



Egal Disputes Arising from Outsourcing Labor - Temporary Service Companies

¹ Jorge Luis Restrepo Pimienta, ² Wilson Alberto Nieto Ríos, ³ Juan Miguel Mercado Toledo

¹Universidad del Atlántico

²Universidad del Manizales

³Universidad Americana - CUC

Abstract: The temporary services companies in Colombia were created with the purpose of contracting with third beneficiaries to collaborate temporarily in the development of their activities, however at the moment of their application the purpose for which they were created is unknown, in this way presented the labor outsourcing that entails the violation and violation of workers, because many of the rights that are legally mandated are unknown.

The International Labor Organization (ILO), through agreements ratified by Colombia, has been referring to the issue with the purpose of counteracting any form of labor outsourcing, and that, with this, it guarantees equal treatment to the workers of the companies that Are presenting this phenomenon, following these guidelines Colombia in its status as a social state of law and guarantor of human rights warned that any figure that is harmful to the working conditions of people within labor relations is under the understanding that the labor law Is a social and human right

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1. Introduction

This monographic research paper is aimed at clarifying the relative aspects that have led temporary service companies to distort their main purpose, which is enshrined in Law 50 of 1990, Article 71, which states: "A temporary service company is one that contracts the provision of services with third-party beneficiaries to temporarily collaborate in the development of its activities, through the work performed by natural persons, hired directly by the temporary service company, which has the status of employer with respect to them."

Likewise, labor outsourcing in Colombia is a phenomenon that is generating a very important social impact, for this reason it has been necessary for the International Labor Organization, the Constitutional Court, the Supreme Court of Justice and the Ministry of Labor to develop legal tools within their powers, to prevent any figure that worsens the working conditions of people and guarantee the protection of their rights in labor relations.

Finally, this scientific article will be developed taking into account a qualitative research approach because the purpose is to know the aspects that have been generating labor outsourcing with temporary service companies, to appreciate the elements that have been used to counteract this phenomenon and to establish the structure of the problem and the impact that it generates on society.

2. Methodology

The methodological approach used in this project is based on a qualitative approach, which allows us to understand and contextualize the research problem (Martínez et al., 2022). A type of hermeneutic documentary analysis is adopted in relation to legal conflicts arising from labor outsourcing, specifically in temporary service companies. To this end, techniques such as document analysis, observation, and bibliographic review were used, which are complemented by instruments such as summaries, conceptual maps, and conference reviews.

3. Results And Discussion.

LABOR OUTSOURCING – CONCEPTUALIZATION

To address the issues associated with labor outsourcing, it is essential to define certain concepts that are crucial for identifying the causes leading to its disfigurement.

Concept of Labor Outsourcing

The International Labour Organization (ILO), in its Resolution 181 of 1997, characterizes this issue by directly referring to Private Employment Agencies (PEA) and establishes a framework for improving their functioning in order to protect employees hired through them. This is because private employment agencies operate through a labor triangulation that practically translates into the outsourcing model.

Labor outsourcing, also known as outsourcing, is the process by which a company identifies a part of its business process that can be performed more efficiently and effectively by another corporation, which is contracted to carry out that specific function. This allows the original organization to focus on its core activities (López, 2001). Although it is promoted as a strategy to improve quality and development processes, the reality is that its implementation is based on two pillars: cost reduction and increased production, often without improving working conditions or outcomes.

In Colombia, there are regulations defining labor outsourcing as the processes carried out by a beneficiary to obtain goods or services from a provider, as long as the current labor regulations are met (Ministry of Labor, 2016).

Decent Work

The ILO, in its effort to protect and guarantee minimum conditions for workers, emphasizes the concept of decent work, defining it as “productive work for fair remuneration, security in the workplace, and social protection for the worker and their family, better prospects for personal and social development, freedom to express concerns, organize, and participate in decision-making that affects their lives, as well as equal opportunities and treatment for women and men” (ILO, 2004).

Regarding the principle of the primacy of reality over formalities, according to Article 53 of the Constitution, this principle recognizes the existing inequality between workers and employers, as well as the need to guarantee workers' rights without their conditions being affected by formalities (Herrera, 1998).

Mission Workers

According to Article 74 of Law 50 of 1990, mission workers are those sent by a temporary services company to the beneficiaries' premises to carry out the contracted tasks or services (Garzón, 2016). In this context, the beneficiary is understood as the natural or legal person who directly or indirectly benefits from the production of a good or the provision of a service by a provider, while the provider is the one offering those goods or services under their responsibility (Ibarra, 2016).

Permanent mission activities refer to those directly related to the production of characteristic goods or services of the company; that is, activities that are inherent and without whose execution the production of the beneficiary's goods or services would be affected (Decree 583, 2016).

Models of Labor Outsourcing

- Independent Contractors: According to Article 3 of Decree 2351 of 1965, these are natural or legal persons who contract the execution of works or the provision of services for the benefit of third parties, assuming all risks and performing the work with their own means and with technical and managerial freedom (Ministry of Labor, 2016).
- Union Contract: This type of contract is entered into between one or several labor unions and one or several employers or employer unions for the provision of services or execution of works through their affiliates. It is collective, solemn, named, and principal in nature (Presidency).
- Associated Work Cooperative: Associated Work Cooperatives (CTAs) are non-profit organizations in the solidarity sector that group together natural persons who are both managers, economic contributors to the cooperative, and direct contributors of their labor (Decree 4588 of 2006).
- Temporary Services Company: Defined as one that contracts the provision of services with third-party beneficiaries to temporarily assist in their activities, using workers directly hired by the temporary services company, which acts as their employer (Law 50 of 1990). The requirements include:
 - Occasional, accidental, or temporary labor.
 - Replacement of personnel during vacations, leaves, or disabilities.
 - Increase in production, transportation, or sales, as well as the provision of services for a term of six (6) months, renewable for six (6) additional months.

Legal Protection Mechanisms Against Illegal Outsourcing

The constitutional protection of labor is not limited to access to employment but seeks to ensure that labor relations are conducted under dignified conditions, adhering to the principles governing work and ensuring adequate compensation for the work performed. International organizations have actively worked on developing mechanisms to protect labor rights. The ILO, for its part, has issued recommendations and trained labor authorities to combat rights violations and eradicate indecent work.

This allows us to deduce that the protection of work is a fundamental principle of the Social State of Law. Therefore, any figure that threatens the integrity and dignity of decent work will be subject to investigation and sanction by the administrative entities responsible for overseeing labor relations, as established in Article 25 of the Constitution:

“Work is a right and a social obligation and enjoys, in all its modalities, the special protection of the State. Everyone has the right to work under dignified and just conditions” (Constitution of Colombia).

ELEMENTOS JURÍDICOS PARA LA IDENTIFICACIÓN DE SITUACIONES DE TERCERIZACIÓN ILEGAL

El Ministerio del Trabajo y la Protección Social, a través del Decreto Reglamentario 583 de 2016, aclara que, en lo referente a la tercerización laboral, la contratación de terceros para llevar a cabo actividades misionales permanentes no está prohibida. Siempre y cuando estas contrataciones no vulneren los derechos constitucionales y legales de los trabajadores, y cumplan con los requisitos establecidos en la normativa, la tercerización no solo será legal, sino que también contribuirá a incrementar la competitividad y generar más empleo.

Dado que los casos de tercerización ilegal no siempre son evidentes y pueden presentar dificultades para su identificación tanto por parte de personas jurídicas como naturales, así como de las entidades de control, el Ministerio del Trabajo, mediante el Decreto 583 de 2016, proporciona una serie de situaciones que son indicativas de tercerización ilegal.

Además, el Ministerio aclara que los elementos presentados en el decreto como indicadores para facilitar la identificación de esta problemática son meramente orientativos. Por lo tanto, no deben ser interpretados como conductas sancionables por sí solas, sino que deben servir como guía para las investigaciones administrativas. Entre las situaciones más relevantes se incluyen las siguientes:

- La contratación de terceros para actividades relacionadas con el giro ordinario de los negocios de la empresa, que ya estaban siendo realizadas anteriormente por trabajadores contratados directamente, a menos que se haya notificado por escrito a estos trabajadores sobre este cambio.
- La existencia de vínculos económicos entre el proveedor tercero y la empresa.
- La falta de capacidad y autonomía administrativa del proveedor para prestar los servicios.

Desnaturalización de la Tercerización Laboral

Este tema ha sido objeto de estudio por parte de diversas entidades nacionales e internacionales, que han implementado herramientas para erradicar su uso indebido. La tercerización, tal como fue concebida, no infringe los derechos fundamentales, ya que su base legal se centra en lograr una mayor competitividad y, por ende, generar más empleo. Sin embargo, la desnaturalización de esta figura se manifiesta al eliminar derechos laborales y diluir la relación entre empleador y trabajador, lo que socava la estabilidad laboral y obstaculiza el derecho de asociación.

Sanciones Administrativas

El Ministerio del Trabajo, a través del Decreto Reglamentario 583 del 8 de abril de 2016, estableció reglas para hacer más eficientes las investigaciones administrativas y las inspecciones laborales, con el objetivo de que empleadores, tanto personas jurídicas como naturales, cumplan plenamente con las normas laborales en los procesos de tercerización. Esto busca asegurar que se cumpla la finalidad que el legislador quiso dar al crear la norma: lograr mayor competitividad y, en consecuencia, generar más empleo, respetando los principios legales, constitucionales e internacionales del trabajo decente, la dignidad humana y otros derechos establecidos por la Organización Internacional del Trabajo. Así, las sanciones administrativas para las empresas que incumplan estos deberes son significativas, pudiendo llegar hasta 5,000 salarios mínimos mensuales legales vigentes.

DIVERSOS PUNTOS DE VISTA SOBRE LA TERCERIZACIÓN

La tercerización laboral ha sido abordada desde diferentes perspectivas, lo que ha llevado a la división de conceptos. Un sector la considera una figura jurídica que viola los derechos de los trabajadores, ya que atenta contra la estabilidad laboral y otros elementos fundamentales establecidos por la Constitución. Por otro lado, quienes defienden esta figura argumentan que la tercerización en sí no viola derechos fundamentales, dado que su base legal radica en buscar mayor competitividad y, por ende, generar más empleo, cumpliendo con los parámetros legales establecidos.

Organización Internacional del Trabajo (OIT)

La OIT define la subcontratación para la producción de bienes y servicios como el proceso mediante el cual una empresa encarga a otra el suministro de bienes o servicios, comprometiéndose esta última a llevar a cabo el trabajo por su cuenta y riesgo, utilizando sus propios recursos financieros, materiales y humanos.

La OIT también ha expresado que la subcontratación de mano de obra tiene como objetivo principal el suministro de mano de obra (no de bienes ni de servicios) por parte del subcontratista a la empresa usuaria, la cual puede solicitar a los trabajadores que laboren en sus instalaciones junto con sus propios empleados, o que lo hagan en otro lugar si la organización de la producción lo requiere.

International Centre for Trade Union Rights (ICTUR)

Este centro la define como un mecanismo de explotación laboral, una forma moderna de esclavitud que elimina los derechos laborales, degrada la relación entre empleador y trabajador, niega la estabilidad laboral y anula el derecho fundamental de libre asociación (Centro Internacional para los Derechos Sindicales, 2011).

El ICTUR define la tercerización como cualquier forma de contratación de fuerza laboral mediada por empresas terceras, o por la exclusión o degradación del vínculo del contrato de trabajo, en las que siempre está presente el ejercicio del poder de organización, dirección y fijación de condiciones por parte de la

empresa a la que, en última instancia, se presta la fuerza laboral (Centro de Estudios Legales y Sociales, 2015).

La tercerización puede considerarse una técnica innovadora de gestión que consiste en la transferencia a terceros de ciertos procesos complementarios que no forman parte del giro principal del negocio, permitiendo así que la empresa se concentre en sus actividades esenciales para obtener competitividad y resultados tangibles.

Esta técnica se basa en un proceso de gestión que implica cambios estructurales en la empresa en aspectos fundamentales como cultura, procedimientos, sistemas, controles y tecnología, con el objetivo de obtener mejores resultados al concentrar todos los esfuerzos y recursos en la actividad principal (Antonio, 2002).

El Ministerio del Trabajo ha establecido que el principio general, legal y constitucional sobre el trabajo es que toda persona que trabaje en Colombia debe prestar su servicio a través de un contrato de trabajo directo. Además, cualquier forma de tercerización laboral en el país debe ser tratada de manera equitativa para todos los trabajadores de una empresa. Este mismo ministerio ha advertido que está prohibida cualquier forma de tercerización laboral que menoscabe las condiciones de los trabajadores. Los empleadores que utilicen de manera incorrecta esta figura, violando derechos laborales tanto individuales como colectivos, se arriesgan a multas que pueden alcanzar hasta los cinco mil salarios mínimos mensuales legales vigentes (El Nuevo Siglo, 2014).

LEGAL ELEMENTS FOR IDENTIFYING ILLEGAL OUTSOURCING SITUATIONS

The Ministry of Labor and Social Protection, through Regulatory Decree 583 of 2016, clarifies that, regarding labor outsourcing, the hiring of third parties to carry out permanent mission activities is not prohibited. As long as these contracts do not violate the constitutional and legal rights of workers and comply with the requirements established in the regulations, outsourcing will not only be legal but will also contribute to increasing competitiveness and generating more employment.

Since cases of illegal outsourcing are not always evident and may present difficulties for identification by both legal and natural persons, as well as by control entities, the Ministry of Labor provides a series of situations that are indicative of illegal outsourcing through Decree 583 of 2016.

Furthermore, the Ministry clarifies that the elements presented in the decree as indicators to facilitate the identification of this issue are merely indicative. Therefore, they should not be interpreted as sanctionable conduct by themselves but should serve as a guide for administrative investigations. Among the most relevant situations are:

- The hiring of third parties for activities related to the ordinary course of the company's business that were previously performed by directly hired workers, unless these workers have been notified in writing about this change.
- The existence of economic ties between the third-party provider and the company.
- The lack of administrative capacity and autonomy of the provider to render the services.

Disfigurement of Labor Outsourcing

This issue has been the subject of study by various national and international entities, which have implemented tools to eradicate its improper use. Outsourcing, as originally conceived, does not infringe upon fundamental rights, as its legal basis focuses on achieving greater competitiveness and, consequently, generating more employment. However, the disfigurement of this figure manifests in the elimination of labor rights and the dilution of the relationship between employer and employee, undermining job stability and hindering the right to associate.

Administrative Sanctions

The Ministry of Labor, through Regulatory Decree 583 of April 8, 2016, established rules to make

administrative investigations and labor inspections more efficient, with the aim of ensuring that employers, both legal and natural persons, fully comply with labor laws in outsourcing processes. This seeks to ensure that the purpose intended by the legislator in creating the norm is fulfilled: to achieve greater competitiveness and, as a result, generate more employment while respecting the legal, constitutional, and international principles of decent work, human dignity, and other rights established by the International Labour Organization (ILO). Thus, the administrative sanctions for companies that fail to meet these obligations are significant, potentially reaching up to 5,000 current legal monthly minimum wages.

VARIOUS PERSPECTIVES ON OUTSOURCING

Labor outsourcing has been approached from different perspectives, leading to a division of concepts. One sector views it as a legal figure that violates the rights of workers, as it threatens job stability and other fundamental elements established by the Constitution. On the other hand, proponents of this figure argue that outsourcing itself does not violate fundamental rights, given that its legal basis lies in seeking greater competitiveness and, therefore, generating more employment while complying with the established legal parameters.

International Labour Organization (ILO)

The ILO defines subcontracting for the production of goods and services as the process by which one company contracts another to supply goods or services, with the latter committing to carry out the work at its own risk, using its own financial, material, and human resources.

The ILO has also expressed that the main objective of labor outsourcing is to supply labor (not goods or services) by the subcontractor to the user company, which may request workers to labor in its facilities alongside its own employees, or to do so elsewhere if the organization of production requires it.

International Centre for Trade Union Rights (ICTUR)

This center defines outsourcing as a mechanism of labor exploitation, a modern form of slavery that eliminates labor rights, degrades the employer-employee relationship, denies job stability, and nullifies the fundamental right to free association (International Centre for Trade Union Rights, 2011).

The ICTUR defines outsourcing as any form of labor hiring mediated by third-party companies or through the exclusion or degradation of the employment contract, in which the exercise of organizational power, direction, and condition-setting by the company that ultimately receives the labor is always present (Centre for Legal and Social Studies, 2015).

Outsourcing can be considered an innovative management technique that involves transferring to third parties certain complementary processes that are not part of the main business, allowing the company to focus on its essential activities to achieve competitiveness and tangible results.

This technique is based on a management process that entails structural changes in the company regarding fundamental aspects such as culture, procedures, systems, controls, and technology, with the aim of obtaining better results by concentrating all efforts and resources on the main activity (Antonio, 2002).

The Ministry of Labor has established that the general, legal, and constitutional principle regarding work is that every person working in Colombia must provide their service through a direct employment contract. Additionally, any form of labor outsourcing in the country must be treated equitably for all workers of a company. This same ministry has warned that any form of labor outsourcing that undermines workers' conditions is prohibited. Employers who incorrectly utilize this figure, violating both individual and collective labor rights, face fines that can reach up to five thousand current legal monthly minimum wages (El Nuevo Siglo, 2014).

Conclusions

Taking into account what has been investigated in the course of the monograph, the following can be concluded: the figure of labor outsourcing in temporary service companies, as it was conceived, does not violate fundamental rights, because its legal basis is to obtain greater competitiveness and thus generate

more employment, complying with the established legal parameters.

Taking into account the above, it is identified that a phenomenon of denaturalization has been occurring in the application of this legal figure, causing a reduction in the rights of workers and thus distorting the object of application by making use of activities that go against the essence and purpose that motivated the creation of this figure. For this reason, this topic has been the subject of study by national and international entities implementing tools to eradicate the improper application of labor outsourcing and that the control entities have the mechanisms to combat the illegal application of this figure.

This improper and illegal use that temporary service companies have been implementing has caused much damage to the rights of workers since a series of fundamental rights have been ignored and thus their dignity has been trampled upon, with the aim of increasing the income of companies at the expense of the undermining of general interests and the illegal application of legal norms.

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