LABOUR & EMPLOYMENT LAW

A Practitioner's Guide

THE FEDERAL MINISTRY OF LABOUR AND EMPLOYMENT'S GUIDELINES ON CONTRACT STAFFING AND OUTSOURCING IN BANKS, INSURANCE COMPANIES AND FINANCIAL INSTITUTIONS: AN OVERVIEW

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1.0 INTRODUCTION

The world of work has, in the last decade, seen the emergence of various species of non-standard work arrangements including casual employment, labour outsourcing and contract staffing. Contract and outsourced employees form a significant fraction of the workforce in the Nigerian banking, insurance and financial services industry. The trade union movement and Non-Governmental Organisations in Nigeria have been protesting against the perceived abuse of contract employment and labour outsourcing in Nigeria. In a bid to regulate and standardize the practice of manpower outsourcing in the Nigerian banking, insurance and financial services industry, the Federal Ministry of Labour and Employment

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in September, 2022 released a Guidelines on Contract Staffing and Outsourcing in Banks, Insurance Companies and Financial Institutions (hereinafter "the Guidelines"). The Guidelines was signed by the Honourable Minister of Labour and Employment on the 8th September, 2022. The said Guidelines went viral a few weeks ago. This work attempts a critical overview of the Guidelines and offers some practice guides to the human resources and industrial relations managers in the Nigerian banking, insurance and financial services industry. It concludes that the Guidelines is a welcome development, however, some of its provisions are capable of exposing the principals to the risks of co-employership.

2.0 LEGAL STATUS OF THE GUIDELINES

The Guidelines was signed by the Hon. Minister of Labour and Employment on the 8th September, 2022. The Guidelines was issued by the Minister pursuant to the powers conferred on him by Section 88 of the Labour Act. Section 88(1)(e) and (g) of the Labour Act specifically empowers the Hon. Minister to make Regulations prescribing ***"anything which is to be prescribed under this Act and is not otherwise provided for" including regulations "containig such procedural or ancillary provisions as he considers necessary or convenient to facilitate the operation of this Act".*** And as the preamble to the Guidelines rightly asserts, guidelines are not meant to replace statutory provisions on the subject they relate to, but are supplementary to them and shall be read in conjunction with the relevant legislation. The Guidelines seeks to ***"lay down good industrial relations principles and set out additional***

[1] See Din v A.G (Fed) 1988 4 NWLR (pt. 87) 147, Ewete v Gyang (1997) 3 NWLR (pt. 496) 728, Bebeji v Abubakar (2009) 19 WRN 117 at 138, Osadebay v A.G. (Bendel) (1991) 1 NWLR (Pt. 169) P. 525 at 599 - 600

basic terms and conditions of employment to be observed by stakeholders". Thus, the Guidelines does not replace the Labour Act nor any other legislation, it only supplements them. it is trite law that administrative guidelines and regulations derive life from the statute by which the enabling power is conferred and as such, guidelines cannot validly alter, vary, or otherwise change a statutory provision[1]. Administrative guidelines and subsidiary legislations have no life of their own and are therefore valid only to the extent that they conform with the spirit and the letter of the enabling Act. This is also an industry-based guidelines and as such binds only the stakeholders in the Nigerian banking, insurance and financial services industry.

3.0 OVERVIEW OF THE GUIDELINES

The Guideliens is a product of a collaboration and robust engagements between the Federal Ministry of Labour, the trade unions, and the labour outsourcing companies. It represents the desire of these stakeholders to regulate and standardise the practice of labour outsourcingand contract staffing in the industry. Divided into 9 Parts, the Guidelines addresses critical issues relating to labour outsourcing and contract staffing in the industry. The 9 Parts are as follows:

- Definition of parties
- Entry requirements and minimum pay
- Career path and development
- Unionisation
- Collective Bargaining
- Dispute Resolution
- Disciplinary procedures
- Compliance with Standards and labour requirements

- Exit procedure and benefits

3.1 Part I of the Guidelines defines the parties to which the Guidelines applies. "Permanent Worker" refers to all employees who are directly employed and remunerated by the principal. A "non-permanent worker" is defined as an employee that is supplied or outsourced by a labour recruiter or a third party to the principal. The "principal" refers to all Nigerian employers in the banking, insurance and financial services industry. A labour recruiter, otherwise known as labour contractors, is defined to mean an institution registered to offer labour recruitment services.

3.2 Part II deals with entry requirements and minimum pay in the industry. It provides that the minimum pay in the industry shall be determined and reviewed annually by the stakeholders including the representatives of the principal, the labour recruiters and the relevant unions. This provision suggests that the stakeholders will meet on annual basis to determine the minimum pay applicable to the non-permanent employees in the industry. It remains to be seen how these stakeholders seek to achieve the much needed consensus on minimum pay in a complex industry comprising of diverse players with varying sizes, financial strength and industrial relations culture. Annual industry review of minimum wage also seems cumbersome. Once in two years seems to be appropriate and more realistic. The Nigerian financial services industry is wide and it encompasses the banks (including commercial banks, merchant banks, mortgage banks and microfinance banks), insurance companies, Registrars, credit agencies e.t.c. Getting the employers in the industry (Principals) and the labour outsourcing companies to the negotiation table by the trade unions on annual

[2] See Patovilki Industrial Planners v National Union of Hotels and Personal Services Workers unreported Suit No. NIC/12/89, Management of Harmony House Furniture Company Ltd v National Union of Furnitue, Fixtures & Wood reported in the Digest of Judgment of the National Industrial Court (NIC) 1978 - 2006 P. 187. Section 1 (1) of the Trade Union Act also recognises the `right of both permanent and non-permanent employees to join a trade union

basis to negotiate the industry's minimum wage may prove to be very cumbersome.

3.3. Part III deals with career path and development. It provides that outsourced and contract employees in the industry shall enjoy annual salary increment including opportunity for promotion and career advancement not later than every 3 years. It further provides that qualified non-permanent employees may be given opportunity for regular employment subject to availability of vacancies. This provision seeks to address the problem of perpetual casualisation, a practice where employees are retained on casual, contract or outsourced basis for several years without opportunities for career development in the industry.

3.4 Part IV and V guarantee the right of the non-permanent employees to join a trade union and to bargain collectively. The right of non-permanent employees to join a trade union is long recognised in Nigeria[2]. The Guidelines provides that all non-permanent employees in the industry shall belong to the National Union of Banks, Insurance and Financial Institutions Employees (NUBIFIE) or Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI) as appropriate. This blanket jurisdiction purportedly conferred on NUBIFIE and ASSBIFI runs contrary to the settled position of the law on union membership in respect of service contracts or Business Process Outsourcing (BPO). Labour contract is often distinguished from service contracts/BPO when it comes to trade union membership. Business Process Outsourcing otherwise called service contracts occurs where a company (principal) outsources some of its internal business processes to a third party who specialises in that task or process. The commonly outsourced business processes in the Nigerian financial services

[3] See Bimbo Atilola, "Business Process Outsourcing and the Right to join a Trade Union" Labour and Employment Law: A Practitioner's Guide P.5.

industry include security, logistics and catering services. The law and practice has been that where a contractor supplies only general personnel to the principal, such vendors are deemed to be labour contractors. But for all service contracts (BPO) where vendors render specific technical or special services which also entail supply of relevant equipments, such vendors are treated as service contractors[3]. The law is long settled that the employees of the labour contractors deployed to the principal are eligible to join the trade unions reognised for the industry of the principal (in this case NUBIFIE & ASSBIFI), while employees of service contractors (BPO) may also join the trade union recognised by law (i.e Trade Unions Act) for the industry of the vendors that employ them and not the trade unions recognised for the business or industry of the principal where they are deployed to work. Thus, while most employees (bankers) deployed by the labour contractors to work for the princpals (banks, insurance companies e.t.c.) will be eligible to join NUBIFIE or ASSBIFI as the case may be, employees deployed by service contractors under a BPO arrangement may only join the trade unions recognised for the industry of their primary employers (service contractors). Thus, for instance, where a bank outsources its catering or security services to a company which specialises in those services, employees so deployed by such service contractors to the principals may only join the National Union of Hotel and Personnel Services Workers (NUPSW) and not NUBIFIE. This is because catering and security services fall under the jurisdiction of NUPSW, not NUBIFIE[4]. It is irrelevant that the employees render the catering or security services to a bank or an insurance company. The Guidelines appears to ignore this settled principle of law and this is a recipe for jurisdictional conflicts among trade unions which may have adverse implications for the industry. The earlier Guidelines issued by the same Federal

[4] See the Third Schedule of Part B of the Trade Unions Act which defines the jurisdictional scope of every registered trade union in Nigeria.

Ministry of Labour & Employment for the Nigerian Oil and Gas Industry[5] appreciates this dichotomy between labour contractors and service contracts. The said Guidelines provides that all contract staff under labour contract in the oil and gas industry shall be eligible to belong to the National Union of Petroleum & Natural Gas Workers (NUPENG) or Petroleum & Natural Gas Senior Staff Association (PENGASSAN) as the case may be. The Guidelines further provides that:

> *"..4. For all service contracts, trade union membership shall be determined by the economic activities of the contractor company and in line with the extant labour laws as contained in the Third Schedule Part*
>
> *B of the Trade Unions Act.*
>
> *6. Where a contractor supplies only personnel, it shall be deemed to be a labour contract.*
>
> *7. Where the contractor supplies personnel with equipment, it shall be demend to be a service contract"*

The dichotomy between labour contract and service contracts (BPO) when it comes to trade union membership has also been endorsed by the Nigerian Courts. We shall discuss two cases decided by the National Industrial Court of Nigeria, and another by the Appeal Court, in this regard.

[5] See the Federal Ministry of Labour Guidelines on Contract Staffing and Outsourcing in the Oil and Gas industry issued in May, 2011.

[6]. (2015) 61 NLLR P. 403.

(i) NATIONAL UNION OF PETROLEUM AND NATURAL GAS WORKERS (NUPENG) V MARITIME WORKERS UNION OF NIGERIA (MWUN)[6]

In this case, a manning company, GAC Manning Services Ltd was retained by BW Offshore Ltd, a Norwegian oilfield services company and the owner of a vessel known as "Sendje Berge" operating in Okwori oilfield Terminal in respect of OML 126/137, to supply the latter with crew. The question arose as to which trade union bewteen NUPENG and the Maritime Workers Union of Nigeria (MWUN) had jurisdiction to organise employees of the GAC Manning Services Ltd on board the "Sendje Berge". The National Industrial Court found that the said workers of GAC Manning Services Ltd are crew members on the "Sendje Berge" and the Court accordingly held that the proper union for the said workers was the Maritime Workers Union of Nigeria, since crew members are employed by a company in the maritime business. In arriving at its decision, the Court considered the specific nature of the services rendered by the deployed staff who were crew, even though the user company (Principal) is an oil and gas company and the vessel (Sendje Berge) carries oil and gas products.

(ii) NUPENG V Maritime Workers Union of Nigeria (MWUN)[7]

In this case, a stevedoring contractor, Plomaz Nigeria Ltd, had a contract to supply trained dock workers to Chevron Nigeria Ltd, an oil exploration and production company. The services rendered by the staff of Plomaz Nig. Ltd deployed to Chevron Nig. Ltd was essentially marine services which involved the loading and off-loading of boats and badges at the dock. Again, the question arose as to which trade union, between NUPENG and MWUN is entitled to

[7] (2012) 28 NLLR 309.

'unionise' the staff of Plomaz Nig. Ltd deployed to Chevron. A panel of the National Industrial Court held that the Maritime Workers Union of Nigeria (MWUN) is the appropriate union in the circumstance the reason being that the services performed by Plomaz was essentially maritime services. It is irrelevant that the principal company (Chevron) is an oil and gas company.

(iii) SEA TRUCKS (NIG.) LTD v PYNE[8]

In this case, the respondent and his colleagues were employed by the appellant which busines fell under water transportation industry but they insisted they would like to belong to National Union of Petroleum and Natural Gas Workers (NUPENG) instead of Nigeria Union of Seamen and Transport Workers. The Court of Appeal held that the union that adequately and appropriately represents the interests of the appellant's workers is Nigeria Union of Seamen and Transport Workers, not NUPENG. His lordship, Salami JCA (as he then was)held interalia as follows:

> *"The respondent and other employees of the appellant cannot belong to a trade union whch is not engaged in the trade or industry of water transportation. To give approval for workers of the appellant, in the circumstance of the present appeal, to be registered with the National Union of Petroleum and Natural Gas Workers would do violence to the provisions of section 37 of the Constitution and would defeat the purpose for which the Constitution is designed to serve. The Constitution is to be interpreted in a manner that would give effect to the intention of the parliament... to avoid lending support to unrestricted access to associations that please their fancy...."*[9]

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[8] (1999) 6 NWLR (Pt. 607) 514.

[9] Ibid, at pp. 536 -537

It is unclear why the Guidelines being reviewed chooses to vest a blanket jurisdiction on NUBIFIE and ASSBIFI on trade union membership for the contract and outsourced staff in the industry. As noted earlier, this is a recipe for jurisdcitional conflicts among the trade unions and which may adversely impact industrial relations in the industry. The Guidelines also provides that the principals may only retain the services of labour recruiters licenced by the Federal Ministry of Labour and Employment. This provision seeks to stamp out the use of unlicensed labour contractors in the industry.

3.5 Part V makes it clear that collective bargaining shall be between the relevant trade unions and labour contractors. It further provides that collective bargaining shall be every two years and ***"in the presence and with the cooperation of the principal company"*** This provision has implications for the principals as it exposes them to the risk of co-employership. The "presence" and "cooperation" of the principals during collective bargaining between the trade unions and labour contractors expose the principals to the risk of co-employership. In a contract staffing and labour outsourcing arrangements, the principal may on account of its conducts be held to be a co-employer of the contract and outsourced employees deployed to it. The "presence" of the principals during collective bargaining between their labour contractors and trade unions implies the principal's endorsement of the process and its outcome, and this certainly has implications for co-employership[10].

[10] See PENGASSAN v Mobil Producing Nigeria Unlimited (2013) 32 NLLR (Pt. 92) 243, Tunde Ayoola - Johnson v 1004 Estates Ltd unreported Suit No. NICN/LA/100/2015.

3.6 Part VI deals with industrial conflict resolution. It provides that the parties shall respect the industrial conflict resolution process and mechanisms prescribed by the Trade Disputes Act. It shall be unlawful to embark on a strike or any form of industrial action without exploring and exhausting these industrial conflict resolution mechanisms. These mechanisms include collective bargaining, mediation, and conciliation. The Guidelines further enjoins the parties to respect the pronouncements of the Federal Ministry of Labour, the Industrial Arbitration Panel (IAP), and the National Industrial Court of Nigeria on trade disputes submitted to them.

3.7 Part VII deals with Disciplinary Procedures. It guarantees the right of employees to fair hearing in disciplinary proceedings. It provides that contract and outsourced employees shall be subjected to the disciplinary process of their respective employers (labour and service contractors) with the trade union representative in attendance. It further provides that in the event that a contract or outsourced employee is subjected to the disciplinary process of the principal, either as a witness or a suspect, the representative of the employer (labour or service contractor) and the trade union shall be in attendance to ensure fair hearing. This provision also has implications for co-employership on the part of the principals. While a contract or outsourced staff may appear as a witness before the Disciplinary Committee set up by the principal, any such appearance before a Disciplinary Committee set up by the principal as a "suspect" exposes the principal to the risk of co-employership. A principal who exercises disciplinary powers over a contract or outsourced employee makes itself a co-employer and may be properly joined as a co-defendant in litigations for wrongful termination and dismissal.

3.8 Part VIII deals with compliance with standards and labour laws. It enjoins the labour and service contractors to comply with all the extant Nigerian labour laws in their operations. This include but not limited to pension remittances as when due, provision of HMO, registration with NSITF, provision of group life insurance e.t.c. The principals also have a role to play in this regard. They should pre-qualify only labour contractors with recruiters licence including evidence of compliance with the above legal requirements. The principals should also reserve in the Service Level Agreements (SLAs) executed with the contractors, the right to demand for evidence of continuous compliance with these requirements while the engagement subsists. Part IX provides that the exit procedures and benefits due to the non-permanent employees shall be in accordance with the Collective Bargaining Agreement in force between the individual contractor and the relevant trade unions.

4.0 CONCLUSION

The Guidelines is commendable as it represents the commitment of the stakeholders in the Banking, Insurance and Financial services industry to standardize the practice of contract staffing and labour outsourcing in the industry. The Guidelines seeks to protect the rights of the non-permanent employees in the industry.

The Guidelines is presumed to have taken effect since the 8th of September 2022 when it was signed by the Honourable Minister of Labour and Employment. All the relevant stakeholders in the industry, especially the Principals which are predominantly banks and insurance companies, as well as the labour recruiters must

familiarize themselves with the provisions of the Guidelines . The Human Resources Managers and Legal Advisers of the principal companies need to urgently review their labour outsourcing processes to align it with the provisions of the Guidelines. The principal companies also need to urgently meet with the forum of their retained labour and service contractors with a view to having a common understanding of the Guidelines and how to operationalise it. The Principals in the industry should meet to discuss the areas of concerns in the Guidelines particulary those provisions that are capable of exposing them to the risks of co-employership. Like any policy document, there will be opportunities for a review of the Guidelines in the future.