ATYPICAL EMPLOYMENT in EUROPEAN AVIATION

ECA Position Paper

Executive Summary

- Direct and indefinite employment contracts should remain the general form of employment relationship between employers and workers. Abuse and illegal use of atypical employment create precariousness, reduce workers' rights and downgrade their working conditions
- Wet-lease must be monitored and controlled both by the authority of the country of the lessor and the country of the lessee. Compliance with labour law of the country where the wet-leased aircraft will be operated habitually must be verified including compliance with the posting of workers' directive.
- Pay to Fly (P2F) should be banned through EU-wide and/or national legislation.
- Labour inspections should prosecute airlines (EU-based airlines and foreign airlines checked through SAFA & during ramp inspection) performing these practices in the territory of the EU.
- Aviation authorities should suspend operation certificates of airlines using P2F.
- Labour inspections should prosecute any organisation recruiting pilots to fly under P2F conditions as necessary contributors to deeds of human trafficking. This includes flight schools that engage in or facilitate (directly or indirectly) such P2F schemes.
- The determination of what is "temporary" in Temporary Agency Work is not codified in European legislation and differs amongst Member States. It is important to: restrict use as much as possible in safety regulations, clarify rules on the existing restrictions in different countries, and clarify rules on when aircrews are considered to be posted in a Member State other than the one in which they habitually work.
- Regulations should introduce clear, harmonised restrictions on the use of fixed-term contracts. Both labour and aviation authorities should prevent, monitor and punish abuses. In addition, abuse of successive fixed-term contracts between the same employer and employee for the same work has to be prevented.EU law and, if not possible, national regulations should establish a refutable presumption of direct employment for mobile staff in civil aviation.
- Around a dozen EU countries have banned zero-hours contracts (Zero-hours contracts are not allowed in Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Italy, Netherlands, Poland and Spain). The whole EU should ban this type of contracts for mobile staff in civil aviation.

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Atypical employment refers to all forms of contractual relations between a company and a person for the provision of work that is not in the form of direct indefinite employment.[1]

Atypical employment is not necessarily illegal. It is the abuse of those contracts that is questionable: posting is legitimate if used temporarily and the worker comes back to the country of origin afterwards. However, it is not reasonable that posted workers stay posted indefinitely. After a reasonable period, the workers should either return to their home country or be employed under local conditions.

As stated in EU law[2], direct and indefinite employment contracts are and should remain the general form of employment relationship between employers and workers. ECA condemns the abuse and illegal use of atypical employment as they create precariousness, reduce workers' rights and downgrade working conditions of those working both on atypical employment. Furthermore, indirectly, workers on typical employment also suffer from the unfair competition from atypically employed workers: "normal" worker's conditions are continuous pressure and they are obliged to increase productivity and accept concessions on their terms and conditions. Abuses or illegal use of atypical employment distort fair competition in the aviation market, lead to social dumping and, in the case of aviation, to Flags of Convenience.

Being a safety-critical industry, aviation is particularly sensitive to the interdependency of social/socio-economic and safety issues. As demonstrated by recent studies, atypical employment has an impact on safety: it influences operational decision-making of safety professionals, such as flight crew, and shapes safety culture in organisations, such as airlines. Concerns over such safety impacts have led to the European Aviation Safety Agency trigger work on how to mitigate against potential safety implications on new business & employment models.[3]

ECA urges airlines, national, European and international administrations to act with legislative, administrative and enforcement tools to strictly limit / ban atypical employment, including to combat abuses of such atypical employment, to create a framework protecting the rights and the working conditions of aircrews, and, ultimately to maintain aviation safety.

Concretely, ECA urges authorities to restrict / ban atypical employment in aviation and in particular to address abuses and illegal practices in the following forms of atypical employment:

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1 See definition in ILO, "Non-standard forms of employment", Geneva, 2015 p.1 ; and Gent University, 'Atypical Forms of Employment in the Aviation Sector', European Social Dialogue, European Commission, 2015, p. 6 https://www.eurocockpit.be/sites/default/files/report_atypical_employment_in_aviation_15_0212_f.pdf ; and London School of Economics, "European pilots' perceptions of safety culture in European Aviation" p. 35. https://www.futuresky-safety.eu/wp-content/uploads/2016/12/FSS_P5_LSE_D5.4_v2.0.pdf

2 "The legislative action of the European Union in the area of employment law is based on the fundamental premise that contracts of indefinite duration are the general form of employment relationship". Opinion of Advocate General Szpunar in case C533/13 and Council Directive 1999/70.

3 E.g. the Regulatory Advisory Group (RAG) subgroup on New Business Models, which produced a report in 2015 (see ECA comments https://www.eurocockpit.be/positions-publications/new-business-employment-forms-aviation) and the EASA Industry Safety Promotion Group (ISPG) on new business models in aviation, which produced best practice guidelines in June 2017 (see https://www.easa.europa.eu/system/files/dfu/Practical%20Guide%20New%20Business%20Models%20Hazards%20Mgt.pdf).

Wet Leasing

- What is it?

A leasing arrangement whereby one airline (the lessor) provides an aircraft, complete crew, maintenance, and insurance (ACMI) to another airline or to other type of business acting as a broker of air travel (the lessee). The wet-leased aircraft remains registered in the Air Operators Certificate (AOC) of the lessor.

- What it does & when is it problematic?

  Wet leasing was developed to provide airlines with aircraft in case of unexpected operational needs due to technical problems or seasonal activity peaks. While initially intended as a short-term and exceptional practice, wet leasing has been generalised and is now used regularly by numerous airlines which operate with a large proportion of wet leased aircraft, often on a long-term basis. Sometimes wet leased aircraft come from third countries.

  The risk is:

  Empty shell companies (companies with no or only very few crews and therefore with no organisational stability and a sound safety culture that have no /only limited control of safety standards.

  - Circumvention of local laws, especially labour law, as the crews on wet-leased aircraft may be subject to low labour standards of other countries.
  - Proliferation of atypical employment forms, as the crews may often be on zero-hours contracts, self-employed or otherwise atypically employed.

- What needs to be done?
  - Wet-lease has to be monitored and controlled both by the authority of the country of the lessor and the country of the lessee. Compliance with local labour law of the country where the wet-leased aircraft will be operated habitually must be verified including compliance with the posting of workers' directive.
  - Wet-lease of aircraft registered in third countries should be limited to cases where there is a lack of adequate aircraft on the EU market and no EU operators can offer the service. Currently, this prerequisite (preference of EU registered aircraft) only applies to seasonal and operational leasing contracts. This requirement must be extended to all types of wet-leasing arrangements (incl. exceptional circumstances).

Pay to Fly

- What is it?

  Also known as 'self-sponsored line training', Pay to Fly (P2F) is a new aviation industry practice whereby a professional pilot operates an aircraft on revenue-earning commercial operation by paying for it. Pay to Fly is used – usually for young pilots – to complete the operator's initial type rating course, line training, and/or some post line training[4].

- What it does & when is it problematic?

[4] There are two typical types of P2F, the one when the pilot pays a large amount of money for the initial type rating when entering an employment contract, and the other P2F model where a graduated pilot buys a number of flying hours (e.g. 500) at certain airlines with no employment contract & no pay involved.

A pilot that ends training from a flying school will have to be trained to work according to the specific operator rules and the operator specific types of aircraft. This requires an investment from companies into the training of their future flight crews, but at the risk that their employees leave once they have completed this training. In the past, all airlines had strategies to retain their young employees e.g. though 'bonding'. If fair & reasonable this is an acceptable practice[5]. Some airlines however stopped hiring pilots directly from flight schools and hire only experienced pilots. This has put a lot of pilots in a situation where they have qualifications (from their flight school) to be a pilot but they do not have the experience (i.e. flight hours, experience on a specific aircraft type etc.) that airlines now require because they do not want to do the investment anymore necessary for the initial training of their pilots.

Some airlines are taking advantage of this situation and have turned the need for pilots to obtain flying experience in order to be hired into a revenue activity: by making the pilots pay for acquiring experience in the airline's aircraft while working for that airline on regular revenue-earning flights. Payments are done directly to the airline or though arrangements with flight schools or financial institutions. The airline generally does not retain the Pay to Fly pilot, but hires directly another pilot on such a Pay to Fly scheme. Those airlines have triple profit: free workers, flexible arrangements and new revenue.

This practice is illegal in different ways[6]:

- On labour standards, it is against the general principle that labour merits salary; it should therefore be considered forced labour.
- Pay to Fly cannot be considered as training since it is not performed under the continuous supervision of a trainer. Type ratings and operator conversion courses are specific to the 'tool' used by the operator (i.e. the aircraft) and an essential & necessary training for the conduct of the airline's business. The costs to train the pilot on a specific & particular tool used by the employer to perform its services should therefore be borne by the employer.
- A P2F scheme cannot be considered as training since the pilot is not guaranteed to stay and is, in the majority of the cases, replaced by another Pay to Fly pilot ('P2F chains').
- Sometimes P2F is not even used for line training, but instead just selling a block of flight hours – a practice that should follow the related procedures for chartering or leasing.
- It entails potential safety risks since the pilot's and the airline's only objective is to fly hours and make a number of take-offs and landings. This may have an impact on operational safety decision-making, on exerting professional judgement, as well as create a 'incentive/ to fly while unfit or fatigued.
- As fixed-term employment, its use should be prevented / prohibited, and an airline should not be allowed to consecutively use fixed-tem employees to replace other fix-term employees.

5 Such bonding agreements usually foresee that the employee repays the cost of the training if he/she leaves the company before a certain reasonable time period. Such bond must be proportionate to the pilot's salary and productivity, and leave a reasonable income, proportionate to his/her skills.

6 See also ECA Position Paper on P2F: http://eurocockpit.be/sites/default/files/2017-04/Pay-to-fly%2C%20ECA%202015_0.pdf .

- The pilot is in an awkward situation because s/he performs work and is at the disposal of an employer, but is at the same time the client of the airline as s/he is paying for occupying the seat of a co-pilot.

- What needs to be done?
  - Pay to Fly should be banned through EU-wide and/or national legislation. Labour inspections should prosecute airlines (EU-based airlines and foreign airlines checked through SAFA & during ramp inspection) performing these practices in the territory of the EU
  - Aviation authorities should suspend operation certificates of airlines using these types of contracts or arrangements.
  - Labour inspections should prosecute any organisation recruiting pilots to fly under these conditions as necessary contributors to deeds of human trafficking. This also includes flight schools that engage in or facilitate (directly or indirectly) such P2F schemes.

Temporary Agency Employment

- What is it?

  Temporary agency work (TAW) is a "three-way" or "triangular" relationship involving a worker, a company acting as a temporary work agency and a user company, whereby the agency employs the worker and places him or her at the disposition of the user company.

- What it does & when is it problematic?

  The use of this form of employment relationships has resulted in the emergence of significant legal ambiguity due to its complex and increasingly internationalised nature – particularly within the aviation industry.

  Not only does temporary agency work encompass both fixed-term work (incl. zero-hours contracts and or self-employment; see below) and outsourcing, it can equally so result in the applicability of the Posting Directive.[7] Namely, if temporary work agencies provide workers to user undertakings / airlines in a different Member State, this can be qualified as the posting of workers, which sparks the applicability of the Posting Directive[8].

  Agency work contracts are becoming increasingly long-term or quasi-permanent in nature. Certain airlines do not hire crews anymore directly on indefinite contracts, but instead via 'temporary' agencies and for long periods, thereby replacing direct employment by such atypical employment forms. Terms and conditions of such contract agency pilots put pilots in a precarious situation with lower job security. The LSE study has also identified a negative impact on corporate safety culture.

- What needs to be done?

  The determination of what is temporary is not codified in European legislation and may, again, differ on a Member State level. For this reason it is important to:

  a) Restrict use as much as possible in safety regulations

7 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

8 See Gent University study cited above, p. 29

b) Clarify rules on the existing restrictions in different countries[9].

c) Clarify rules on when aircrews are considered to be posted in a Member State other than the one in which they habitually work.

Fixed-term contracts

- What is it?

  A fixed-term contract is a contract – between a pilot and an airline – for a definite duration.

- What it does?

  Less access to training, lower protection in case of illnesses and maternity and to long term benefits from the employer; fixe-term workers are precarious by nature, can less easily defend their rights and their contracts can be easily stopped by the employer in case of dispute.

- What needs to be done?

  EU law should introduce uniform specific restrictions on the use of fixed-term contracts in aviation.

  Both labour and aviation authorities should prevent, monitor and punish abuses. In addition, abuse of successive fixed-term contracts between the same employer and employee for the same work has to be prevented.

Self-Employment

- What is it?

  There are different understandings and definitions of the term self-employment across countries, with a number of different subcategories defined[10]: for instance, according to (a) the legal status of the enterprise, (b) whether the business has employees or not (employers versus own-account workers) and/or (c) the sector in which the business operates (e.g. agriculture). Some countries also make the distinction between self-employed status and the status of 'dependent self-employed' (e.g. Spain, Italy), where the self-employed person works for only one client. Others distinguish self-employment which is carried out in addition to paid employment (e.g. Belgium).

  Many countries have developed criteria to determine what is legitimate self-employment such as The Netherlands, Belgium and the United Kingdom. In the later, for example, the following criteria is used to determine legitimate self-employment[11]:

  - the person must run their own business and take responsibility for its success or failure;
  - they must have several customers at the same time;

9 For example, in Belgium, the law defines three situations in which temporary agency work is authorized: as a replacement for a permanent worker, temporary and exceptional peaks of work, and unusual work.

10 European Commission, European Employment Observatory Review, "Self-employment in Europe" 2010, p.6.

11 See « Self-employment in Europe » cited above, p. 7.

- they can decide how, when and where to work;
- they are free to hire other people to do the work for them or help them at their own expense;
- they provide the main items of equipment to do the work.

Self-employment could be linked to – or sometimes be assimilated to – Zero-hour contracts.

- What it does?

  Problem is not self-employment as such, but *bogus* self-employment: when a worker effectively performs its work as an employee but under a self-employed contract.

  Bogus self-employment has a negative impact on European crew members:
  - Less rights
  - Pressure for cost reduction
  - Less contributions for the social security.

  For those reasons bogus self-employment distorts the internal market by providing an unfair competitive advantage to airlines having integrated in their business model a systematic use of bogus self-employment for their crewmembers.

  The bogus self-employment changes the relationship between the airline and the pilot where the pilot's interest is that its contract is renewed and/or sufficient billable flight hours are provided by the airline 'client'. This leaves other considerations aside and having potential implications on safety and on the responsibility in case of accidents/incidents.[12]

  The bogus self-employed pilot is deprived of any safeguards awarded to direct employees, whereas the same restrictions and rules are nevertheless imposed as for a direct employee. The latter entails that, despite being formally registered as self-employed, the crew members do not have any control with respect to remuneration, working time, holidays or place of employment. This renders their position vis-à-vis direct employees substantially more precarious and disadvantageous.

  Moreover, bogus self-employment can arise via an intermediary such as a (temporary work) agency or, alternatively, directly vis-à-vis the employer. Employment relations constructed as such include at least three to four parties. Needless to say, this form of atypical contract is highly disadvantageous for an individual worker and places him or her in a particularly precarious employment situation.[13]

- What needs to be done?

  EU law and, if not possible, national regulations should establish a refutable presumption of direct employment for mobile staff in civil aviation.

[12] Reference to Ghent study?

[13] Concrete reference to Ghent study, page …

An example of this can be found in Belgian law. A presumption of direct employment exists for all work relationships in nine specific sectors including transport. A person that intends to work in one of these sectors as self-employed must comply with a majority of criteria listed in the law.[14]

Zero-hour contracts

- What is it

  Zero-hour contracts are a form of flexible working arrangements that specify no minimum number of working hours a week. While the employee may sign an agreement to be available for work as and when required, the employer is not necessarily obliged to give the worker any work and the employee is – in principle at least – not obliged to accept the work offered. The employee is expected to be on call and receives compensation only for hours worked.

- What it does?

  Zero-hour contracts are often linked to (bogus) self-employment. Questions raise on the acceptability of exclusivity clauses in such contracts (i.e. the obligation to work only for one client), on workers' access to unemployment benefits & social security, whether to compensate workers for their additional flexibility, payment for travel time and expenses for short assignments, etc. Zero-hour contracts can also constitute problems in terms of application of FTL rules and FRMS.

  Zero-hour contracts can constitute a way to circumvent social legislation on maximum working hours, paid leave, weekly rest… It has severe consequences on family/work balance. It gives employers complete discretion on calling an employee or not, without any kind of prejudice if the employee is not called to work. This could have perverse consequences: a worker that is not ready to follow instructions even if they are contrary to their professional judgement, can be not called for work and will not be remunerated.

- What needs to be done?

  Around a dozen other European countries have banned zero-hours contracts (Zero-hours contracts are not allowed in Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Italy, Netherlands, Poland and Spain).[15]

  The EU should ban this type of contracts for mobile staff in civil aviation.

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[14] http://www.emploi.belgique.be/defaultTab.aspx?id=42058#

[15] https://fullfact.org/law/zero-hours-contracts-uk-europe/