FEDERAL MINISTRY OF LABOUR GUIDELINES ON CONTRACT STAFFING AND OUTSOURCING IN THE OIL AND GAS SECTOR*

1. Introduction

The need to cut costs and remain competitive in the global market has thrown up new forms of work with attendant effects on workers' rights. This global development has led to the emergence of various species of non- standard work arrangements[1] including casual employment, labour outsourcing and contract staffing. Casual employment and contract staffing form a significant fraction of that group of employment arrangements that are collectively known as non-standard, contingent, atypical and alternative work arrangements in international labour law. That these species of non-standard and unconventional work arrangements with deplorable working conditions have become a familiar practice in Nigerian workplace, especially in the oil and gas industry, is no longer news. The trade union movements, Non-Governmental Organisations (NGOs) and other organised groups have condemned and protested this fast growing cankerworm in Nigerian workplace but yet, this practice continues unabated. In an attempt to regulate manpower outsourcing and contract staffing in the Nigerian oil and gas industry, the Federal Ministry of Labour and Productivity in May 2011 released guidelines on Contract Staffing and Outsourcing in the Oil and Gas Industry[2] (hereinafter "the Guidelines").

The Guidelines include provisions on permanent and fixed contract jobs, migration from contract to permanent employment, unionisation,

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1. Non-standard forms of employment refers to work arrangements which do not fall within the traditional or conventional type of employment. They are non-permanent employment usually lacking rights and benefits consistent to traditional master-servant relationship. For further readings on the concept of Non-Standard Work Arrangements, See Rosemary Danesi, "Non- Standard Work Arrangements and the Right to Freedom of Association in Nigeria", Labour Law Review (NJLIR) Vol. 4 N0. 4 (2010) P. 1 -41.
2. Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector.

collective bargaining, dispute resolution, job security and capacity building for contract staff.

This work attempts a critical overview of these Guidelines. It concludes that while the Guidelines represent a commendable effort by the Federal Ministry of Labour and other stakeholders in checking the increasing abuse of contract staffing and labour outsourcing in the Nigerian Oil and gas sector, it is important that these Guidelines be reviewed along with the extant Labour Act and submitted to the National Assembly for re-enactment into law.

2. Definition of Terms

Contract Staffing

The term "contract staff" or "contract employee" is generally loosely used to describe workers who are engaged on temporary basis. These categories of staff are hitherto commonly referred to as casual workers, but because the expression "casual worker" is considered derogatory and no employer wants to be associated with it, it has become fashionable for organisations using them, especially banks and oil and gas companies, to refer them as contract staff.[3] Contract or casual staff are usually employed on temporary basis and with irregular contracts with various breaks between them. It is an irregular employment which carries no workplace benefits such as pensions, gratuity, medical care, paid annual, sick and maternity leave, paid holidays, redundancy pay, including the right to organise and bargain collectively. Indeed, the so called contract employment only differs from the standard or permanent employment only in the sense that the former confers no employment benefits such as those highlighted above. Contract staff receive lower wages and benefits compared to their permanent counterparts even though they may have the same academic qualifications and experience and even do the same work. Other features of temporary and casual employment include:

(i) Low and irregular earnings;
(ii) Loss of skill and age related increments;
(iii) Vulnerability to changes in schedules;

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3. Most Definitions equate "temporary" with "casual", though it has been argued that temporary employment is wider in scope than casual employment as the former typically includes fixed term contracts, seasonal employment, casual employment and other species of non-standard forms of employment. See Oyesola Animashaun "Casualisation and Casual Employment in Nigeria: Beyond Contract", Labour Law Review (NJLIR) Vol. 1 No. 4 (2007) P. 18.

(iv) Lack of representational rights;
(v) The relative ease of disengaging the workers as they may be fired at will;
(vi) Degrading and demeaning status of workers
(vii) Lack of job security; and
(viii) The continued quest of the affected workers to become permanent staff.

Outsourcing

Outsourcing occurs anytime one enterprise makes a contract with another to perform a process that is normally done internally by the first enterprise[4]. It is simply a process where a firm secures a set of its services performed by another firm. Outsourcing is, therefore, a tripartite employment relationship involving the client company, the contractor company (mostly labour contractors) and the contractor employees (outsourced employees). Outsourced employees, therefore, are those workers engaged by the contractor company to work for the client company. In this arrangement, the outsourced employees remain the staff of the contractor companies even where they work for, and in the premises of, the client companies. The outsourced employees work for the client company but he is paid by his primary employer, the contractor company, which is in turn paid a fee by the client company.

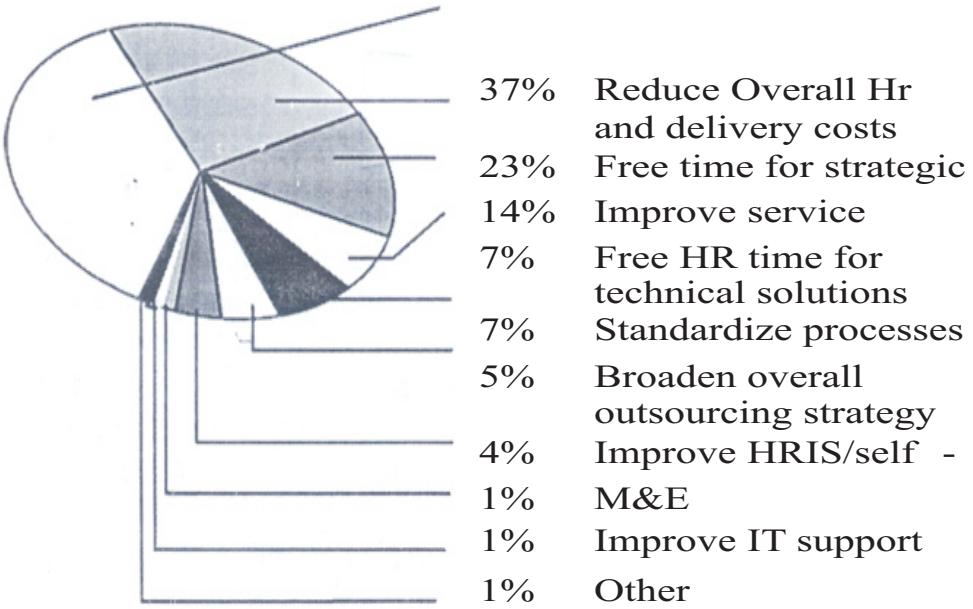
3. Outsourcing and Contract Staffing: HR Strategy or a Purely Economic Decision?

The question is often asked as to whether outsourcing and contract staffing is a human resource strategy or purely an economic decision. Some have argued that outsourcing of non-core operations of a company to an external legal entity that specialises in that particular job or operation promotes efficiency. But while this theory is correct, it appears that outsourcing and contract staffing is purely an economic decision. Outsourcing is a response to low cost global economy. The practice is largely motivated by economic considerations of profit, cost control, economies of scale and comparative advantage rather than any human resource theory[5].

The drive for global competitiveness and business survival has promoted and popularised outsourcing as an effective cost saving tool. Outsourcing,

4. This is the definition adopted by the National Outsourcing Policy (Nigeria) 2007.
5. See generally, J. Ochi Ikape, "Protecting the Rights of Outsourced Employees", in Human Resource Management Journal vol. 3 N0. 1 2011.

as a business model, reduces significantly an organisation's operating overhead costs. The table below illustrates the motivating factors for outsourcing.



Source: HR Outsourcing: New Realities, Expectations (2005 HR Outsourcing Effectiveness Survey Report) reproduced in J. Ochi Ikape Op. Cit P.6

The table above provides some insights into why organisations outsource their operations. The statistics provided by this table confirms our proposition that outsourcing as a business model is driven primarily by the need to save cost. The table shows that the major underlining reason for outsourcing is the need to reduce overall HR service and delivery costs. When a company outsources its operations, it saves both equipment and labour costs. Most organisations eliminate data processing and supervisory positions with a transition to outsourcing. Client companies bear no further costs on outsourced staff (other than the fees paid to the contractor company) and because contract staff are normally not paid employment related benefits, (and in the very rare cases where they are entitled to benefits, this burden is borne by their primary employers, the contractor companies) the company secures significant savings. In

addition to savings in payroll costs, the firm can also reduce office space and operational costs associated with it.

It is apparent that the increasing shift from standard to non-standard and precarious work arrangements is driven by the desire of the employers to avoid the mandates and costs[6] associated with permanent employment. Outsourced and casual workers are also often denied the right to organise and as such save the employers the 'nuisance' associated with union representation and collective bargaining[7]. Labour legislations in most developing countries, including Nigeria[8], are designed to protect permanent employees in conventional employment relationship and in order to avoid the costs associated with the regime of these laws, employers are massively shifting from traditional permanent employment to non-standard work arrangements including casualisation and contract staffing. The erosion of the employee-employer relationship in nonstandard work arrangements is having negative impacts on workers' rights.

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6. These include statutory and contractual benefits such as pensions and gratuity. Other costs associated with permanent employment include contribution to the Nigerian Social Insurance Trust Fund (NSITF) pursuant to the regime of the new Employees Compensation Act, 2010, procurement of group life insurance on staff, pursuant to the provisions of the Pension Reform Act (2014), contribution to the Industrial Training Fund (ITF) under the ITF Act and payments to the company's retained Health Management Organisations (HMO) for staff medical care.
7. A group of workers denied the right to organise (which is always the case with outsourced and casual/contract staff) is ill equipped to effectively demand for pay rise and improved terms and conditions of employment from their employers. They are also not in a position to embark on any effective strike or other forms of industrial action that may compel their employers to accede to their demands.
8. The Labour Act Cap L1 LFN 2004 and most labour legislations in Nigeria which define workers rights and benefits do not apply to casuals. This is because "casuals" are not contemplated in the definition of "workers" under these legislations. See for instance, the provisions of section 91 of the Labour Act which defines a worker as "any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is express or implied or oral or written and whether it is a contract of service or contract personally to execute any work or labour". There is, however, a ray of hope as the Employees Compensation Act (2010) includes casual, part-time and temporary workers in the definition of an 'employee'. That is, the Act include these species of workers in the categories of workers that can claim compensation under the Act. See section 73 of the Employees Compensation Act. For further readings on the regime of the Employees Compensation Act, see Themes on the New Employees Compensation Act (Bimbo Atilola ed) Hybrid Consult, 2013, Lagos. The rather restrictive definition of a worker under the Labour Act is understandable. The Act was enacted in 1971 at a time when non-standard work arrangement was not popular. The Act remains unamended since its enactment in 1971. This further reinforces the need for a complete overhaul of the Nigerian labour legislations most of which have become very obsolete and devoid of any contemporary relevance. The Labour Act is presently incapable of addressing the challenges of the increasingly complex Nigerian labour and industrial relations environment.

4. Contract Staffing and Outsourcing in the Nigerian Oil & Gas Industry

The last two decades have witnessed a major increase in the number of workers engaged on casual and temporary basis in the Nigerian oil and gas industry. In addition to developing a more flexible workforce, casualisation and contract staffing readily provide Nigerian employers with regular cheap labour. The practice has become a cost saving strategy by the indigenous and foreign oil companies operating in Nigeria because the employers are saved the costs associated with regular and permanent employment relationship.

Casualisation and contract employment provide enormous savings and flexibility for employers since historically, employment protection rights including benefits are confined to permanent employees. Labour rights and core labour standards have now become the sacrificial lambs on the alter of competitive edge by companies due to the perception that they constitute 'costs' which if eliminated or reduced to the barest minimum, will impact positively on the ability of companies to compete favourably in the global market and consequent improvement of their balance sheets, to the joy of shareholders[9a]. Good jobs are falling prey to corporate cost-cutting moves at the expense of working families. Too many jobs are being outsourced, contracted out or reclassified under a barrage of legal definitions designed to keep pay down, benefits low and the unions out[9b].

Corporate re-engineering and business restructuring, admittedly, is the prerogative of every employer of labour and indeed a legitimate tool in the hand of management for corporate survival, this aspiration must however be balanced against workers rights and other public policy considerations.

It is also important to reiterate that casual and temporary work has always been with us but the form it has taken in the last two decades is what is worrisome. In the past, contract and casual labour was required for seasonal employment and usually for a very short period. This work arrangement was predominant in the construction and agricultural sectors and it was mainly for the unskilled workers. However, today, both the skilled and unskilled are engaged as casual and temporary workers in the

9a. Rosemary Danesi, "Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria", Labour Law Review (NJLIR) Vol. 4 N0. 4 (2010)

9b. Lynda Eroke, Nigeria: Casualisation, Precarious Threat to Decent Employment, available at www.thisdaylive.com of 2nd April, 2013.

informal sector, the organised private and public sectors in Nigeria. The permanent nature of casual work has resulted into the development of "permanent casuals", a phenomenon used to describe a situation where workers are employed and retained on casual basis for several years. Casualisation and contract staffing in the Nigerian Oil and Gas Industry is also not limited to the private local and multinational companies but the practice is also rearing its ugly head in the public sector as the Nigerian National Petroleum Corporation (NNPC) and its subsidiaries now reportedly retain casual and contract staff to perform key functions.[10]

This casual and contract employment arrangement takes different forms. The employer may retain the services of workers directly on casual basis and terminate their contract at will. They are laid off periodically, say every three months, and reabsorbed under a new contract and this process continues in an endless cycle. The commonest form, however, is to retain the services of a labour broker who supplies the casuals to the client companies and recall them at will on the instruction of the client company. The labour broker remains the employer of the casuals even though the casuals work in the premises of the client companies. These casuals are often recycled among the various client companies needing their services. There are occasions where an oil and gas company will have in its operations hundreds of workers deployed by over 15 labour contractors. By this arrangement, the client companies are relieved of the legal responsibilities and the costs associated with being the employer of the workers in its workforce. These workers, most of whom are university graduates, work under deplorable terms and conditions. Most of them earn far less than their permanent counterparts even though they possess the same (and sometimes higher) qualifications and do the same work. They are often denied paid annual and maternity leave, pension, gratuity and other social security benefits, they enjoy no representational rights and may be disengaged at will.

Although there is a dearth of statistics on the level of casualisation among the various sectors of the economy, the Nigerian oil and gas sector is certainly one of the sectors where the cankerworm called casualisation and contract staffing is deeply rooted. As at 1991, the Nigerian oil and gas

10. See Casualisation + Outsourcing = slave labour (NBF News) P. 4 available on The Nigerian Voice of 29th August, 2011 (www. The nigerianvoice.com)

industry reportedly had 14,559 casual and contract workers as against 23,065 permanent junior workers[11]. These casuals and temporary staff, commonly found in the upstream oil and gas sector, work in the different sections and departments of these companies but earn lower salaries and welfare benefits when compared with their permanent counterparts. There is a sharp discrimination between casual and permanent employees in terms of pay, welfare benefits and the right to associate and bargain collectively. This discriminatory practice is contrary to section 17 (3) (e) of the Nigerian Constitution which states that "the State shall direct its policy towards ensuring that there is equal pay for equal work without discrimination on account of sex, or any other ground whatsoever".

It has become a matter of common knowledge that the Nigerian oil and gas industry has put in place a dual system of employment, the first is a permanent employment system which carries full benefits and the second is the casual and precarious work arrangement with no benefits.

Although the arguments of these companies is that they have had to outsource their non- core operations to external contractors who specialise in such services to enable them concentrate on their core operations, the truth of the matter is that these companies outsource both core and non-core operations including technical and semi-technical tasks on the production line. Indeed, cases abound where casual and outsourced staff have worked on the very core operations of these companies along with their permanent counterparts for years without being given permanent status.

The increasing dominance of casual workers in the Nigerian oil and gas industry has been protested by the two trade unions[12] in the industry including the Nigerian Labour Congress (NLC) and Trade Union Congress (TUC) on several occasions. The National Union of Petroleum and National Gas Workers (NUPENG) and Petroleum and Natural Gas Senior Staff Association (PENGASSAN) have on several times protested this unfair labour practice in the industry through demonstrations and picketing.

11. Rosemary Danesi, "Taking Labour Laws Seriously: Agenda For Legal Advisers and Human Resources Managers", Labour Law Review (NJLIR) Vol. 6 N0. 4 (2012) P. 8.
12. There are two registered trade unions in the Nigerian oil and gas industry. These are National Union of Petroleum and Natural Gas Workers (NUPENG) and Petroleum and Natural Gas Senior Staff Association (PENGASSAN). The former comprises of junior staff while the latter comprises of senior staff in the oil and gas industry.

The Nigerian Labour Congress and Trade Union Congress have also not relented in their fight against casualisation of Nigerian workers. While the protests by the labour movement have increased public awareness of this unfair labour practice, it appears there is no end in sight to perennial casualisation in Nigeria. This is due to a combination of many factors, the major factor being the massive unemployment in the country. The real sectors of the economy capable of generating employment opportunities for our teeming graduates is almost non-existent. The few existing ones groan under bad economic policies and multiple taxation which makes it impossible for them to compete with cheap imports from overseas. The local industries, especially the manufacturing sector, groan under soaring energy costs occasioned by perennial power failure and the recent removal of the fuel subsidy, multiple and oppressive tax regimes and unsustainable bank interest rates. The resultant massive unemployment in the country has forced many graduates to queue for casual jobs.

5. The Federal Ministry of Labour Guidelines on Contract Staffing and Outsourcing in the Oil and Gas Sector

The Federal Ministry of Labour and Productivity rose up to the increasing challenge of casualisation and contract employment in the Nigerian Oil and Gas Industry by coming up in May 2011 with a guideline tagged "Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector".

The Guidelines, a product of collaboration between the Federal Ministry of Labour, NUPENG, PENGASSAN and other relevant stakeholders in the Nigerian oil and gas sector, addresses critical issues relating to permanent and fixed contract jobs, migration from contract to permanent employment, unionisation, collective bargaining, dispute resolution, job security and capacity building for contract staff. These provisions will be examined one after the other.

Permanent and Fixed Contract Jobs

The Guidelines provide as follows:

(i) All jobs on the organogram of the company are regular jobs and must be occupied by permanent employees of the company.

(ii) The company's organogram shall be determined by the company's management; however, yearly work programme of companies shall be submitted with organograms to relevant governmental

agencies namely: Department of Petroleum Investment Management Services (NAPIMS) and the Nigerian Content Development Monitoring Board (NCDB) for review.

(iii) Where regular jobs on the organogram are found to be occupied by non-permanent staff, such jobs shall be resourced to permanent employment using company's recruitment standards.

(iv) Outsourcing shall be restricted to non-core business of the company except for proven short term projects.

The above provisions attempt to provide a framework for the use of permanent and contract staff in the Nigerian oil and gas industry. The provisions clearly set out to ensure that core operations in the industry are performed by workers on permanent employment while non- core operations may be outsourced to labour brokers. The Guidelines adopts a multifaceted approach by vesting some supervisory roles in the relevant government agencies in the oil and gas industry including DPR, NAPIMS and NCDB. The question of what is core and non-core operations in the Nigerian oil and gas industry is a recurrent one. The Guidelines, unfortunately, offers no guide in this regard. While the management insists that what qualifies as core and non-core operations is entirely their prerogative, the unions on the other hand contend that there must be some objective criteria for this dichotomy. And because the Guidelines offers no guide as to which job qualifies as core and non-core in the industry, the distinctions is susceptible to manipulation by the oil companies. But while the controversy exists, it is hardly debatable that jobs in the production line (technical and non-technical), marketing and office administration are core operations while non-core jobs will include logistics, security, catering, recruitment and similar services ancillary to exploration and production.

Migration from Contract to Permanent Employment

The Guidelines provide that contract staff who meets company recruitment standards shall be given opportunity for regular employment when vacancies exist. It further provides that qualified contractors staff shall be given opportunities in line with the principal companies recruiting standards before such vacancies are advertised. This provision seeks to curb the emergence of "permanent casuals", a phenomenon used to describe a growing practice where workers are employed and retained on casual basis for several years.

Unionisation

The Guidelines provide as follows:

1. It is the right of every worker to be unionized and bargain collectively. No employer, whether, third party contractor or principal company shall hinder overtly or covertly, the unionisation of workers.

2. All contract staff under Manpower/Labour contract shall belong either to the National Union of Petroleum & Natural Gas Workers (NUPENG) or Petroleum & Natural Gas Senior Staff Association of Nigeria (PENGASSAN) as appropriate.

3. Principal oil companies shall endeavour to facilitate unionisation and collective bargaining by streamlining labour contractors especially where there are large numbers of such contractors.

4. For all service contracts, trade union membership shall be determined by the economic activities of the contractor company and in line with extant labour laws as contained in the Third Schedule Part B of the Trade Unions Act.

5. Where a service contractor is engaged in multiplicity of economic activities that makes it difficult to pin the contract down to a particular area in the Third Schedule of part B of the Trade Unions Act, staff of such contractor company shall belong to the trade union where the contract in reference operates. This shall, however, be without prejudice to the rights of the contractor (employer) to deploy any of his staff from one area of his company's operation to the other.

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 deemed to be a service contract

8. All contract bid document shall clearly indicate whether a contract is a service or labour contract.

9. The union shall be free to seek formal confirmation from the contractor or the principal company on whether a contract is a service

contract or labour contract.

10. Where in doubt, the union shall be free to request clarification from relevant government agencies.

11. Where there are jurisdictional disputes, due processes in line with labour laws shall be followed in determining the appropriate trade union.

12. In the event of a conflict/trade dispute between the unions and employers, both parties shall follow due process as enunciated in the extant labour legislations.

13. All workers in the Free Trade Zones and Export Promotion Zones (FTZ/EPZ) shall not be denied the rights to freedom of association and collective bargaining. Unionisation in FTZ/EPZ shall therefore follow the provisions of extant labour legislations in view of the fact that the Act regulating industrial relations in the zone does not and cannot preclude unionisation.

The above provisions seek to address perhaps the most burgeoning challenge of casualisation and contract staffing – denial of representational rights. Casual and contract staff are often denied the right to organise by joining a trade union for the protection of their interests and advancement of their welfare. There were also instances where casual and contract workers were made to sign "yellow dog" contracts under which they undertake not to join trade unions. This practice is a contravention of the provisions of the Nigerian Constitution and the International Labour Organisation (ILO) standards.

Section 40 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right to Freedom of Association. The section provides that "every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests". (underlining mine)

The ILO Convention on the Freedom of Association and Protection of the Right to Organise N0. 87 and the ILO Convention on the Right to Organise and Collective Bargaining, both of which have been ratified by

Nigerian government, guarantees workers right to form and join a trade union and bargain collectively. Thus, denying workers these rights is a clear contravention of the 1999 Constitution and the ILO Standards. Workers, whether permanent or temporary, have the right to organise and bargain collectively. This is because the Trade Unions Act[13], which is the law regulating the formation and membership of trade unions in Nigeria accommodates both permanent and temporary staff. Section 1 (1) of the Trade Unions Act defines a trade union as " any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers..." (underlining mine). The National Industrial Court of Nigeria had held in Patovilki Industrial Planners V National Union of Hotels and Personal Services Workers[14] that the denial of workers of the right to join a trade union on the ground that they are temporary staff is unconstitutional.

The constitutional right of casual and contract staff to organise and bargain collectively is often suppressed in Nigeria and this practice is part of the cost cutting strategies since a group of employees denied the right to join a trade union is ill-equipped to bargain for pay rise including improved terms and conditions of employment. And indeed, NUPENG and PENGASSAN had repeatedly maintained that increasing casualisation in the Nigerian oil and gas industry is taking a toll on their membership strength. The Guidelines assert the right of every worker to join a trade union and bargain collectively. It further provides that no employer, whether the principal company or third party contractor shall hinder overtly or covertly, the unionisation of workers. The Guidelines further provide for the appropriate trade unions casual and contract staff can join in the oil and gas industry. The Guidelines distinguish between a labour contract and a service contract in this regard. Where a contractor supplies only personnel (labour broker), it shall be deemed to be a labour contract, but where the contractor supplies personnel with equipment, it shall be treated as a service contract. The Guidelines provide that all contract staff deployed by labour brokers (i.e labour contract) shall belong to either NUPENG or PENGASSAN as appropriate. However, in the case of service contracts, membership of trade unions by workers under such arrangement shall be determined by the economic activities of the

13. Cap T14 LFN 2004.
14. Suit N0. NIC/12/89 reported in the Digest of Judgements of National Industrial Court (1978 – 2006) pp. 288 -289.

contractor's company in accordance with the Third Schedule Part B of the Trade Unions Act. The Third Schedule, Part B referred to here defines the jurisdictional boundary of every registered trade union in Nigeria. And where a service contractor is engaged in multiplicity of economic activities that makes it difficult to pin the contractor to a particular area in the Third Schedule of Part B of the Trade Unions Act, staff of such contractor company shall belong to the trade union where the contract in reference operates. And where there is some ambiguities, the Guidelines further provide that the union shall be free to seek formal confirmation from the contractor, the principal company or relevant government agencies on whether a contract is a service contract or labour contract. The question as to which union the contract and outsourced staff in the oil and gas industry may lawfully belong to has always been a subject of controversy. NUPENG and PENGASSAN had hitherto maintained the position that every staff, whether casual, contract, outsourced (or under any similar appellation) working in or deployed to work in an oil and gas company is entitled to join their unions and no other union but this stand has been consistently opposed by the contractor or companies who insisted that their staff deployed to work in oil and gas industry may only join the relevant trade union recognised by law for the business or industry where the contractor operates. They argue, and correctly in my view, that mere deployment of their staff to an oil and gas client company does not ipso facto translate their workers to oil and gas workers. For instance, where a civil engineering and construction company deploys its staff to an oil and gas client company, the contractor company would insist that such staff may only join the Nigerian Union of Construction and Civil Engineering Workers and not NUPENG or PENGASSAN. And their argument is always that the deployment of their workers to an oil and gas company does not make the company an oil and gas company nor the staff oil and gas workers. Again, this argument has some economic undertone. The contractor companies financial obligations to workers (by way of pay and welfare benefits) is usually higher under the Collective Bargaining Agreement (CBA) in force and concluded by NUPENG and PENGASSAN compared to the CBA in force in other industries[15] but NUPENG and PENGASSAN would not let go due to the risk of loss of

15. It is a matter of common knowledge that pay and benefits negotiated by NUPENG and PENGASSAN for their members is usually higher than what is obtainable in most other unionised industries. The reason is not far-fetched, the Nigerian oil and gas industry is blossoming and the workers are one of the highest paid in Nigeria.

check-off[16]. The Guidelines' framework on the unionisation of workers under the labour and service contracts is commendable as same seeks to address a teething industrial relations challenge in the oil and gas sector.

Collective Bargaining

Closely related to unionisation is the question of collective bargaining. Collective bargaining refers to the process of reaching a collective agreement. It is a collective dialogue and negotiation between the employers' representatives and the workers' representatives with a view to reaching a collective agreement on matters relating to terms and conditions of employment.

The Guidelines provide as follows:

(i) Collective bargaining shall be between the relevant trade union and the workers direct employers or the contractors' forum and not the principal company

(ii) Contract agreement between the principal company and contractor companies shall include a clause which empowers the principal company to deduct from the contract sum, whatever is owed to the contract staff by the contractor in cases of default in the payment of wages and/or other agreed entitlements of the worker.

(iii) Employers and employees alike shall respect and uphold the sanctity of collectively bargained agreements.

(iv) Contract agreement between the principal/end user company and the contractor shall make collective bargaining between contractors and their employees mandatory. This provision shall be included in the scope for the contract.

This provision seeks to entrench collective bargaining in casual and contract work arrangements. The Guidelines emphasised the right of casual, contract and outsourced staff to bargain collectively with their primary employers. The Guidelines further guarantee this by ensuring that collective bargaining clause is inserted in the contract agreement between the client companies and the contractors.

16. Check-off dues refers to the monthly deductions trade unions make from the salaries of their members to run the affairs of the union. It represents the major source of revenue to trade unions. For further readings on the sources of trade union revenues, see Bimbo Atilola, "Legal Framework For the Management of Trade Union Funds and Accounts in Nigeria", Labour Law Review (NJLIR) Vol. 4 No. 3 (2010) pp 1-15.

Dispute Resolution

The Guidelines promote amicable settlement of industrial or trade disputes. It provides that parties shall respect and comply with the laid down provisions in the Trade Disputes Act for the resolution of disputes. Workers and employers shall not engage in industrial action without exhausting the provisions of the law for dispute resolution[17]. Parties shall also exhaust internal machinery for the resolution of a trade dispute before reporting the dispute to the Minister of Labour. Parties shall also respect the pronouncements of the Industrial Arbitration Panel (IAP) and the National Industrial Court (NIC).

Job Security and Capacity Building for Contract Staff

The Guidelines also make provisions for job security and capacity development for contract staff working in the oil and gas sector. The Guidelines provide that NAPIMS and other relevant agencies shall grant contractors in the upstream sector 3 years plus one year contract. This is to ensure some form of stability and job security for the contract staff. And where there is a change of contractor, the new contractor shall be encouraged to absorb the employees of the former contractor subject to satisfactory performance of such employees. Where a contractor is appraised to have performed credibly by both the client and the regulatory body, the client and the regulatory body shall explore the possibility of a renewal of the contract for another term. Contractors are also obliged to submit details of remuneration, training and development plan for their employee during prequalification for contracts. The relevant government agencies and the client companies shall monitor their contractors compliance with the extant Nigerian labour laws and ILO core standards. The Guidelines also mandate every contractor to have a Recruiter's licence and it shall be an offence for an oil company to deal with a contractor without a recruiter licence. This is one provision that is commonly honoured in breach than in compliance in Nigeria. Most Nigerian labour brokers operate without the requisite recruiters licence.

Legal Status of the Guidelines

Central to this paper is the question of legal status of the Guidelines issued by the Federal Ministry of Labour. Are the Guidelines enforceable and can a breach of its provisions amount to an offence as asserted by the

17. The Trade Dispute Act Cap. T8 LFN 2004 provides that parties shall explore Collective Bargaining, Mediation, Conciliation and Arbitration before resorting to industrial actions.

Guidelines? Can an offence be created by way of an administrative directive? If not, then how otherwise can an administrative directive or guidelines be enforced? And if yes, what is the applicable sanction or punishment where same is not defined or specified by the instrument or the Guidelines creating the offence? These issues will be examined with a view to determining the efficacy of the Guidelines in the fight against abuse of contract employment and labour outsourcing in the Nigerian oil and gas industry.

The Guidelines under consideration was made by the Minister of Labour and Productivity, pursuant to the powers conferred on him by Section 88 of the Labour Act. Section 88 (1) (e) and (g) specifically empowers the Minister to make regulations prescribing "anything which is to be prescribed under this Act and is not otherwise provided for" including regulations "containing such procedural or ancillary provisions as he considers necessary or convenient to facilitate the operation of this Act". And like 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 legislations. It is trite law that administrative guidelines and regulations derive life from the statute by which the enabling power is conferred and as such no such guidelines may validly alter, vary or otherwise change a statutory provision[18]. Any guideline or regulations that is inconsistent, either expressly or impliedly, with the substantive provisions of the statute by which the enabling power is derived is ultravires and null and void[19].

This implies that a statutory provision cannot be amended by an administrative guideline, directive or regulation but by the National Assembly itself[20]. 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 Act or law it relates to. The implication of this is that an administrative guideline or directive, including a subsidiary legislation, is incapable of curtailing or expanding a statutory provision. Administrative guidelines and subsidiary legislations cannot, therefore, cover substantive matters not contemplated by the enabling Act.

18. See Din V A.G (Fed) (1988) 4 NWLR (pt. 87) P. 147, Ewete V Gyang (1997) 3 NWLR (Pt. 496) P. 728.
19. See Bebeji V Abubakar (2009) 19 WRN 117 at 138, Osadebay V A.G (Bendel) 22 N.S.C.C (Pt.1) 137 at 184, (1991)1 NWLR Pt. 169 P. 525 at 599 – 600.

A close examination of the Federal Ministry of Labour Guidelines on Contract Staffing and Outsourcing in the Oil and Gas Sector reveals that some of the provisions are ultra vires the power of the Minister and as such null and void. The Guidelines, for instance, purports to impose obligations on the DPR, NAPIMS and the NCDB, agencies of government that are clearly not under the control of the Federal Ministry of Labour and Productivity.[20] While these provisions are noble and well intentioned, same is ultra vires and null and void.

The Labour Act, under which the Minister derives its power to make the Guidelines, does not have these agencies in contemplation. These agencies are creation of the law and their powers and functions are clearly spelt out in their enabling laws. The Minister of Labour, cannot, in my view, by way of an administrative guidelines, issue directives to them. And while inter governmental agencies co-operation is encouraged for efficiency in governance, same must be within the confines of the law. These administrative agencies are under the Federal Ministry of Petroleum Resources and they act in accordance with their enabling Act including administrative directives and guidelines issued from time to time by the Minister of Petroleum. The Court of Appeal had in the case of Onazulike V CDS Anambra State[21] warned that Ministers and Commissioners must exercise their powers in accordance with the enabling statutes. Closely related to this is the provision of the Guidelines creating an offence. The Guidelines, for instance, make it an offence for an oil company to retain a contractor without a recruiters licence but the Guidelines prescribe no punishment or sanction. Although section 88 (2) of the Labour Act empowers the Minister to "specify for an offence under the regulations" and "impose a fine not exceeding ₦500 or imprisonment for a term not exceeding one year, or both", these provisions, in my view, has not been sufficiently invoked by the Minister since the Guidelines prescribe no specific sanction or punishment. It is an elementary principle of our criminal and constitutional jurisprudence that no one may be tried or convicted for an offence unless the offence is defined and the penalty prescribed in a written law[22]. This reinforces the need for a more comprehensive labour code in Nigeria to address the numerous challenges occasioned by the increasingly complex and changing world of work.

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20. DPR, NAPIMS and the NCDB are parastatals under the Federal Ministry of Petroleum Resources.
21. (1992) 3 NWLR (Pt. 232) P. 791.
22. See Section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999. See also Aoko V Fagbemi (1961) 1 ALL NLR 400, Udokwu V Onugha (1963) 7 E.N.L.R. 1

6. Conclusion and Recommendations

Casual and contract employment with deplorable working conditions has continued for too long in Nigeria. The practice knows no bound as we now have both skilled and unskilled casuals in private and public sectors. There is also currently a worrisome development where companies phase out full time employees only to re-engage them on casual or contract basis or have their employment transferred to a labour contractor. Employment agency and labour outsourcing is largely unregulated in Nigeria and as such, the business has become all comers affair. Labour brokers recruit, exploit and freely recycle casuals among their numerous client companies.

The Guidelines released by the Federal Ministry of Labour, though a commendable and innovative approach, is incapable of sanitising Nigerian workplace of the current exploitative and undignifying use of labour occasioned by massive Casualisation and contract staffing. The current abuse of casual and temporary employment in Nigeria can only be checked by putting in place a strong and comprehensive legal framework for the employment and retention of casual and temporary workers. It is not sufficient to issue a ministerial guideline or directive, efforts must be made to prepare and submit a Bill to the National Assembly to curb this degrading and unfair labour practice. It also when we have a readily enforceable legal framework regulating nonstandard work arrangements that the protests of the trade unions can have any meaningful impact.

It is our recommendation that the Federal Ministry of Labour along with the trade union movements including other relevant stakeholders should convene a stakeholders meeting to address this ugly trend. The Guidelines should be reviewed along with the extant Labour Act and be submitted as a Bill to the National Assembly. The Bill must be applicable to all the sectors of the economy as what is needed now is a holistic rather than a sectoral approach. Casualisation and contract staffing with deplorable working conditions is not limited to the oil and gas industry, the practice is also endemic in the banking, construction and manufacturing sectors.

The proposed Bill must provide a comprehensive legal framework for the employment of casual and temporary workers in Nigeria. The Bill must guarantee the rights of casual, contract, outsourced and other nonstandard workers to dignity of labour and freedom from servitude. The Bill must

specifically define the rights and benefits that go with non-standard employments including the circumstances under which employers may legitimately resort to casualisation and contract staffing. It is important that the use of casual and temporary workers be limited to seasonal work or work that is only available periodically and continues for a relatively short period. The use of outsourced employees should be limited to the non-core operations of the client companies. The use of casual and temporary workers by the employers for core-operations or operations of permanent nature must be prohibited and penalised. This is to curb the growing phenomenon of "permanent casuals". The statutory framework should also include provisions regulating the practice of employment agency and labour outsourcing.

Nigeria may borrow a leaf from Ghana, China and India in this regard. Ghana adopted a holistic reform of its labour laws in 2003 when it harmonised its various labour legislations and consolidated them into a single Act known as the Labour Act N0. 651 of 2003. The Act is one of the most comprehensive labour legislation in the world in that it combines in a single Act subjects hitherto covered by separate legislations[23]. The Ghanaian Act defines casual and temporary workers including the rights and benefits they are entitled to. Casual and temporary workers are guaranteed fair and just remuneration including paid public holidays and weekends.

The Chinese Labour Contract Law of 2007 also offers some protection to workers in nonstandard forms of employment. Under this law, while the outsourced employees remain the staff of the labour contractor, the user client company is obliged by law to ensure that the remuneration of such staff is consistent with the standards of the working locations. They are also entitled to paid overtime, performance bonuses and similar benefits and earn the same pay as that received by workers of the client companies. Their right to join a trade union for the protection of their interests is also guaranteed. Similarly, the Contract Labour (Regulation and Abolition) Act of India stipulates that contract workers may only be hired to perform non-core operations and that those who perform the same kind of work as regular staff must receive equal treatment in terms of wages and conditions of employment.

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23. The Act repealed a total of 15 legislations. For further readings on the regime of the Ghana Labour Act (2003) See Bimbo Atilola, "Protecting the Rights of Casual Workers in Nigeria: Lessons From Ghana", Labour Law Review (NJLIR) Vol. 8 N0. 2 (2014) P.1-11.

It is, however, important to reiterate that appropriate machinery must be put in place to enforce the law and bring violators to book. Laws are not self enforcing. It is not sufficient to enact laws, same must be rigorously and vigilantly enforced and non-compliance sanctioned accordingly.