration was drafted around the same time as the OECD Guidelines in 1977. The language uses various words/phrases including: ‘employee’; ‘worker’; ‘workers whom they employ’; and ‘workers in their employment’ which remains in the text today (see *TABLE 7* for the precise terminology in the provisions that are relevant to the Employment Chapter of the OECD Guidelines). TUAC understands, however, that there was no intention on the part of the drafters to use the terms to limit or broaden the scope of the provisions. Furthermore, the last revision of the Declaration in 2006, pre-dates a number of significant developments in the areas of business and human rights, supply chains and due diligence, which have major implications for the scope of the responsibility of enterprises, which need to be reflected in the terminology of the Updated OECD Guidelines.

**12 ILO:** The ILO generally uses the word ‘worker’, although not consistently. It also uses the term ‘employee’. The terms used in the conventions and recommendations that are relevant to the Employment Chapter of the Guidelines are set out in *TABLE 7*. The ILO does not have a standard definition of the term ‘worker’. In some cases ILO Conventions specify their own definition. As a general rule ‘worker’ is used when the aim is to cover all those engaged in work for remuneration and ‘employee’ is used when the intention is to restrict the scope.

**13 UN Protect, Respect and Remedy Framework:** The adoption of the UN Protect, Respect and Remedy Framework in 2008, which was endorsed by governments and business alike, provides new concepts and principles, which have reinforced the case for the use of the term ‘worker’. The UN Framework establishes that enterprises have a responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others and address adverse impacts that occur. This responsibility extends to all people – not just workers, and certainly not just to employees. These concepts and principles have been incorporated in the form of new provisions on due diligence, supply chains and human rights. They should similarly be reflected in the Chapter on Employment and Industrial Relations.

**14 Other instruments:** Other authoritative instruments for promoting responsible business conduct use the word ‘worker’, although sometimes in conjunction with ‘employee’. Examples are provided in *TABLE 5*.

**15 The legal framework:** National and European law also use the term ‘worker’ in order to ensure the broadest protection (see *TABLE 6*).

**TABLE 5:**  
**‘WORKER’ ‘V’ EMPLOYEE**

	Worker		Other
Universal Declaration of Human Rights	X	X	Everyone who works
International Covenant on Economic, Social and Cultural Rights	✓	X	
UN Global Compact	✓	✓	
ISO26000	✓	✓	
World Bank	✓	X	
International Finance Corporation (IFC)	✓	✓	
European Bank for Reconstruction and Development (EBRD)	✓	X	
Ethical Trading Initiative	✓	X	





**TABLE 6:**  
**‘WORKER’: WIDENING THE NET OF LEGAL PROTECTION**

Title	Description	worker	Employee
Charter of Fundamental Rights of the European Union (Official Journal 2007/C 303/01)	This is effectively the ‘bill of rights’ for the 27-member EU, and was given legally binding status with effect from 1 December 2009, when the Treaty of Lisbon came into force. Article 30 ... Every worker has the right to protection against unjustified dismissal... Article 31 ... 1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.	✓	X
Community Charter of the Fundamental Social Rights of Workers December 1989	<a href="http://www.aedh.eu/The-Community-Charter-of.html">http://www.aedh.eu/The-Community-Charter-of.html</a> This document enshrines social rights for all those engaged in <u>paid labour</u> in the context of the European internal market – to ensure that ‘fundamental social rights which should not be jeopardised because of the pressure of competition or the search for increased competitiveness’. It uses the term ‘ <u>worker</u> ’ throughout.	✓	X

### Terminology matters

**16** The rationale for changing from ‘employee’ to ‘worker’ is to update the Guidelines in view of the profound changes in the organisation of global production that have occurred over the past thirty-five years and the reality of relationships under which work is performed in both developing and industrialised countries.

**17** Maintaining the status quo of ‘employee’ would mean that the Guidelines would only apply to those workers in a recognised employment relationship with the enterprise, thus excluding 56% of workers in Nestlé’s factories in Indonesia, 89% of workers at the Walls Ice Cream factory in Pakistan and 75% of the garment workers working in the factories surveyed by Oxfam in Bangladesh. In short, those workers most in need of protection would fall outside the scope of the Guidelines.

**18** This would be wholly unjust. It would also undermine the fundamental purpose of the Guidelines – to close governance gaps and promote sustainable development. Furthermore, it would mean that the provisions of Chapter on Employment would be contradictory to the new provisions on human rights and supply chains and the responsibility of enterprises to respect the rights of ‘workers’.

**19** TUAC welcomes the shift to from ‘employee’ to ‘worker’ in the draft of the Employment Chapter but considers that the qualifying text that has been introduced in the latest Chair’s draft proposals (3 February 2011) based on<sup>8</sup> language used in the ILO MNE Declaration is restrictive and unclear. TUAC urges governments to adopt the term ‘worker’ throughout the Employment Chapter, in line with underpinning ILO standards and other authoritative international instruments. Failure to do so would deny the Update success in realising its objective of the Guidelines being a “*leading international instrument for the promotion of responsible business conduct*”.

8 But not always in line with as TABLE 7 shows.



TABLE 7:  
TERMINOLOGY MATTERS

EMPLOYMENT AND INDUSTRIAL RELATIONS CHAPTER	UNDERPINNING STANDARDS	WHY IT MATTERS
1a) <u>Respect the right of their employees <b>workers</b> to be represented by <b>establish or join</b> trade unions and <b>representative organisations of their own choosing</b>.</u>	1. ILO MNE Declaration, Provision 42: Uses the term: ' <b>workers employed by</b> ' 2. C87 Freedom of Association and Protection of the Right to Organise Convention, 1948: Uses the term: ' <b>workers without distinction</b> ', ' <b>workers organisation</b> ', ' <b>workers</b> '	All workers – as well as all employers – have the basic right of freedom of association. They also have the right to organise themselves at different levels: sectoral, national and international.
1b) <u>Respect the right of workers <b>whom they employ</b> to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on <b>terms and conditions of employment</b></u>	1. ILO MNE Declaration, Provision 49: Uses the term: ' <b>workers employed by</b> ' 2) C98 Right to Organise and Collective Bargaining Convention, 1949: Uses the term: ' <b>workers</b> '; ' <b>workers' organisation</b> '	All workers have the basic right to engage in collective bargaining. Enterprises are required to respect the right of all workers.  <i>If the Guidelines use the term 'employee' then 89% of worker at the Walls Ice Cream factory in Pakistan would be excluded from their scope.</i>
1e) <u>Be guided throughout their operations by the principle of <b>equality of opportunity and treatment in employment and</b> <del>Not</del> discriminate against their employees workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin <b>or other</b> status. Selectivity concerning <b>employee worker</b> characteristics <b>that</b> furthers established governmental policies <b>which specifically</b> to promote greater equality of employment opportunity <b>and treatment</b> or relates to the inherent requirements of a job, <b>shall not be regarded as discrimination</b></u>	1. C100 Equal Remuneration Convention, 1951: Uses the terms: ' <b>workers</b> '; ' <b>men and women workers</b> ' 2. C111 Discrimination (Employment and Occupation) Convention, 1958: Uses the term: ' <b>workers organisations</b> '	- This is about the right to equal opportunity and treatment for all workers.  <i>If the Guidelines use the term 'employee' then an enterprise discriminating against a worker who is not an employee on the grounds of race, colour, sex, or 'other status' would fall outside their scope.</i>
2 a) Provide <b>such</b> facilities to <b>employee worker's</b> representatives as may be necessary to assist in the development of effective collective agreements	1. ILO MNE Declaration, Provision 51: 51. Multinational enterprises, as well as national enterprises, should provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements. 2. C135 Workers' Representatives Convention, 1971: Uses the terms: ' <b>workers</b> ', ' <b>representatives in the undertaking</b> ', ' <b>workers</b> ', ' <b>workers representatives</b> '	



2 b) Provide information to <u>employee workers'</u> representatives <u>of workers they employ</u> which is needed for meaningful negotiations on conditions of employment	1. ILO MNE Declaration, Provision 55: Uses the term: ' <u>workers' representatives</u> '  It does not use the term ' <u>workers they employ</u> '	<i>Using the term 'employee' would mean, that the Guidelines recommend that just 2% of workers in the Lipton Tea factory in Pakistan, should be provided with information.</i>
2c) Promote consultation and co-operation between employers and <u>employees workers they employ</u> and their representatives on matters of mutual concern	1. ILO MNE Declaration: Provision 57: Uses the term: ' <u>workers and their representatives</u> '. It does not use the term ' <u>workers they employ</u> '. 2. R94 Co-operation at the Level of the Undertaking Recommendation, 1952: Uses the terms: ' <u>workers at the level of the undertaking</u> '	
3) Provide information to <u>employees workers'</u> representatives <u>whom they employ</u> and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.	1 ILO MNE Declaration: Provision 55: Uses the term: ' <u>workers' representatives</u> ' NOT ' <u>workers whom they employ</u> '  2. R129 Communications within the Undertaking Recommendation, 1967: Uses the term: ' <u>workers</u> '	
4b) <u>When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families;</u>	1. ILO MNE Declaration, Provision 34: Uses the term: ' <u>workers</u> '  2. R116 Reduction of Hours of Work Recommendation, 1962: Uses the terms: ' <u>workers</u> '; ' <u>workers' representatives</u> '	
5. In their operations, to the greatest extent practicable, employ local <u>personnel workers</u> and provide training with a view to improving skill levels, in co-operation with <u>employee worker</u> representatives and, where appropriate, relevant governmental authorities.	1. R195 Human Resources Development Recommendation, 2004:  Uses the term: ' <u>workers</u> ' and ' <u>employees</u> '	The Recommendation calls on governments to recognise that education and training are a right for all and to recognise the role of enterprises and ' <u>workers</u> ' in training and call for skills upgrading of all workers.



<p>6. In considering changes in their operations which would have major <u>employment effects upon the livelihood of their employees</u>, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their <u>employees workers in their employment and their organisations</u>, and, where appropriate, to the relevant governmental authorities, and co-operate with the <u>employee worker</u> representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.</p>	<p>1. ILO MNE Declaration, Provision 26:  Uses the term: <u>'workers in their employment and their organisations'</u>  2. C158 Termination of Employment Convention, 1982 <u>'Workers' representatives'</u>: defined as the workers' representatives recognised as such by national law or practice</p>	<p>The closure of a factory impacts potentially adversely impacts on all workers – not just the employees of the enterprise. The impacts on women working in precarious jobs are illustrated in the interviews in BOX 1) The Guidelines should recommend that enterprise consult with the representatives of all workers.</p>
<p>7. In the context of <i>bona fide</i> negotiations with <u>workers'</u> representatives <u>workers whom they employ</u> on conditions of employment, or while <u>employees workers</u> are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer <u>employees workers</u> from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise</p>	<p>1. ILO MNE Declaration, Provision 53: Uses the term: <u>'workers' representatives'</u> NOT <u>'workers whom they employ'</u>.</p>	
<p>8. Enable authorised representatives of their <u>employees workers whom they employ</u> to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.</p>	<p>1. ILO MNE Declaration, Provision 52: Uses the term: <u>'workers' in their employment.</u></p>	