

CLLD OUTLINE
TEMPORARY WORK AND FIXED-TERM CONTRACTS

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Abstract

El Comparative Labor Law Dossier (CLLD) de este número 1/2014 de IUSLabor está dedicado a la contratación temporal e incorpora artículos, elaborados por académicos y profesionales de prestigio, de la regulación en materia de contratación temporal en, además de España, Alemania, Bélgica, Francia, Italia, Luxemburgo, Reino Unido, Colombia, Perú, Uruguay y Estados Unidos.

Sin perjuicio de recomendar a nuestros lectores la lectura de dichos artículos, hemos extraído –de los artículos en materia de contratación temporal elaborados por nuestros asesores internacionales– las 10 conclusiones principales en materia de contratación temporal en los países analizados. Asimismo, hemos elaborado un cuadro-resumen con aquellas cuestiones más relevantes en materia de trabajo temporal en los distintos ordenamientos jurídicos analizados en este número de IUSLabor.

The Comparative Labor Law Dossier (CLLD) in this issue 1/2014 of IUSLabor is dedicated to temporary work and fixed-term employment contracts. Elaborated by internationally renowned academics and professionals, this issue's CLLD includes the regulation of temporary contracts in, aside from Spain, Belgium, France, Italy, Germany, United Kingdom, Colombia, Peru, Uruguay and the United States.

Without detriment to recommend our readers the reading of these articles, we have drawn the top 10 conclusions regarding temporary work and fixed-term contracts in the analyzed countries. Further, it has elaborated a summary table with the most relevant issues regarding temporary work in the different legal systems analyzed in this issue of IUSLabor.

Summary

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1. «Top ten» conclusiones

1. Todos los ordenamientos jurídicos analizados admiten la **contratación temporal**, aunque, en la mayoría de supuestos, la norma general es la contratación indefinida.

La excepción a esta norma lo constituye el **ordenamiento jurídico estadounidense** donde, como es conocido, existe la regla *employment at will*, que admite cualquier forma de contratación aceptada por las partes contratantes. Singular es el caso de **Uruguay**, donde, a pesar de no existir previsión legal específica en materia contratación temporal, los contratos temporales son ampliamente utilizados.

2. En la práctica totalidad de estados analizados, **la contratación temporal tiene una presencia cuantitativamente importante en el mercado laboral** y, en muchos supuestos, creciente en los últimos años.

Sin embargo, **España** es uno de los estados con mayor tasa de temporalidad en el ámbito de la Unión Europea (23.9%). El porcentaje de dichos contratos celebrados en 2012, según datos del Eurostat, es claramente superior a la media de la UE (13.7%) y de la zona-euro (15.2%), y significativamente superior a la registrada en el Reino Unido (6.3%), Bélgica (8.1%), Italia (13.8%) o Alemania (13.9%).

3. En términos generales –aunque existen excepciones–, los ordenamientos jurídicos analizados han establecido de **forma tasada** las **causas** que admiten la **contratación temporal**. En la mayoría de supuestos, estas causas son: **a) sustitución de trabajadores, b) incrementos en la carga de trabajo, c) trabajos de temporada y d) trabajos esencialmente excepcionales o temporales.**

En este punto, es interesante destacar la regulación de la contratación temporal en **Alemania** que admite, como medida de fomento del empleo, contratos temporales sin causa por: a) dos años en ausencia de relación laboral anterior; b) cuatro años para empresas de nueva creación; y c) cinco años cuando se suscribe con una persona mayor de 52 años y desempleada en los cuatro meses anteriores.

El **ordenamiento jurídico italiano**, aunque sujeto al principio de causalidad en la contratación temporal, también admite la contratación sin causa para el primer contrato temporal suscrito inferior a doce meses.

Finalmente, es interesante destacar el contrato de reclutamiento de trabajador temporal para ocupar la vacante producida por la extinción del contrato de un trabajador indefinido del **ordenamiento jurídico belga**.

4. Los países analizados –mayoritariamente– **no reconocen un derecho de preferencia** de los trabajadores temporales a ocupar un puesto de trabajo permanente en la empresa, sin perjuicio de la **obligación**, incluida en múltiples ordenamientos jurídicos analizados, **de informar a los trabajadores temporales de vacantes permanentes** en la empresa y la posibilidad de reconocer un derecho de preferencia en la **negociación colectiva**.

La excepción a la anterior norma general se encuentra en el **ordenamiento jurídico italiano** que, desde 2007, reconoce al trabajador temporal contratado durante más de seis meses en la misma empresa el derecho a ocupar un puesto de trabajo indefinido, siempre que en los doce meses siguientes a la finalización del contrato de trabajo en la empresa se creara dicho puesto de trabajo y para realizar las mismas tareas realizadas durante la vigencia del contrato temporal.

Es también interesante apuntar la regulación en **Luxemburgo**, donde se establece una conversión automática del contrato temporal en indefinido cuando: a) es renovado más de dos veces o b) se supera la duración máxima agregada de 24 meses (o 12 para ETT).

Finalmente, destacar que el **ordenamiento jurídico peruano** reconoce un derecho de preferencia de los trabajadores temporales a suscribir otro, de los siguientes, contrato temporal: contrato intermitente y/o contrato a temporada.

5. Salvo en Estados Unidos donde las empresas puede establecer condiciones laborales diferentes para los trabajadores, en la totalidad de países opera el **principio de igualdad de trato entre trabajadores fijos y temporales**. Sin embargo, en muchos supuestos existe **evidencia de diferencia de trato** entre trabajadores fijos y temporales.

6. En todos los estados analizados, las **Empresas de Trabajo Temporal actúan como agentes en el mercado de la contratación temporal**, con una presencia, en la mayoría de casos, cuantitativamente importante.

Es interesante destacar la importancia cuantitativa de las Empresas de Servicios Temporales en **Colombia**, a diferencia de **Uruguay**, donde representa un porcentaje reducido. En materia de ETT, también resulta de interés la regulación establecida en **Perú**, que establece un máximo de 20% de trabajadores contratados vía ETT en una empresa usuaria.

7. Aunque la mayoría de ordenamientos jurídicos reconocen una indemnización por despido ilegal o irregular del trabajador temporal, existe una **remarcable diversidad** en relación con la existencia de **compensación económica por extinción del contrato**,

aunque es posible afirmar que **predominan los ordenamientos jurídicos que no reconocen indemnización** alguna.

En este sentido, mientras que **Bélgica, Alemania, Italia, Luxemburgo, Reino Unido, Perú o Uruguay** no reconocen indemnización por extinción del contrato temporal, sí la reconocen los ordenamientos jurídicos de **Francia, España y Colombia**. Entre los estados que reconocen compensación económica por extinción del contrato temporal, ésta varía desde el 10% del salario en el caso de Francia a 11/12 días de salario por año de servicio en el ordenamiento jurídico español.

8. El incumplimiento de la regulación en materia de contratación temporal da lugar, en la totalidad de los estados analizados, a la **conversión del contrato en indefinido**.

9. Aunque existen importantes diferencias en los instrumentos utilizados, en la mayoría de ordenamientos jurídicos analizados existen **previsiones dirigidas a evitar el fraude en la contratación temporal**.

En este contexto, el **ordenamiento jurídico francés**, a fin de garantizar el principio de causalidad en la contratación temporal, como regla general, establece la posibilidad de renovar el contrato temporal una sola vez. En caso que el empleador quisiera contratar de nuevo a un empleado para el mismo puesto de trabajo, deberá respetar un período de espera (*délai de carence*), calculado de acuerdo con la duración del contrato inicial.

Cabe destacar igualmente la regulación en el **Reino Unido** que, aunque no configurada en sentido estricto como una norma para evitar el fraude, presupone el carácter permanente del trabajador temporal ocupado de forma continua durante más de cuatro años bajo sucesivos o renovados contratos temporales, salvo que se justifique de forma objetiva el carácter temporal del contrato.

Finalmente señalar la regulación en **Bélgica**, donde un empleador únicamente puede realizar hasta cuatro contratos temporales con un trabajador, por una duración total máxima de dos años. Sólo mediante la autorización de la inspección laboral podrá realizar contratos temporales sucesivos, de seis meses de duración mínima, hasta un máximo de tres años.

10. Su importancia cuantitativa varía en atención a los estados, sin embargo, en la mayoría de ellos **la negociación colectiva está habilitada para incluir previsiones materia de contratación temporal**, tales como limitaciones a la contratación temporal, derechos de preferencia, condiciones de trabajo, etc.

2. «Top ten» conclusions

1. All legal systems analyzed allow **temporary work**, notwithstanding that the general rule, in most cases, is the indefinite contract.

The exception to this rule is the **U.S. legal system** where, as is known, there is the employment at will rule, that allows the formation of nearly any kind of contract desired by the parties. Special is also the case of **Uruguay**, where, despite the absence of specific legal provisions regarding temporary work, fixed-term contracts are widely used.

2. In nearly all countries analyzed, **fixed-term contracts are quantitatively significant in the labor market** and, in many cases its presence has increased in recent years.

Nonetheless, **Spain** is one of the countries in the European Union with the highest rate of temporary employment (23.9%). The percentage of fixed-term contracts subscribed in 2012, according to Eurostat, is above the EU (13.7%) and Euro area (15.2%) average, and significantly higher than the rate of temporary contracts in UK (6.3 %), Belgium (8.1%), Italy (13.8%) and Germany (13.9%).

3. The majority of analyzed legal systems –although there are exceptions– have **established legal reasons or causes** for fixed-term contracts. Overall, these causes are: **a) replacement of workers, b) increases in workload, c) seasonal jobs and d) essentially accidental or temporary jobs.**

On this point, it is interesting to outline the regulation of temporary employment in **Germany** that allows, as a measure to promote employment, temporary contracts without cause for a maximum of: a) two years in the absence of previous employment; b) four years for new firms/companies; and c) five years when the contract is subscribed with a person over 52 years old and unemployed in the previous four months.

The **Italian legal system**, although subject to the causality principle in regard to temporary work, also allows fixed-term contracts without cause for the first contract subscribed for a period of less than twelve months.

Finally, it is interesting to highlight the recruitment contract of fixed-term workers to occupy a vacancy caused by the termination of an indefinite contract that exists in the **Belgian legal system.**

4. The legal systems analyzed –mainly– **do not recognize a preferential right** for temporary workers to occupy a permanent position in the company, notwithstanding the **employer’s obligation**, included in many legal systems, **to inform fixed-term workers of permanent vacancies** in the company and the possibility to recognize such preferential right in **collective bargaining agreements**.

The exception to this rule is found in the **Italian legal system** that, since 2007, recognizes temporary workers employed for more than six months in the same company the right to occupy a permanent position, provided that within the twelve months following the expiry of the fixed-term contract the company creates such a position to perform the same tasks developed during the fixed-term contract.

It is also interesting to highlight the regulation in **Luxembourg**, which includes an automatic conversion of the fixed-term contract into a permanent contract when: a) is renewed more than twice or b) exceeds the maximum aggregate duration of 24 months (or 12 months in the case of Temporary Employment Agencies).

Finally, outline the **Peruvian legal system** that recognizes a preferential right of fixed-term workers to subscribe another, of the following, temporary employment contract: intermittent contract and/or seasonal contract.

5. Except in the U.S. where employers are free to state different conditions for their employees, all countries analyzed have an **equal treatment principle between permanent and temporary workers**. However, in many cases there is **evidence of less favorable treatment** between these two types of workers.

6. In all countries studied, **Temporary Employment Agencies act as agents in the market of temporary work** and, in most cases, their presence is quantitatively significant.

Interestingly, emphasize the quantitative importance of the Temporary Employment Agencies in **Colombia**, unlike **Uruguay** where they account for a small percentage of temporary work. Regarding Temporary Employment Agencies, it is also interesting to point out the regulation in **Peru**, which sets a maximum of 20% of agency workers in a company.

7. Although most legal systems recognize compensation for unfair dismissal of fixed-term workers, there is a **significant diversity** regarding the existence of an **economic compensation for the expiry of the contract**; although it is possible to confirm that

the majority of legal systems analyzed do not recognize compensation for the expiry of the fixed-term contract.

In this sense, while **Belgium, Germany, Italy, Luxembourg, United Kingdom, Peru** and **Uruguay** do not recognize economic compensation for the termination of fixed-term contracts, compensation is awarded in **France, Spain** and **Colombia**. Among the countries that recognize compensation for the expiry of fixed-term contracts, such compensation varies from 10% of the worker's salary in the case of France to 11/12 days of salary per year of service in the Spanish legal system.

8. Breach of the legal regulation of temporary employment contracts leads to, in almost all the countries analyzed, the **conversion of the fixed-term contract into a permanent contract**.

9. Although there are significant differences in the means, in most legal systems analyzed, there are **legal provisions designed to prevent fraud on temporary work**.

In this context, the **French legal system**, to ensure the principle of causality in temporary work, as a general rule, limits the possibility of extending a fixed-term contract to one renewal. If the employer wants to rehire an employee for the same job, he or she has to respect a waiting period (*délai of carence*) calculated according to the duration of the initial contract.

Also noteworthy the regulation in the **United Kingdom** which, although not strictly set as a provision designed to prevent fraud, presupposes the permanent nature of the fixed-term worker occupied continuously for more than four years under successive contracts or renewed contract, unless the company can objectively justify the temporary nature of the contract.

Finally note the regulation in **Belgium**, where an employer can only subscribe up to four temporary contracts with a worker, for a total period of two years. Only with the authorization of the labor inspection may he or she subscribe successive fixed-term contracts, with a minimum duration of six months and maximum of three years.

10. Even though their quantitative importance varies depending on the country, **most legal systems enable collective bargaining agreements to include provisions regarding temporary work**, such as limitations on temporary contracts, preferential rights, working conditions, etc.

3. Summary table

3.1. Europe

	Belgium	France	Germany	Italy	Luxemburg	Spain	UK
<p>1. Is it possible to subscribe temporary employment contracts?</p> <p>What is the principle that governs temporary work?</p>	<p>Yes.</p> <p>Legal restrictions.</p>	<p>Yes.</p> <p>Prohibition for jobs related to the company's normal activity.</p>	<p>Yes.</p> <p>But the general rule is indefinite contract.</p>	<p>Yes.</p> <p>But the general rule is indefinite contract.</p>	<p>Yes.</p> <p>Subject to use specific and temporary need.</p>	<p>Yes.</p> <p>Subject to causality principle and temporary need.</p>	<p>Yes.</p> <p>There is no central guiding legal principle.</p>
<p>2. Which temporary employment contracts exist in?</p> <p>In which cases can these temporary employment contracts be used and what is their legal regulation?</p>	<p>4 types:</p> <p>a) temporary replacement absent worker, b) increase workload, c) exceptional work, d) recruitment temporary worker.</p>	<p>4 types:</p> <p>a) temporary replacement absent worker, b) increase workload, c) seasonal jobs, d) <i>emplois d'usage</i>.</p>	<p>8 types:</p> <p>objective reasons established by law; and without cause fixed-term contracts.</p>	<p>Technical, productive, organizational or substitutive reasons, even if company's ordinary activity.</p> <p>Exception: first fixed-term contract (< 12 months) doesn't require cause.</p>	<p>3 types:</p> <p>a) temporary replacement absent worker, b) seasonal jobs, c) increase workload.</p>	<p>4 types:</p> <p>a) specific project or service, b) increase workload, c) temporary replacement absent worker, d) internship and training.</p>	<p>3 types:</p> <p>a) identifiable and fixed duration, b) limited but uncertain duration, c) subject to the occurrence of a specific event.</p>

<p>3. Does the legal regulation recognize temporary workers a preferential right to occupy a permanent job in the company?</p>	<p>No. Obligation to inform permanent positions.</p>	<p>No. Collective agreements can include obligation to inform of vacancies and/or preferential rights for temporary workers.</p>	<p>No. Obligation to inform permanent positions.</p>	<p>Yes. Only contracts > 6 months, when the permanent job is created in the 12 months following the fixed-term contract and for the same job.</p>	<p>No. But, automatic conversion to contract for unspecified duration if a) extended > twice or b) exceeds aggregated extension of 12 (agencies) or 24 months.</p>	<p>No. Only when established in collective agreement. Obligation to inform permanent positions.</p>	<p>No. Employee continuously employed > 4 years under successive or renewed fixed-term contracts, is presumed 'permanent'</p>
<p>4. Does the legal system allow differences in the working conditions of permanent and temporary workers? Does the reality in the labor market fulfill this regulation?</p>	<p>No. Equal treatment principle. In practice, the adequacy of some measures could be questioned.</p>	<p>No. Equal treatment principle. Exception: compensation for expiry contract. Violation of this principle is criminally sanctioned. Limited efficacy of the principle in reality.</p>	<p>No. Equal treatment principle, except objective justification for a difference in treatment.</p>	<p>No. Equal treatment principle. However, evidence of less favorable treatment.</p>	<p>No. Equal treatment principle.</p>	<p>No. Equal treatment principle. Exceptions: compensation for expiry contract and salary of internship contract. However, evidence of less favorable treatment.</p>	<p>No. Equal treatment principle. However, evidence of less favorable treatment.</p>
<p>5. What is the role of Temporary Employment Agencies</p>	<p>Quantitative significance of agency workers.</p>	<p>Quantitative significance of agency workers.</p>	<p>Decrease of quantitative significance of</p>	<p>Use of Temporary Employment</p>	<p>Use of Temporary Employment</p>	<p>Quantitative significance of agency workers.</p>	<p>Quantitative significance of agency workers.</p>

in regard to temporary work?	Almost all temporary work is agency work.	Especially industry and construction sector and non-skilled workers.	agency workers, as a result of a changes in regulation in 2012.	Agencies for the same causes as temporary work.	Agencies.	Same causes as temporary work.	
6. Which is the legal regulation regarding the expiry of temporary employment contracts? Specifically, does the legal regulation recognize compensations to workers for the expiry of the temporary employment contract?	No compensation for expiry contract. Economic compensation for unfair dismissal.	Economic compensation: 10% total salary. Economic compensation for unfair dismissal: damages and interests.	No compensation for expiry contract.	No compensation for expiry contract.	No compensation for expiry contract. Economic compensation for unfair dismissal: compensation received if contract had expired in accordance with its terms (max. compensation for unspecified term contract).	Economic compensation: 12 days of salary per year of service. Economic compensation for unfair dismissal.	Economic compensation for unfair dismissal if employed ≥ 1 or 2 years. Except automatically unfair' reasons (trade unions, pregnancy, etc.) Other cases: demonstration of a potentially fair reason for non-renewal.
7. Which consequences arise from the breach of the legal regulation of temporary employment contracts?	Conversion to permanent employment contract. Criminal sanctions.	Conversion to permanent employment contract. Compensation of, minimum, 1 month's wage. Criminal sanctions.	Conversion to permanent employment contract.	Conversion to permanent employment contract.	Conversion to permanent employment contract.	Conversion to permanent employment contract. Economic sanctions.	Claims of less favorable treatment.

<p>8. Does the legal regulation of temporary employment contracts include provisions designed to prevent fraud on temporary work?</p>	<p>Presumption of temporary workers as indefinite.</p>	<p>Burden of proof of the motive temporary contract: employer. One extension. Workers' representatives.</p>	<p>Conversion to permanent employment contract.</p>	<p>Conversion to permanent employment contract.</p>	<p>Violation of regulatory protections: assumption of long-term employment contract.</p>	<p>Yes. "Chaining rule of temporary contracts"</p>	<p>No specific legal provision.</p>
<p>9. What is the role of collective bargaining in regard to temporary employment contracts?</p>	<p>Restrictions or prohibition temporary work. Establish working conditions for temporary workers.</p>	<p>Limitations on use of temporary contracts.</p>	<p>Restrictions or prohibition temporary work.</p>	<p>Relevant role of collective bargaining. Possibility of extending the "no cause" exception to certain events.</p>	<p>Collective bargaining agreements: also applicable to short-term workers. Specific collective agreement for agency workers.</p>	<p>Determine and/or increase maximum duration, limit temporary work, objective criteria or conversion commitments, etc.</p>	<p>Specific collective agreements: determined according to the specific conditions, circumstances, sector and/or employing organization.</p>
<p>10. Other relevant aspects regarding temporary employment contracts</p>	<p>Wish of the Belgian lawmaker to promote permanent work.</p>	<p>Increase in Social Security contributions for short-term contracts (> 3 months), subscribed from 1.7.2013.</p>	<p>-</p>	<p>Fixed-term contract: heavily modified in recent years. Liberalization of this contract.</p>	<p>-</p>	<p>Indefinite contract support entrepreneurs: fixed-term undercover.</p>	<p>Trades Union Congress: formal complaint European Commission regarding the 'Swedish Derogation' in <i>the AWR</i>.</p>

3.2. America

	Colombia	Peru	Uruguay	USA
1. Is it possible to subscribe temporary employment contracts? What is the principle that governs temporary work?	Yes. Employment Agency: causality principle and temporary need.	Yes. Temporary need.	Yes. Objective justification of temporary need.	Yes. The default rule is employment at will.
2. Which temporary employment contracts exist in? In which cases can these temporary employment contracts be used and what is their legal regulation?	3 types: a) accidental or temporary tasks, b) substitution and c) increases in workload or seasonal work.	3 types: a) accidental nature, b) temporary nature and c) specific project or service. 9 temporary contracts.	No legal regulation. Common contracts: a) seasonal contracts, b) specific project or service, c) substitution...	“At will” rule.
3. Does the legal regulation recognize temporary workers a preferential right to occupy a permanent job in the company?	No.	No. Preferential right for temporary workers to access temporary contracts.	No. Collective agreements often include this right.	No. Collective agreements can include this right.
4. Does the legal system allow differences in the working conditions of permanent and temporary workers? Does the reality in the labor market fulfill this regulation?	No. Equal treatment principle. Compensation for dismissal and agency workers. However, evidence of less favorable treatment.	No. Equal treatment principle. However, evidence of less favorable treatment.	No. Equal treatment principle. Compensation for dismissal.	Yes. Employers are free to state different terms for employees.

<p>5. What is the role of Temporary Employment Agencies in regard to temporary work?</p>	<p>Quantitative significance of agency workers.</p>	<p>In cases of temporality, complementarity and specialization. Maximum 20% agency workers.</p>	<p>No quantitative significance of agency workers.</p>	<p>No regulation of employment agencies. “Staffing services” is widespread.</p>
<p>6. Which is the legal regulation regarding the expiry of temporary employment contracts? Specifically, compensations for the expiry of the temporary employment contract?</p>	<p>Economic compensation for the expiry of contract: pending wages.</p>	<p>No economic compensation for the expiry of contract. Economic compensation for unfair dismissal.</p>	<p>No economic compensation for the expiry of contract.</p>	<p>This question does not apply to the U.S.</p>
<p>7. Which consequences arise from the breach of the legal regulation of temporary employment contracts?</p>	<p>Conversion to permanent employment contract. Economic sanctions.</p>	<p>Conversion to permanent employment contract.</p>	<p>Conversion to permanent employment contract. No economic or criminal sanctions.</p>	<p>This question does not apply to the U.S.</p>
<p>8. Does the legal regulation of temporary employment contracts include provisions designed to prevent fraud on temporary work?</p>	<p>Joint liability of Temporary Employment Agencies.</p>	<p>Inspection administrative authority. Economic sanctions.</p>	<p>Primacy of reality. Continuity principle. Succession fixed-term contracts: automatic conversion</p>	<p>This question does not apply to the U.S.</p>
<p>9. What is the role of collective bargaining in regard to temporary employment contracts?</p>	<p>Unimportant role of collective bargaining.</p>	<p>Unimportant role of collective bargaining.</p>	<p>Collective agreements can establish time limits, preferential rights, etc.</p>	<p>Collective agreements can include provisions regarding temporary workers.</p>

10. Other relevant aspects regarding temporary employment contracts	-	Judicial doctrine of the Constitutional Court regarding the exceptional nature of the temporary employment contract.	The absence of legal regulation of temporary employment contracts is supplemented by legal principles.	-
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