# Atypical Employment: Legal Protections for Atypical/Non-standard Employees in Malaysia

Nazruzila Razniza Binti Mohd Nadzri
Faculty of Business, Communications and Law
INTI International University, Nilai, Negeri Sembilan
*nazru.zila@newinti.edu.my*

**ABSTRACT**

Atypical employment or non-standard employment is seen as a common trend opted by employers in engaging employees nowadays. Non-standard employment takes in form of fixed-term contract relationship, part-time working, temporary work and agency working. This form of employment is becoming increasingly important particularly in Malaysia as it offers flexibility for employers in accommodating the organization demand. Meanwhile, it promotes uncertainty in term of job security and other legal protections of employees. Subsequently, this paper is intended to identify the fundamental features of atypical employment and reflects on the legal protection offers to these non-standard employees. The relevant statutory provisions and case laws will be analysed to figure out the extent the labour laws in Malaysia regulate atypical employments and finally confer the readers with the suggestions of improvement and/or alternative legal framework.

**KEYWORDS: Atypical Employment, Non-standard Employment, Labour Laws**

## INTRODUCTION

Across the globe, there have been marked changes to the nature of work. Factors which trigger the changes mainly due to the mobility of financial capital, the transferability of intellectual capital,[1] technological advancements, delocalization of production throughout the world, societal and cultural changes which is caused by globalisation, economic and political development.[2] These changes consequently drive the evolution of the employment relationship particularly from traditional employer-employee relationship to various uncertain emergence of employment relationship namely atypical employment or non-standard employment. In developed countries such as Japan, US, Canada, Germany and New Zealand the trend of creating this labour engagement is closely associated with the growing need for organisational flexibility.[3] Similar factor is identified influenced employers in Malaysia in moving to this mode of

[1] Thompson, C. (2003). 24 *Indus. L.J.* (Juta) 1793.
[2] Bronstein, A. (2009). *International and Comparative Labour Law: Current Challenges*. Geneva: International Labour Organization. Retrieved 5 April 2014, from www.ilo.org. ; Saad, S. S. (2011). Regulating Atypical Employment in the Malaysian Private Sector: Balancing Flexibility and Security. *Journal of Global Management*, 3 (1), January, 59-72. ; Che Rose, R., Kumar, N. and Gani, H. (2008). Unions' Perception Toward Changing Landscape of Industrial Relations in Malaysia. *European Journal of Social Sciences*, 7 (2), 114-133.
[3] Simard, G. (2010). Organisational and Individual Determinants of atypical Employment: the Case of Multiple Jobholding and Self-employment in Canada. Canadian Journal of Career Development, 9 (1), 26-33. Retrieved 23 July 2014, from http://ceric.ca/cjcd/archives/v9-n1/article3.pdf.; Mathias, A.T. (2007). Labour Flexibility and the Protection of Non-standard Workers in South Africa, Paper presented at *5th International Research Conference on Social Security*, Social Security and the Labour Market: A Mismatch?, Warsaw 5-7 March.

labour recruitment.[4] In Europe, the hiking trend of non standard employment has been in place since 1990s and it seems gradually extend to Asian countries in recent years including Malaysia. In consequence, there is a rich literature can be found on related issues of atypical employment within the scope of European countries.

In Malaysia, prior studies which addressed the issue of atypical employees' legal protection or any related matters are very limited. Therefore, this study is aimed at adding the wealth of knowledge on this area. The article begins with an analysis of definition and fundamental features of atypical employment and the aspects that it is different with typical employment. The paper then seeks to explore the legal framework that protects the rights of atypical employees particularly fixed-term employees, part-time workers and agency workers. However, the discussion will be limited to few aspects i.e. security of tenure and dismissal as well as social security protection. At the same time, the study examines any weaknesses in the existing legal framework which regulate these group of employees. Finally, the study offers suggestion or recommendation to improve the existing laws.

## ATYPICAL OR NON-STANDARD EMPLOYMENT VS TYPICAL OR STANDARD EMPLOYMENT

Atypical or non-standard employment and typical or standard employment imply from industrial practice. There are none of the literature formally classifies these forms of employment. Such categories of employment are founded on the common features of each category has. Thus there is no specific definition for each of them. Standard or typical employment refers to a traditional type of relationship between employer and employee that has permanent position in nature, standard working hours, wide range of statutory protection and security of tenure.[5] Whilst, atypical or non-standard employment comprises of engagement that is for short-term, impermanent position, individually negotiated and flexible arrangement. These features are consistent with the definition of atypical workers stated by Polivka[6] for instance as "*any job in which individual does not have an explicit or implicit contract for long-term employment or one in which the minimum hours worked can vary in a non-systematic way*". Hence, the common examples of atypical employees are temporary, part-time, agency and fixed-term.

## EMPLOYMENT TREND IN MALAYSIA

There is no prominent data to support that the trend of employment in Malaysia is heading to similar development as what happened across the globe but there are few literatures either directly or indirectly have indicated such pattern. The studies generally have recognised the practice of recruiting employees through this mode of employment i.e. non-standard. Ramasamy[7] proposed that one of the challenges is encountered by labour movement in Malaysia in protecting employees' interest is the trend of outsourcing and offering precarious jobs by employers which indirectly confirms the trend of hiring employees on atypical

[4] Che Rose, R., Kumar, N. and Gani, H. (2008). Unions' Perception Toward Changing Landscape of Industrial Relations in Malaysia. *European Journal of Social Sciences*, 7 (2), 114-133 at 120.
[5] Serrano, M. R. (2014). From Standard to Non-standard Employment: The Changing Patterns of Work. In Serrano, M. R. (Ed.). *Between Flexibility and Security: The Rise of Non-Standard Employment in Selected Asean Countries*. Jakarta: Asetuc p. 12. Retrieved 20 May 2014, from www.fes.de/cgi-bin/gbv.cgi?id=10792&ty=pdf.
[6] Polivka, A. E. and Nardone, T. (1989). The Definition of Contingent Work. *Monthly Labor Review*, 112 (12), 9-16.
[7] Ramasamy, N. (2012). The Future of the Trade Union Movement in Malaysia. 1 *LNS(A)* vii.

arrangements. Additionally, Kuruvilla and Erickson[8] commented that the growth of contract work and the hiring of guest workers in Malaysia have affected the union power and influence. Uncertainty on the involvement of workers in atypical employment relationship can also be inferred from the Malaysian's Labour Force Survey reported by the Department of Statistic Malaysia which concluded that there are four categories of worker namely employer, employee, own-account worker and unpaid family worker.[9] Serrano analysed the data and commented that majority of workers in Malaysia are classified as "employees" but from the four categories of employed persons, it is difficult to understand the magnitude of atypical employment in Malaysia.[10] There is a tendency that these four categories of employed persons may also participate in labour force as non-standard employees. Nevertheless, Saad's work[11] could be described as a good guidance to support that the Malaysian labour environment is moving to the same pace with the global labour trend even though it is not a comprehensive study. The study found that the 16 companies who responded to the survey engaged the service of non-standard workers either under a fixed-term contract or on part-time basis. The literature further indicated that the major contributions of hiring non-standard workers are either to address the shortage of manpower or as a measure to re-employ retired employees. In addition, the surveyed employer consensus that ease termination and lower labour costs as advantages of employing fixed-term and part-time workers. In another study[12] it is implied that multinational companies have widely accepted atypical types of employment.

## CONTRACT OF SERVICE AND CONTRACT FOR SERVICE

Adopting the English common law, employees in Malaysia must be hired under the contract of service for them to be covered by the employment law even though there are wider protection recognised for "employees" within the definition of employees in the Employment Act 1955 (Act 265) (the EA 1955).[13] Besides the EA 1955, the related employment law statutes are Industrial Relations Act 1967 (Act 177), the Employees Provident Fund Act 1991 (Act 452) and Employees' Social Security Act 1969 (Act 4). There are employed persons but under contract for services and they are called independent or self-employed contractor.[14] Consequently, the differences between contract of service[15] and contract for services is significant as the employees related rights and protections[16] are only confined to employee within the contract of employment or contract of service.[17]

---

[8] Kuruvilla, S. and Erickson, C.L. (2002). Change and Transformation in Asian Industrial Relations. *Industrial Relations*, 41, 171-228 at 196.

[9] See Table 13: Number of employed persons by status in employment, Malaysia, 1982-2012. Retrieved 18 July 2014, from http://www.statistics.gov.my/portal/download_Economics/files/DATA_SERIES/SURVEY10/PDF/TABLE13.pdf.

[10] Serrano, M. R. (2014). Malaysia. In Serrano, M. R. (Ed.). *Between Flexibility and Security: The Rise of Non-Standard Employment in Selected Asean Countries*. Jakarta: Asetuc p. 60. Retrieved 20 May 2014, from www.fes.de/cgi-bin/gbv.cgi?id=10792&ty=pdf.

[11] Saad, S. S. (2011). Regulating Atypical Employment in the Malaysian Private Sector: Balancing Flexibility and Security. *Journal of Global Management*, 3 (1) ), January, 59-72.

[12] Subramaniam, A. G., Overton, B. J. and Bala Maniam, C. (2015). Flexible Working Arrangements, Work Life Balance and Women in Malaysia. *International Journal of Social Science and Humanity, 5 (1), January,* 34-38.

[13] See s. 2 (1) of the EA 1955.

[14] Ahmad Mir, A. and Kamal, N. A. (2006). *Employment in Malaysia*. Selangor: ILBS at 11; Aminuddin, M. (2010). Complying with the Employment Laws. 1 *LNS(A)* xvii

[15] See s. 2 (1) of the Employment Act 1955 .

[16] Among others employees are subjected to compulsory statutory contributions and payments for instance the employees' provident fund, public insurance scheme, workmen's compensation and pensions scheme. Additionally, employee is entitled for minimum standard of employment protections, minimum requirement

Generally, the features of contract of service are closely associated with the features of atypical forms of employment i.e is on full time basis, continuously for indefinite period, performed at the employer's place of business and under close direction of employer.[18] These features have been integrated in the common law tests usually applied in order to determine an employment status of a worker in the Industrial Courts. However with diversification of employment relationships, undeniably it becomes the challenge to the courts in concluding any cases with such legal issue. A thorough analysis and evaluation of the facts and circumstances of the individual case is crucial in order to fairly justify each courts' findings. The implication of courts decision on the issue then infer cost implication to both employer and employee.

## FIXED-TERM EMPLOYEES, PART-TIME EMPLOYEES AND AGENCY WORKERS

In general, fixed term employees refer to employee who are employed under contract of employment that is based on apparently specified and limited duration. It usually will automatically end when the period during which a contract is due. Sometimes there are contract mistakenly interpreted as fixed term when it is terminable on either the happening of a specified future event at some uncertain future time.[19] Additionally, a genuine fixed-term contract of service may include a provision allowing termination by notice before the expiry of the fixed term.[20]

While, fixed-term contract of service seems increasingly popular in the employment of expatriates and also in the construction industry where employees are commonly engaged on a project basis, [21] part-time work is evidenced preferred among female[22] as it allows flexibility of working hours and this helps female workers to focus and manage the family needs.[23] Thus, the popularity of part-time work is partly linked with the increase of women's participation in labour force.[24] Part-time employee is defined in s. 2 (1) the EA 1955 as person included in the First Schedule whose average hours of work per week as agreed between him and his employer are more than thirty per centum but do not exceed seventy per centum of the normal hours of work per week of a full-time employee employed in a similar capacity capcity in the same enterprise.

Agency work or in Malaysia, is better known as outsourcing of labour comes into place when a temporary agency assigns temporary workers from one firm to another for usually short-term tasks. Globalisation and highly competitive business have been identified as among the reasons

---

of dismissal and termination notices and protections against unfair dismissal and the right to redundancy payments.

[17] *Ibid.*

[18] Arne L. Kalleberg (2000). Non standard Employment Relations: Part-time, Temporary and Contract Work. *Annual Review of Sociology*, 26 341-365 at 341

[19] *Brown v Knowsley Borough Council* [1986] IRLR 102 cited by Ali Mohamed, A. A. (1995). Legal Status of An Employee Under Fixed Term Contracts of Employment , *5 ILR* xli.

[20] *Dixon v British Broadcasting Corporation* [1979] 2 All ER 112 (CA)

[21] Teh, E. L., Cheah, T. and Su. Malaysia. In *Employment and Labour Law in Malaysia*. 1st edition, London: Global Legal Group 95-105 at 99

[22] Sharma, B.(1996). *Industrial Relations in ASEAN: A Comparative Study*, Kuala Lumpur, Malaysian Book Publisher Association cited in Zakaria. S. and Saif, S. (2010). The Changes in Business Practices in the Era of Globalization Indicate that Trade Unions have no Place in Today's Working World: An Overview. *Prosiding PERKEM Persidangan Kebangsaan Ekonomi Malaysia ke V (PERKEM V), Inovasi dan Pertumbuhan Ekonomi,* Port Dickson, Negeri Sembilan, 15 – 17 Oktober, 1-9 at 3

[23] Goh, L. (2012). Flexibilty for Working Mums. *Thestaronline*. Retrieved 1 May 2014, from http://www.thestar.com.my/News/Nation/2012/09/30/Flexibility-for-working-mums/.

[24] Zainal Abidin, M. (2012). Having a Job but not Building a Career. *The Edge*, 13 February.

many organisations resorting to this way of engaging workers.[25] The legal position of outsourcing agent was once become controversial issue mainly in year 2010 subsequent to a proposed amendment of the EA 1955.[26] It was claimed that this kind of engagement has the adverse effect to such employees for example denial of right to become member of trade unions[27] and pay wages are normally lower even though such worker carrying out the same work as other workers in the core workforce.[28] There is neither specific definition is provided by any of employment related legislations for the term "agency workers" nor "agency work" but agency work involves a tripartite relationship between the agency, the worker and the client company. The agency and the employee conclude an employment contract in which the main working conditions such as working time and level of pay are laid down, but the work is carried out in the client company.

## SECURITY OF TENURE AND DISMISSAL

In an employment context, security of tenure or job security is very fundamental as it guarantees pay rise, promotions and other related benefits.[29] Perhaps this right has been judicially interpreted as property right[30] which in the employment law carries the meaning that an employer has no right no dismiss or terminate the service of his worker save with just cause or excuse.[31] Furthermore, the right to life guaranteed by Article 5 (1) of the Federal Constitution for every citizen has been given wider interpretation to encapsulate "right to livelihood".[32] It is concluded that right to livelihood then means a worker has an interest proprietary in nature in the continuation of his employment.[33]I n the Malaysian jurisdiction, the right of employee to seek legal redress against unfair termination of service is founded in s. 20 of the IRA 1967 provided such employee falls within the definition of "workman" in the IRA 1967.[34] Consequently, for the courts to allow an employed person to resort to s. 20 of the IRA 1967 such employee shall at the first place to prove that he/she is hired under a contract of service.

---

[25] Hassan, K. H., Lee. J.P. and Ismail, N. (2013). Human Resource Management: Labour Outsourcing from Malaysian Law Perspective Kamal Khalili. *Persidangan Kebangsaan Ekonomi Malaysia ke VIII (PERKEM VIII),* "Dasar Awam Dalam Era Transformasi Ekonomi: Cabaran dan Halatuju", Johor Bahru, 7-9 June

[26] The proposed amendment to the EA 1955 through the tabling of the Employment (Amendment) Bill 2010 was opposed by many quarters including trade unions because among others it was claimed to legalise the outsourcing of labour practice by replacing the definition of "sub-contractor of labour" to "contractor of labour". The amendment is however passed through and was in force on 1st April 2012. However, the Minister exempted the application of this definition from all contractors other than those who are supplying labour to the agricultural sector through the Employment (Exemption) Order 2012 (Order 2).

[27] Hector, C. (2009). Workers on fixed-term contracts: HR Ministry fails to provide JUST calculation of benefits when they are retrenched. 23 March. Retrieved 12 July 2014, from http://charleshector.blogspot.com/2009/03/termination-and-lay-off-benefits.html.

[28] Seifert, H. (2010). Atypical Employment In Japan and Germany. *Policy paper*, Japan Institute for Labour Policy. at 8. Retrieved 8 July 2014, from http://www.jil.go.jp/profile/documents/Seifert.pdf.

[29] Ali Mohamed, A. A. (1995). Legal Status of An Employee Under Fixed Term Contracts of Employment. 5 *ILR* xli.

[30] *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor* [1996] 1 MLJ 481 at 509-510.

[31] Ali Mohamed, A. A. and Sardar Baigh, F. B. (2012). Security of Tenure vs Management Prerogative to Discharge Surplus Labour. *International Journal of Business and Social Science*, 3 (7), April, 150-161 at 152.

[32] *R Rama Chandran v The Industrial Court of Malaysia and Anor* [1997] 1 MLJ 145 at 190, FC Eusoff Chin CJ

[33] Davies, P. and Freedland, M. (eds). (1981). *Labour Law: Text and Material*. 2nd edition, London: Weidenfield and Nicolson, at 428 cited in Ali Mohamed, A. A. and Sardar Baigh, F. B. (2012). Security of Tenure vs Management Prerogative to Discharge Surplus Labour. *International Journal of Business and Social Science*, 3 (7), April, 150-161 at 152.

[34] See s. 2 of the IRA 1967.

As regards an employed person under a fixed-term contract of service, they can easily fit in the above definition and the issue hardly disputed in court. Nevertheless, the major concern of many cases that have been referred to the courts regarding fixed-term employee is to determine the genuine status of the fixed-term contract. There are cases whereby employers engage their employees permanently on several fixed-term contracts in order to avoid liability of redundancy payment or compensation for unfair dismissal.

Retrenchment has been legally authorised by the law and admitted as the employer's prerogative[35] and in the meantime, the law has also assured the employees' right in such cases for instance to be offered termination benefits or redundancy payment.[36] However, the right is limited to employees who are covered by the EA 1955. In other words, the statutory redundancy scheme is intended for full-time and permanent nature of employment. Thus, fixed-term contract of service can be described as a way out to this liability as the engagement usually on short term basis. The employer may upon the expiry of existing contracts decide not to renew the employment. The Industrial Courts in several cases had decided that when employed persons challenged the status of their contracts, the court would enquire into is whether there was an "ulterior motive" behind the fixed term contract. Ali Mohamed in his literatures[37] addressed this issue in lengthy and can be summed up that in such cases the courts would decide by inferring to the real intention of employer i.e. it should have been related genuinely to the operational need of the establishment. The analysis of few cases are worthwhile to illustrate the extent the courts had applied the principle. In the case of *Malaysia Airlines Bhd v Micheal Ng Laing Kok* [2000] 3 ILR 179 (Award No. 588 of 2000) the Industrial Court decided that the employer company had neither successfully proved that the claimant was redundant nor hired on a genuine fixed term contract of service. Perhaps, the claimant was engaged on the ordinary contract of employment. Therefore it is subjected to the statutory protection of security of tenure. While holding that, the Industrial Court concluded that the employer's business is not seen as on temporary basis in which requires the service of the claimant to be specified till definite duration. The court further added the circumstances of the claimant's tenure with the company shows that he was employed in an intergral part of the company's ongoing business operations rather than to a service or operations which must of necessity be for a fixed duration. Similar approach was taken in the case when the claimant alleged that non-renewal of contract is founded on the bad motive for instance to weaken the power of trade unions. In the case of *Han Chiang High School Penang, Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools West Malaysia and Industrial Court of Malaysia,*[38] the Industrial Court found that the non-renewal of contract of service of some teachers who had been served for 20 years was without just cause and excuse since it was intended to evade the power of teacher's union where such employees were the members. Despite the above cases, the courts had been willing to decide in a genuine fixed term contract will end automatically on the date specified therein. Consequently the issue whether the worker was dismissed from employment does not arise.[39]

---

[35] *TWI Training and Certification (SE Asia) Sdn Bhd v Jose A Sebastian* [1998] 2 ILR 879 at 882; *East Asiatic Company (M) Bhd v Valen Noel Yap* [1987] ILR 363

[36] See Regulation 6 (1) of the Employment (Termination and Lay-Off Benefits Regulations) 1980.

[37] Ali Mohamed, A. A. (2003). Legal Aspects of Fixed-term Contracts. New Straits Times, 23 August.; Ali Mohamed, A. A. (2010). Security of Tenure in Employment: An Employees Precious "Property". 3 *ILR*, xxv-xliv.

[38] [1990] 1 ILR 473 (IC).

[39] *M Vasagam Muthusamy v Kesatuan Pekerja-pekerja Resorts World, Pahang & Anor* [2005] 4 CLJ 53; *Tan See Guan v Pembinaan Infra E & J Sdn Bhd* [2011] 4 ILR 353.

In short, the legal redress that is provided by s. 20 of the IRA 1967 is also applicable to an employee under a fixed-term contract either to challenge the status of existing fixed-term contract or non-renewal of such contract. Undeniably that an employee who is employed under a genuine fixed-term contract of service is not protected with security of tenure and easily being affected in a case of retrenchment. The courts then would make each case fact important and deal with each case on its own facts. This cautious approach of the courts would absolutely will be very helpful for fixed-term employees from being abused with unfair labour practice since there is no clear legal test and specific legislative provisions addressing this issue.

Another pertinent issue with regards the fixed-term contract employee is as how many times can a fixed term contract legally be renewed. There is no clear law which specify how many times such contract of service can be renewed or extended. Unlike in UK with the enactment of Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002,[40] the use of successive fixed-term contracts is limited to four years unless further fixed-term contracts can be justified on objective grounds.[41] Furthermore, if a fixed-term contract is of four years or more and is renewed, it will be treated as permanent contract unless the use of a fixed-term contract is accordingly justified. [42]

While the legal position of fixed term employee in UK is quite clear on the above issue, it is silent in the Malaysian related employment statutes. Thus, it is relatively important for the courts to consider of setting out certain guidelines as to the general features of fixed term contract and other relevant rules relating to fixed term contract of service. Generally, the common approach of courts is that the more times a fixed-term contract is renewed, there is high probability the court may treat it as a permanent contract.

In a case of part-time employee, it is quite clear legal position that such worker may seek legal recourse to address a claim of unfair dismissal in the Industrial Court since the definition of "workman" in s. 2 of the Ira 1967 does not specifically exclude a part-timer. The fundamental condition imposed by the s. 2 is only a person employed under a contract of service. An analysis of the case of *Minnal Fun Pub v Dinesh Muniandy [2004] 2 ILR 519* is helpful to support this proposition. The Industrial Court in the case has made a reference to the Federal Court decision in the case of *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govidasamy Palanimuthu*[43] where Salleh Abbas FJ held that "the duration and nature of an employment, be it temporary or permanent is immaterial for the purposes of determining the existence of a contract of service". Therefore, the court concluded that even though the claimant was employed on a part-time basis and paid hourly, he is entitled to be considered as an employee of the company. In other words, there exists a relationship of employer and employee between the disputed parties. This findings is consistent with the definition of part-time employee in the EA 1955.[44] Consequently, the normal remedy for dismissal without just cause and excuse i.e. reinstatement or damages in lieu of reinstatement is equally applicable to part-time.

In the case of *Ranhill Bersekutu Sdn Bhd v Noor Suzinee Abu Bakar* [2002] 3 ILR 1009, the Industrial Court in addressing the retrenchment exercise has made clear that despite selecting an employee on the basis of his status as a part time employee, the employer would have still proved the decision was not clouded with the element of *mala fide*. The claimant in this case, a senior engineer with the company who was retrenched contended that the conversion of her

[40] 2002 No. 2034.
[41] Reg 8 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
[42] Ibid.
[43] [1982] CLJ 538
[44] See s. 2 (1) of the EA 1955.

employment status from a full-time employee to a part-time employee without her consent and subsequently selected her to be retrenched was amounted as victimisation. The court finally found that the claimant's dismissal was tainted with *mala fide* and was without just cause and excuse.

Both cases have indicated that in spite of lack of security of tenure for a part-time employee but such worker is well protected against unfair labour practice or victimisation. It is however subjected to the level of awareness of the employee concern to uphold his right through the right legal avenue. S. 20 of the IRA 1967 obviously envisage the right of part-time employee to file a representation in cases of alleged unfair dismissal.

Lastly, it can be stated that agency worker also shares the similar concern with part-time employees and fixed-term workers when it comes to the issue of security of tenure. Perhaps this group of workers are the most vulnerable one. It is widely acknowledged that agency worker is significantly affected in term of job security. Hassan[45] highlighted that from legal perspective, outsourcing damages worker's rights including the security of tenure which is at stake. The workers who work under the contractors may be employed and terminated at any time by the principal and contractor. Briefly, the major role of a contractor for labour[46] is to supply workers, particularly foreign workers to the principal[47] (the owner) of any trade or business. Obviously, there is no employment relationship between either the principal or the contractor and the employees. As such, it justifies the fact that agency workers can be fired easily even there is no commission of misconduct by the worker. Furthermore, the minimum rights and protection provided by the EA 1955 and the employment related statutes including the IRA 1967 are not applicable to agency workers. Thus, the right to seek legal recourse from the Industrial Court through s. 20 of the IRA 1967 is not available to agency workers. It is agreeable that the insertion of s. 33A to the EA 1955 which imposes legal obligation on a contractor for labour to register with the Director General of Labour Department is a good measure to provide some form of protection to workers but it remains uncertain as to the position of agency workers.

It is therefore strongly proposed that there should be a clear-cut statutory provision to address the status of contractor for labour i.e. whether the contractor for labour should be regarded as the actual employer to the workers when he supplies them to the owner of the workplace. Consequently, these workers will not be neglected by the statutory protection especially the IRA 1967 so that their rights to join trade unions and file representation for unfair dismissal will be recognised.

**SOCIAL SECURITY PROTECTION**

In short, social security traditionally means a social insurance program providing social protection, or protection against socially recognised conditions, including poverty, old age, disability and others.[48] The major types of security protection that are particularly offered to the private sectors employees in Malaysia including the employees provident fund, employees' social security insurance for local workers and insurance protection for foreign workers. The relevant statutes that purposely enacted to regulate the social security schemes are the Employees Provident Fund Act

[45] Hassan, K. H., Lee. J.P. and Ismail, N. (2013). Human Resource Management: Labour Outsourcing from Malaysian Law Perspective Kamal Khalili. *Persidangan Kebangsaan Ekonomi Malaysia ke VIII (PERKEM VIII)*, "Dasar Awam Dalam Era Transformasi Ekonomi: Cabaran dan Halatuju", Johor Bahru, 7-9 June.
[46] See s. 2 (1) of the EA 1955.
[47] *Ibid.*
[48] Rohaizat, b. y., Hassan, M. O. N. M. and Davis, J. (2012). Approaches and Future Direction of Social Security System: Malaysian Perspective. Malaysian Journal of Public Health Medicine, 12 (1), 1-13.

1991 (the EPF Act 1991) and the Employees' Social Security Act 1969 (the ESSA 1969). The EPF Act 1991 statutorily formed the Employees Provident Fund as a social security institution and is responsible to manage the EPF members savings. The EPF Act 1991 provides retirement benefits for its members who are mainly private and non-pensionable public sector employees. While the EPF Act 1991 caters the retirement benefits for employees, the ESSA 1969 provides through Social Security Organisation (SOCSO) social security to employees and their dependants in the event of injury or death arising in the course of employment under two main insurance schemes mainly the employment injury scheme and the invalidity pension scheme.

Basically, it is apparent that the EPF Act 1991 and the ESSA 1969 extends the protection to fixed-term employees and part-time employees because they have fallen within the definition of employee in both Acts since the main requirement is such employee must be an employed person under a contract of service. As regards the agency workers, the contribution to EPF and SOCSO has always been an issue due to the uncertainty of their legal position. Since the primary legal requirement of the EPF Act 1991 and the ESSA 1969 in imposing liability on employer to contribute to both protection schemes is that employee must be hired under a contract of service, immediate employer/principal and contractor may easily evade themselves from this statutory duty. Therefore, it is again emphasised that an urgent legal deliberation is necessary to make clear as the status of agency workers.

## RECOMMENDATIONS

There are few aspects that require close attention. Firtsly, it is recommended that the definition of fixed-term employee to be specifically spelled out. Alternatively,the courts as stated above may provide the common features of fixed-term contract. This absolutely will assist the courts in determining the status of an employed person under a fixed-term contract when it is challenged or disputed. Perhaps with the increasingly popularity of fixed-term contract in recent employment environment, it is strongly suggested that a comprehensive statute be proposed to secure the rights and welfare of these employees.

Part-time employee has been given recognition with the insertion of the term part-time employee in the EA 1955 and the coming into force the Employment (Part-time Employees) Regulations 2010. Thus they enjoy the minimum benefits and protection provided by the Act. Nevertheless, they are easily affected in retrenchment exercise as the nature of employer-employee relationship is usually on temporary basis. Therefore, it is the duty of courts to carefully evaluate each case in totality so that the employer does not take advantage from such drawbacks.

Finally, for the agency workers, there are so many aspects that must be carefully attended in order to secure their welfare, rights and status. Obviously, the fundamental issue that require urgent attention is on the determinative factors of real employer as principal and contractor may easily escape from their responsibility. The enforcement s. 33A of the EA 1955 even though is admitted a good initiative to address this matter but an extensive legislative measures are still necessary,

## CONCLUSION

Atypical work is no longer a new employment form and has been in place since during pre-independence time and recently has been relatively acceptable by the employers especially the multinational companies. Agency workers for example at once were popular among foreign workers in construction industry but contractor of labour is now widely recognised in supplying

local workers to the immediate employers. An engagement of employees through fixed-term contracts are extensively practised by employers in private sectors as well as public sectors. Lastly, part-time work arrangement is apparently popular among female employees. This trend of employment shows that it is time to seriously find out an ideal mechanism especially through legal intervention so that their rights are equally protected and they are fairly treated without any discrimination especially in the aspect of job security and social protection. It should be noted that this work is far from comprehensive mainly because it is just a conceptual paper based on the existing literature. Therefore, a field study and empirical research is pertinent to figure out the extent atypical employment is recognised by employers. Besides that, other related issues that also need extensive research including the right to unionise, the implication of minimum wage and minimum retirement age policy, protection against discrimination and sexual harassment as well as occupational health and safety protection.

## REFERENCES

Ahmad Mir, A. and Kamal, N. A. (2006). *Employment in Malaysia*. Selangor: ILBS at 11; Aminuddin, M. (2010). Complying with the Employment Laws. 1 *LNS(A)* xvii

Ali Mohamed, A. A. and Sardar Baigh, F. B. (2012). Security of Tenure vs Management Prerogative to Discharge Surplus Labour. *International Journal of Business and Social Science*, 3 (7), April, 150-161 at 152.

Ali Mohamed, A. A. (2010). Security of Tenure in Employment: An Employees Precious "Property". 3 *ILR*, xxv-xliv.

Ali Mohamed, A. A. (2003). Legal Aspects of Fixed-term Contracts. New Straits Times, 23 August.

Ali Mohamed, A. A. (1995). Legal Status of An Employee Under Fixed Term Contracts of Employment. 5 *ILR* xli

Arne L. Kalleberg (2000). Non standard Employment Relations: Part-time, Temporary and Contract Work. *Annual Review of Sociology*, 26 341-365 at 341

Bronstein, A. (2009). *International and Comparative Labour Law: Current Challenges*. Geneva: International Labour Organization. Retrieved 5 September 2012, from www.ilo.org.

Che Rose, R., Kumar, N. and Gani, H. (2008). Unions' Perception Toward Changing Lanscape of Industrial Relations in Malaysia. *European Journal of Social Sciences*, 7 (2), 114-133.

Department of Statistics Malaysia. Retrieved 18 July 2014, from http://www.statistics.gov.my/portal/download_Economics/files/DATA_SERIES/SURVEY10/PDF/TABLE13.pdf.

Employees Provident Fund Act 1991 (Act 452).

Employees' Social Security Act 1969 (Act 4).

Employment (Part-time Employees) Regulations 2010.

Employment (Termination and Lay-Off Benefits Regulations) 1980.

Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (2002 No. 2034).

Goh, L. (2012). Flexibilty for Working Mums. *Thestaronline*. Retrieved 1 May 2014, from http://www.thestar.com.my/News/Nation/2012/09/30/Flexibility-for-working-mums/.

Hassan, K. H., Lee. J.P. and Ismail, N. (2013). Human Resource Management: Labour Outsourcing from Malaysian Law Perspective Kamal Khalili. Persidangan Kebangsaan Ekonomi Malaysia ke VIII (PERKEM VIII), "Dasar Awam Dalam Era Transformasi Ekonomi: Cabaran dan Halatuju", Johor Bahru, 7-9 June.

Hector, C. (2009). Workers on fixed-term contracts: HR Ministry fails to provide JUST calculation of benefits when they are retrenched. 23 March. Retrieved 12 July 2014, from http://charleshector.blogspot.com/2009/03/termination-and-lay-off-benefits.html

Industrial Relations Act 1967 (Act 177)

Mathias, A.T. (2007). Labour Flexibility and the Protection of Non-standard Workers in South Africa, Paper presented at 5th International Research Conference on Social Security, Social Security and the Labour Market: A Mismatch?, Warsaw 5-7 March.

Kuruvilla, S. and Erickson, C.L. (2002). Change and Transformation in Asian Industrial Relations. *Industrial Relations*, 41, 171-228.

Polivka, A. E. and Nardone, T. (1989). The Definition of Contingent Work. *Monthly Labor Review*, 112 (12), 9-16.

Ramasamy, N. (2012). The Future of the Trade Union Movement in Malaysia. 1 *LNS(A)* vii.

Rohaizat, b. y., Hassan, M. O. N. M. and Davis, J. (2012). Approaches and Future Direction of Social Security System: Malaysian Perspective. Malaysian Journal of Public Health Medicine, 12 (1), 1-13.

Saad, S. S. (2011). Regulating Atypical Employment in the Malaysian Private Sector: Balancing Flexibility and Security. *Journal of Global Management*, 3 (1), January, 59-72.

Seifert, H. (2010). Atypical Employment In Japan and Germany. *Policy paper*, Japan Institute for Labour Policy. at 8. Retrieved 8 July 2014, from http://www.jil.go.jp/profile/documents/Seifert.pdf.

Serrano, M. R. (Ed.). *Between Flexibility and Security: The Rise of Non-Standard Employment in Selected Asean Countries*. Jakarta: Asetuc p. 12. Retrieved 20 May 2014, from www.fes.de/cgi-bin/gbv.cgi?id=10792&ty=pdf.

Simard, G. (2010). Organisational and Individual Determinants of atypical Employment: the Case of Multiple Jobholding and Self-employment in Canada. Canadian Journal of Career Development, 9 (1), 26-33. Retrieved 23 July 2014, from http://ceric.ca/cjcd/archives/v9-n1/article3.pdf.;

Subramaniam, A. G., Overton, B. J. and Bala Maniam, C. (2015). Flexible Working Arrangements, Work Life Balance and Women in Malaysia. *International Journal of Social Science and Humanity, 5 (1), January,* 34-38.

Teh, E. L., Cheah, T. and Su. Malaysia. In *Employment and Labour Law in Malaysia*. 1st edition, London: Global Legal Group 95-105.

Thompson, C. (2003). 24 *Indus. L.J.* (Juta) 1793.

Zainal Abidin, M. (2012). Having a Job but not Building a Career. *The Edge*, 13 February.

Zakaria. S. and Saif, S. (2010). The Changes in Business Practices in the Era of Globalization Indicate that Trade Unions have no Place in Today's Working World: An Overview. *Prosiding PERKEM Persidangan Kebangsaan Ekonomi Malaysia ke V (PERKEM V), Inovasi dan Pertumbuhan Ekonomi,* Port Dickson, Negeri Sembilan, 15 – 17 Oktober, 1-9.