

Job Contracting in the Philippines: A Balancing Act in an Ever-Changing Business Milieu

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I. INTRODUCTION

When this Author was a Labor Law practitioner in the mid-1980's, he handled an interesting case involving a five-star hotel in Makati City, which decided to close down its cafeteria operations in favor of a catering concessionaire.¹ There were two reasons for the closure. *First*, the cafeteria was not earning

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This Article is being published as part of the *Journal's* tribute to honor Atty. Casis and his years of service and impact upon the legal profession. This Article is his final work.

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1. This is based on the Author's experience.

because it provided primarily free meals for employees.² *Second*, the cafeteria operations were merely an adjunct and not an essential component of the hotel business.³ The cafeteria's closure terminated the employment of 11 regular employees, who were members of a certified bargaining labor union.⁴ The situation thus posed an interesting opportunity for the application of the Philippine Labor Code's provisions on job contracting.⁵

This case came to mind as the country faces a myriad of challenges brought about by the novel Coronavirus (COVID-19) pandemic. The "new normal,"⁶ is defined by limitations on mobility due to health and public safety quarantines, and the ever-increasing reliance on technology to bridge the gap.⁷ Thus, work-from-home arrangements⁸ are par for the course, meetings are conducted via online platforms,⁹ and online businesses are on the

2. *Id.*

3. *Id.*

4. *Id.*

5. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Ensure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442, arts. 106-09 (1974) (as amended).

6. See Collins Dictionary, Definition of 'the new normal', available at <https://www.collinsdictionary.com/dictionary/english/the-new-normal> (last accessed Apr. 30, 2022) [<https://perma.cc/3NQC-W6YT>]. See generally Department of Health, The New Normal for Health, available at <https://doh.gov.ph/sites/default/files/publications/The-New-Normal-for-Health.pdf> (last accessed Apr. 30, 2022) [<https://perma.cc/6KH9-PHHL>].

7. Department of Health, *supra* note 6, at 8.

8. See Kathleen de Villa & Tina G. Santos, *DOH: Keep Work-From-Home Setup*, PHIL. DAILY. INQ., Jan. 7, 2022, available at <https://newsinfo.inquirer.net/1537253/doh-keep-work-from-home-setup> (last accessed Apr. 30, 2022) [<https://perma.cc/5KS7-7FDC>].

9. See, e.g., Rappler, *LIVE: House Committee for COVID-19 Virtual Meeting*, RAPPLER, May 28, 2020, available at <https://www.rappler.com/nation/257872-updates-house-committee-coronavirus-virtual-meeting> (last accessed Apr. 30, 2022) [<https://perma.cc/FP8Z-4JFB>]. See generally Securities and Exchange Commission, Guidelines on the Attendance and Participation of Directors, Trustees, Stockholders, Members, and Other Persons of Corporations in Regular and Special Meetings Through Teleconferencing, Video Conferencing and Other Remote or Electronic Means of Communication, Memorandum Circular No. 6, Series of 2020 [SEC Memo. Circ. No. 6, s. 2020], §§ 4 & 10 (Mar. 12, 2020).

rise.¹⁰ Everyone is adjusting to a new way of life. The challenge is for the government, the business sector, and the average Filipino worker to explore alternative ways to adapt to the new normal.

These days, many businesses are streamlining their operations.¹¹ Business structures are changing — becoming leaner and more flexible, even as business processes are adjusted to meet new demands (i.e., less face-to-face interaction,¹² greater online presence,¹³ and more delivery mechanisms for products and services).¹⁴ Against this backdrop, more and more businesses are moving towards job contracting and moving some components of their operations.¹⁵

Job contracting has long been a contentious issue in the Philippines.¹⁶ It traverses the realm of politics and socio-economics, challenging the

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10. Ben O. de Vera, *PH E-Commerce Gains During COVID-19 Lockdown*, PHIL. DAILY. INQ., Apr. 21, 2020, available at <https://business.inquirer.net/295234/philippine-commerce-gains-during-covid-19-lockdown> (last accessed Apr. 30, 2022) [<https://perma.cc/2X4W-5BZ4>].
 11. Ramon M. Lopez, Secretary of the Department of Trade and Industry, Keynote Speech at the 2021 Ease of Doing Business Summit (May 7, 2021) (transcript available at <https://www.dti.gov.ph/archives/2021-ease-of-doing-business-summit> (last accessed Apr. 30, 2022) [<https://perma.cc/BZ73-8Q4H>]).
 12. International Finance Corporation, *How Firms Are Responding and Adapting During COVID-19 and Recovery: Opportunities for Accelerated Inclusion in Emerging Markets*, at 18-19, available at https://www.ifc.org/wps/wcm/connect/08f1c445-87af-4868-a77c-29dee3e1ac4e/Report_How_Firms_Are_Responding_And_Adapting_During_COVID-19_And_Recovery_March21-web.pdf?MOD=AJPERES&CVID=nwjXW4G (last accessed Apr. 30, 2022) [<https://perma.cc/VQ73-LLBM>].
 13. INTERNATIONAL LABOUR ORGANIZATION, *COVID-19 LABOUR MARKET IMPACT IN THE PHILIPPINES: ASSESSMENT AND NATIONAL POLICY RESPONSES 35* (2020).
 14. Organisation for Economic Co-operation and Development, *E-Commerce in the Time of COVID-19*, at 3-4, available at <https://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8> (last accessed Apr. 30, 2022) [<https://perma.cc/4E8A-GPHB>].
 15. See, e.g., Varsolo Sunio, et al., *Service Contracting as a Policy Response for Public Transport Recovery During the Covid-19 Pandemic: A Preliminary Evaluation*, 13 TRANSP. RES. INTERDISC. PERSPECTIVES 1, 3 (2020).
 16. See *Norkis Trading Corporation v. Buenavista*, G.R. No. 182018, 683 SCRA 406, 424 (2012); *Petron Corporation v. Caberte*, G.R. No. 182255, 757 SCRA 390, 403 (2015); & *RNB Garments Philippines, Inc. v. Ramrol Multi-Purpose*

government to protect labor even as it gives flexibility to businesses amidst a dynamically growing economy. Not surprisingly, with every change in the administration, the issue becomes politicized — prompting the government, through the Department of Labor and Employment (DOLE) to re-examine its administrative issuances.

After the Labor Code’s Omnibus Implementing Rules and Regulation, Book III, Rule VIII, Sections 7 to 9 were issued in 1974,¹⁷ DOLE, concomitant with every change in political leadership, promulgated new Department Orders (D.O.) on job contracting:

- (1) D.O. No. 10, Series of 1997 — “[Amending] [] the Rules Implementing Books III and VI of the Labor Code, as Amended”¹⁸ under President Fidel V. Ramos;
- (2) D.O. No. 3, Series of 2001 — “Revoking [D.O. No. 10, s. 1997] and Continuing to Prohibit Labor-Only Contracting”¹⁹ under President Maria Gloria M. Macapagal Arroyo;
- (3) D.O. No. 18, Series of 2002 — “Rules Implementing Articles 106 to 109 of the Labor Code, as Amended”²⁰ also under President Arroyo;
- (4) D.O. No. 18-A, Series of 2011 — “Rules Implementing Articles 106 to 109 of the Labor Code, as Amended”²¹ under President Benigno Simeon C. Aquino III; and

Cooperative, et al., G.R. No. 236331, Sept. 14, 2020, at 11, *available at* <https://sc.judiciary.gov.ph/16355> (last accessed Apr. 30, 2022).

17. Department of Labor and Employment, Omnibus Rules Implementing the Labor Code, Presidential Decree No. 442, bk. III, rule VIII, §§ 7-9 (1989) (as amended).
18. Department of Labor and Employment, Amendment to the Rules Implementing Books III and VI of the Labor Code, Department Order No. 10, Series of 1997 [DOLE D.O. No. 10, s. 1997] (May 30, 1997).
19. Department of Labor and Employment, Revoking Department Order No. 10, Series of 1997, and Continuing to Prohibit Labor-Only Contracting, Department Order No. 3, Series of 2001 [DOLE D.O. No. 3, s. 2011] (May 8, 2001).
20. Department of Labor and Employment, Rules Implementing Articles 106 to 109 of the Labor Code, as Amended, Department Order No. 18, Series of 2002 [DOLE D.O. No. 18, s. 2002] (Feb. 21, 2002).
21. Department of Labor and Employment, Rules Implementing Articles 106 to 109 of the Labor Code, as Amended, Department Order No. 18-A, Series of 2011 [DOLE D.O. No. 18-A, s. 2011] (Nov. 14, 2011).

- (5) D.O. No. 174, Series of 2017 — “Rules Implementing Articles 106 to 109 of the Labor Code, as Amended”²² under President Rodrigo R. Duterte.

All these issuances aim to “restrict or prohibit the contracting-out of labor to protect the rights of workers[.]”²³

Job contracting is allowed under Articles 106 to 109 of the Labor Code.²⁴ Permissible job contracting is “an arrangement whereby a principal [engages] ... a contractor or subcontractor [to perform] or [complete] [] a specific job, work[,] or service within a definite or predetermined period, regardless of whether such job, work[,] or service is to be performed or completed within or outside the premises of the principal[.]”²⁵

On the other hand, while job contracting is allowed and regulated, labor-only contracting is prohibited to protect the rights of the workers and to prevent their exploitation.²⁶ As defined in Article 106 of the Labor Code —

There is ‘labor-only’ contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer.²⁷

II. A DELICATE BALANCING ACT

In recent years, there has been a trend towards job contracting in the Philippines,²⁸ often attributed to an increasingly globalized

22. Department of Labor and Employment, Rules Implementing Articles 106 to 109 of the Labor Code, as Amended, Department Order No. 174, Series of 2017, [DOLE D.O. No. 174, s. 2017] (Mar. 16, 2017).

23. LABOR CODE, art. 106, para. 3.

24. *Id.* arts. 106–09.

25. *Allied Banking Corporation v. Calumpang*, G.R. No. 219435, 852 SCRA 1, 15 (2018) (citing *Sasan, Sr. v. National Labor Relations Commission*, G.R. No. 176240, 569 SCRA 670, 689 (2008) (citing DOLE D.O. No. 174, s. 2017, § 3 (c))).

26. DOLE D.O. No. 10, s. 1997, art. 1; DOLE D.O. No. 3, s. 2011, § 2; DOLE D.O. No. 18, s. 2002, §§ 5–6; DOLE D.O. No. 18–A, s. 2011, §§ 4 & 6; & DOLE D.O. No. 174, s. 2017, §§ 4–5.

27. LABOR CODE, art. 106, para. 4.

28. ASEAN SERVICES EMPLOYEES TRADE UNIONS COUNCIL, BETWEEN FLEXIBILITY AND SECURITY: THE RISE OF NON-STANDARD EMPLOYMENT IN SELECTED ASEAN COUNTRIES 97 (2014).

economy.²⁹ Globalization has contributed to market efficiency, causing gains in investments, employment creation, and increased wages.³⁰ It also, however, reduced jobs in some economic sectors, and paved the way for the adoption of flexible production practices, leading to increased job contracting arrangements.³¹

With globalization, continuing technological advancements, the advent of the Association of the Southeast Asian Nations (ASEAN) Economic Community³² and the emerging challenges posed by the COVID-19 pandemic,³³ it is expected that job contracting will continue to be part of country's industrial landscape.

The issue of job contracting, therefore, is a delicate balancing act between the State's obligation to afford full protection to labor on one hand,³⁴ and on the other, the need to allow flexibility in business to support economic growth.³⁵

Protection of labor is enshrined in the 1987 Philippine Constitution, Article XIII, Section 3,³⁶ which recognizes and guarantees the following rights of workers:

- (1) “[S]elf-organization, collective bargaining ..., and peaceful concerted activities, including the right to strike[;]”³⁷

29. *Id.* at 27.

30. Michael Spence, *The Impact of Globalization on Income and Employment: The Downside of Integrating Markets*, 90 FOREIGN AFF. 28, 28-30 (2011).

31. Winfred M. Villamil & Joel Hernandez, *Globalization, Labor Markets and Human Capital in the Philippines*, at 1, available at https://www.dlsu.edu.ph/wp-content/uploads/pdf/vcri/aki/_idrc/_vol2/01NovVillamilAndHernandezGlobalization2.pdf (last accessed Apr. 30, 2022) [<https://perma.cc/QPM7-E8UA>].

32. See Ernie Cecilia, *Emerging Global Perspectives in Job Contracting*, available at <https://cda.gov.ph/wp-content/uploads/2021/01/03-Emerging-Global-Perspective.pdf> (last accessed Apr. 30, 2022) [<https://perma.cc/VEX2-M8NU>].

33. Department of Health, *supra* note 6, at 8.

34. See PHIL. CONST. art. II, § 18.

35. PHIL. CONST. art. XIII, § 3, para. 4.

36. PHIL. CONST. art. XIII, § 3.

37. PHIL. CONST. art. XIII, § 3, para. 2.

- (2) “[S]ecurity of tenure, humane conditions of work, and a living wage[;]”³⁸
- (3) “[Participation] in policy and decision-making processes affecting their rights and benefits[;]”³⁹ and
- (4) “A just share in the fruits of production[.]”⁴⁰

While the Constitution makes labor protection a national policy,⁴¹ it also provides that the State shall regulate labor relations, “[promoting] the principle of shared responsibility between workers and employers ... [in fostering] industrial peace.”⁴²

Article XIII, Section 3 of the Constitution likewise recognizes the right of enterprises to reasonable returns on investments and to expansion and growth.⁴³ Thus, employers have the legal right to conduct their businesses in ways they deem appropriate, for as long as these are done in good faith and in accordance with law.⁴⁴ This is consistent with the national economic policy laid down in Article XII (National Economy and Patrimony) of the Constitution,⁴⁵ which provides —

Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

38. PHIL. CONST. art. XIII, § 3, para. 2.

39. PHIL. CONST. art. XIII, § 3, para. 2.

40. PHIL. CONST. art. XIII, § 3, para. 4.

41. PHIL. CONST. art. II, § 18.

42. PHIL. CONST. art. XIII, § 3, para. 3.

43. PHIL. CONST. art. XIII, § 3, para. 4.

44. *Abosta Ship Management v. Hilario*, G.R. No. 195792, 741 SCRA 525, 533 (2014) (citing *San Miguel Corporation v. Ubaldo*, G.R. No. 92859, 218 SCRA 293, 301 (1993)).

45. PHIL. CONST. art. XII, § 1.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

...

Section 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.⁴⁶

Clearly, the above-mentioned Constitutional provisions lay down the foundation for a balanced approach to governance that protects workers and at the same time, supports businesses that ensure equitable and sustainable economic growth.

III. TOWARDS MUCH-NEEDED REFORMS

Articles 106 to 109 of the Labor Code have not changed since 1974. It is good law since it distinguishes between permissible job contracting and labor-only contracting, which is prohibited because it circumvents the rights of the workers.⁴⁷

The proper implementation and enforcement of this prohibition is lodged with the DOLE, which has been conducting multi-stakeholder consultations on issues surrounding job contracting, in general, and labor-only contracting, in particular.⁴⁸

Noting the changes in its issuances, it is clear that the DOLE recognizes how the business sector is evolving and why changes in business operations need to be accommodated. At the same time, DOLE strives to protect labor

46. PHIL. CONST. art. XII, §§ 1 & 6.

47. LABOR CODE, art. 106, paras. 3-4.

48. *Id.* para. 3 & Celeste Terrenal Maring, 100 Days Accomplishment, Bello: 10,532 Workers Regularized by 195 Establishments After Consultations and Assessments of DOLE Regional Offices, *available at* <https://www.dole.gov.ph/news/100-days-accomplishment-bello-10532-workers-regularized-by-195-establishments-after-consultations-and-assessments-of-dole-regional-offices> (last accessed Apr. 30, 2022) [<https://perma.cc/UY2W-4W64>].

amidst all these changes, especially with regard to security of tenure and compliance with labor, health, and safety standards at the workplace.⁴⁹

There must be a balance between the rights of workers to employment, just wages, security of tenure, and self-organization,⁵⁰ and the rights of investors to manage and operate their businesses to ensure a reasonable return on their investment.⁵¹ Achieving this balance, however, has been and will always remain a challenge.

After reviewing the Omnibus Implementing Rules and Regulations of the Labor Code⁵² and various DOLE Department Orders,⁵³ the Author has concluded that the following safeguards are necessary for the crafting of a more comprehensive administrative issuance that will address the issues associated with job contracting and labor-only contracting:

- (1) Establishing the control test;
- (2) Ensuring the payment of wages and other benefits;
- (3) Defining the substantial capital or investment requirement;
- (4) Engaging in the business of subcontracting;
- (5) Specializing on business processes; and
- (6) Protecting the rights and interests of labor.

A. On the Issue of Control

As of writing, the latest D.O. issued by DOLE classifies the absence of control over the contractual employees by the contractor as labor-only contracting.⁵⁴ This is correct. To better protect workers, however, the Author proposes that if there is a finding that control over the contractual employees is exercised by the principal (and not by the contractor/subcontractor), the contractual

49. See Office of the President, Reorganizing the Ministry of Labor and Employment and for Other Purposes, Executive Order No. 126, Series of 1987 [E.O. No. 126, s. 1987], §§ 3 & 5 (f) (Jan. 30, 1987) (as amended).

50. PHIL. CONST. art. XIII, § 3, paras. 1 & 2.

51. PHIL. CONST. art. XIII, § 3, para. 4.

52. Department of Labor and Employment, Rules to Implement the Labor Code, Presidential Decree No. 442 (1989).

53. DOLE D.O. No. 10, s. 1997; DOLE D.O. No. 3, s. 2011; DOLE D.O. No. 18, s. 2002; DOLE D.O. No. 18-A, s. 2011; & DOLE D.O. No. 174, s. 2017.

54. DOLE D.O. No. 174, s. 2017, § 5 (b).

employees should be deemed regular employees of the principal, regardless of the nature of the contracting agreement.

Including such a provision in DOLE's administrative issuances would be an effective deterrent to this unscrupulous practice. After all, it is established in Philippine jurisprudence that the presence of control over an employee establishes an employer-employee relationship.⁵⁵ This test is premised on whether "the person for whom the services are performed reserves the right to control [both] the end achieved [and] the manner and means [] used [to achieve] that end."⁵⁶

B. On Non-Payment of Wages and Other Benefits

Articles 106 to 109 are part of Book III of the Labor Code (Conditions of Employment), indicating that the law gives priority and special concern to the payment of wages of contractual employees.⁵⁷ The Author believes that this should be reflected in DOLE issuances, such that in case wages and other benefits are not paid, or paid but not in compliance with the law, both the contractor and the principal will be liable. Though, this is already in the Labor Code —

Article 109. Solidary liability. The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for any violation of any provision of this Code. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers.⁵⁸

The policy, however, has not been fully incorporated in the DOLE D.O. Currently, D.O. No. 174, Series of 2017 provides —

Section 9. Solidarity Liability. In the event of violation of any provision of the Labor Code, including the failure to pay wages, there exists a solidary liability on the part of the principal and the contractor for purposes of enforcing the provisions of the Labor Code and other social legislations, to the extent of the work performed under the employment contract.⁵⁹

It is submitted that the issuance of a direct policy statement on the matter, through the inclusion of a provision along these lines, will surely address the

55. *Abante, Jr. v. Lamadrid Bearing & Parts Corp.*, G.R. No. 159890, 430 SCRA 368, 379 (2004).

56. *Id.*

57. LABOR CODE, arts. 106-09.

58. *Id.* art. 109.

59. DOLE D.O. No. 174, s. 2017, § 9.

issue of non-payment of wages and other benefits of employees in job contracting and labor-only contracting arrangements. The Author thereby suggests this construction of the additional provision — “Non-payment of Wages. The principal and the contractor/subcontractor are solidarily liable for all unpaid wages, including all benefits relating to work rendered by the contractual employee. Such benefit shall include, but not be limited to, overtime pay, nightshift differential pay, rest day pay, holiday pays, and 13th month pay.”

C. On Capitalization and Investment Requirements in Relation to the Business of Sub-contracting and Specialized Business Processes

These three factors are discussed together to highlight the need to focus on the business of the contractor. Before setting amounts for substantial capital requirement, as first done in D.O. No. 18-A, Series of 2011 (₱3,000,000.00)⁶⁰ and currently under D.O. No. 174, Series of 2017 (₱5,000,000.00),⁶¹ it should be noted that Article 106 of the Labor Code provides for the absence of “substantial capital or investment in the form of tools, equipment, machineries, work premises, among others” to be classified as a labor-only contractor.⁶² It is submitted that rather than arbitrarily setting amounts for capitalization requirements, an assessment of the totality of business of the contractor/subcontractor needs to be undertaken.

First, the conjunction in the requirement is “or” and not “and[.]”⁶³ This being the case, the entire phrase, “substantial capital or investment in the form of tools, equipment, machineries, work premises, among others”⁶⁴ must be taken in its totality. The Court in *Neri v. National Labor Relations Commission*,⁶⁵ held that

the law does not require both substantial capital and investment in the form of tools, equipment, machineries, etc.[.] This is clear from the use of the conjunction [‘or’.] If the intention was to require the contractor to prove

60. DOLE D.O. No. 18-A, s. 2011, § 3 (l).

61. DOLE D.O. No. 174, s. 2017, § 3 (l).

62. LABOR CODE, art. 106.

63. *See id.*

64. LABOR CODE, art. 106.

65. *Neri v. National Labor Relations Commission*, G.R. Nos. 97008-09, 224 SCRA 717 (1993).

that he has both capital and the requisite investment, then the conjunction ‘and’ should have been used.⁶⁶

Second, what is “substantial” will depend on the type of work that is outsourced. In other words, substantial is relative, thus, it cannot be pre-determined or set arbitrarily. *De Castro v. Court of Appeals*⁶⁷ cited *Vinoya v. National Labor Relations Commission*⁶⁸ where the Court dealt with the insufficiency of paid-in capitalization, taking into account the “current economic atmosphere in the country[.]”⁶⁹

Thus, in *De Castro*, the Court held that “the determination of sufficient capital stock for independent contractors must be assessed in a broad and extensive manner with consideration of the industry involved.”⁷⁰ Therefore, “the sufficiency of a subscribed capital of ₱1,000,000.00 for independent contracting must be assessed [with] ... the extent of the undertaking [in mind,] relative to the nature of the industry in which Nuvoland was engaged.”⁷¹ Furthermore, the Court stated —

Nuvoland was one of the prominent corporations in the real estate industry. It is safe to assume then that the marketing of its condominium projects would entail a substantially high amount in what was typically a capital intensive industry. The undertaking covered not just one[,] but two considerably huge condominium projects located in prime spots in the metropolis.

For the sale and marketing of two condominium buildings, it would require massive funds for promotions, advertisements, shows, salaries, and operating expenses of its more or less 40 personnel. In light of this vast business undertaking, it is obvious that the [₱1,000,000.00] subscribed capital of Silvericon would hardly suffice to satisfy this huge engagement. Nuvoland was apparently aware of this that it had to fund the marketing expenses of the project in an amount not exceeding [₱30,000,000.00] per building. This was even provided in paragraph [six] of the [Sales and Marketing Agreement].

66. *Id.* at 721.

67. *De Castro v. Court of Appeals*, G.R. No. 204261, 805 SCRA 265, 287 (2016) (citing *Vinoya v. National Labor Relations Commission*, G.R. No. 126586, 324 SCRA 469, 482 (2000)).

68. *Vinoya*, 324 SCRA 482 (2000).

69. *Id.*

70. *De Castro*, 805 SCRA at 287.

71. *Id.*

This being the case, the paid-in capitalization of Silvericon amounting to [₱1,000,000.00] was woefully inadequate to be considered as substantial capital. Thus, Silvericon could not qualify as an independent contractor.

The [finding of Court of Appeals] that Silvericon's capital was sufficient for independent contracting due to the agreement that Nuvoland would advance the amount of ₱30,000,000.00 for marketing expenses, though deductible from Silvericon's earned marketing fees at a later time, was a strained reasoning. The Court agrees with the observation of the [Labor Arbiter] that this [set-up] would not have been resorted to if Silvericon's capital was substantial enough from the start of the business venture. It is logical to presume that an established corporation like Nuvoland would select an independent contractor, which had the financial resources to adequately undertake its marketing and advertising requirements, and not an under[-]capitalized company like Silvericon. It perplexes the Court that the CA disregarded this setup as it certainly shows that Silvericon, from the beginning, did not have substantial capital to service the needs of Nuvoland.⁷²

In this case, there was a finding that the paid-up capital of Silvericon, Inc. is only ₱1,000,000.00.⁷³ This is less than the required paid-up capital for contractors, as provided in DOLE D.O. No. 18-A, Series of 2011, which is ₱3,000,000.00.⁷⁴ Yet, the Court stressed that "the determination of sufficient capital stock for independent contractors must be assessed in a broad and extensive manner with consideration of the industry involved."⁷⁵

The Court further stated that "the sufficiency of a subscribed capital of ₱1,000,000.00 for independent contracting must be assessed [—] taking into consideration the extent of the undertaking relative to the nature of the industry in which Nuvoland was engaged."⁷⁶

Third, the contractor or subcontractor must be evaluated to determine if, it is, in fact, engaged in business process outsourcing. Engaging in the business of process outsourcing immediately removes any cloud on the legitimacy of the operation of the contractor/subcontractor.⁷⁷ Otherwise, the reverse is true: if the contractor or subcontractor is not engaged in the business of process outsourcing, then the presumption is that they are in violation of the law on

72. *Id.* at 287-88 (emphases omitted).

73. *Id.* at 287.

74. DOLE D.O. No. 18-A, s. 2011, § 3 (l).

75. *De Castro*, 805 SCRA at 287.

76. *Id.*

77. DOLE D.O. No. 174, s. 2017, § 8.

job contracting and labor-only contracting.⁷⁸ Thus, the D.O.s of DOLE prohibit the following:

- (1) “Contracting out of a job, work[,] or service through an in-house agency as defined herein;”⁷⁹ and
- (2) “Contracting out of job, work[,] or service when not done in good faith and not justified by the exigencies of the business[.]”⁸⁰

The current Department Order, DOLE D.O. No. 174, Series of 2017, also includes in-house agency in other illicit forms of employment arrangement.⁸¹

Taken together, Department Orders and jurisprudence, the better approach to determine the sufficiency of capital or investment is by assessing the totality of the business operation of the contractor/subcontractor.

Lastly, on the aspect of doing business, the DOLE must recognize the reality that globalization, technology, and the growth of business structures beyond physical borders justifies the need for business process outsourcing. The issuance by DOLE of Department Circular No. 1, Series of 2017,⁸² to clarify the non-applicability of D.O. No. 174 to specialized industries⁸³ is a step in the right direction. This provision of non-applicability, however, should already be incorporated in the DOLE D.O. on job contracting, considering that a growing number of businesses require specialized operations that justify outsourcing to legitimate service providers, such as:

- (1) Security services;⁸⁴

78. *Id.* § 14, para. 2.

79. DOLE D.O. No. 10, s. 1997, art. 1, § 7 (e). *See also* DOLE D.O. No. 18, s. 2002, § 6 (d) & DOLE D.O. No. 18-A, s. 2011, § 7 (a) (4).

80. DOLE D.O. No. 18, s. 2002, § 6 (a). *See also* DOLE D.O. No. 10, s. 1997, art. 1, § 7 (g) & DOLE D.O. No. 18-A, s. 2011, § 7 (b).

81. DOLE D.O. No. 174, s. 2017, § 6 (b).

82. Department of Labor and Employment, Clarifying the Applicability of Department Order No. 174, Series of 2017, Department Circular No. 01, Series of 2017 [DOLE Dept. Circ. No. 01, s. 2017] (June 13, 2017).

83. *Id.* pts. II-IV.

84. *Id.* pt. IV.

- (2) Janitorial and maintenance services;⁸⁵
- (3) Messengerial services;⁸⁶
- (4) Delivery services;⁸⁷
- (5) Information and technology services;⁸⁸
- (6) Call center and customer care services;⁸⁹
- (7) Health care and medical services;⁹⁰
- (8) Merchandising services;⁹¹
- (9) Advertisement and marketing services;⁹²
- (10) Accounting services;⁹³ and
- (11) Legal services.⁹⁴

This proposed provision on non-applicability or exemption of specific industries from the coverage of the administrative issuance on job contracting should also be flexible enough to accommodate adjustments on the list of industries, as the need arises. After all, the intent of the law is to protect labor, not stymie the growth of industries that create employment.

Thus, as part of the recommendation, instead of fixing the amount for substantial capital as was done beginning from DOLE D.O. No. 18-A, Series of 2011,⁹⁵ a comparison between the contractor's business and the worth of the process outsourced must be done. The substantiality of the capital or investment needs to be appraised relative to the work undertaken. Again, the Court decision in *De Castro* is instructional as it held that "the determination

85. *Id.* pt. V.

86. *Id.*

87. *Id.*

88. DOLE Dept. Circ. No. 01, s. 2017, pt. II.

89. *Id.*

90. *Id.*

91. *Id.* pt. V.

92. *Id.*

93. DOLE Dept. Circ. No. 01, s. 2017, pt. V.

94. *Id.* pt. II.

95. DOLE D.O. No. 18-A, s. 2011, § 3 (l).

of sufficient capital stock for independent contractors must be assessed in a broad and extensive manner with consideration of the industry involved.”⁹⁶

By approaching the issue in this manner, the objective of balancing the interests and protecting the rights of stakeholders, both labor and business, may be achieved.

D. On Protecting the Rights and Interests of Labor

Any administrative issuance on job contracting must protect workers and be consistent with labor laws.⁹⁷ Concerns over security of tenure must be addressed, as the opposition to job contracting essentially relates to this issue.⁹⁸

Job contracting, if done in contravention of labor laws, leads to situations where workers unjustly lose jobs because the work, job, or service is outsourced to a contractor or subcontractor.⁹⁹ In such exploitative arrangements, the right to security of tenure is rendered inutile. One of the measures undertaken by DOLE to address this situation is the imposition of registration requirements for contractors or subcontractors.

Registration of contractors or subcontractors has been required by the DOLE since D.O. No. 10 was issued in 1997.¹⁰⁰ Whether or not this approach has been effective is subject of conjecture at this point. Thus, the Author proposes a different approach to the issue: instead of implementing a registration or an accreditation process, DOLE should consider instituting a clearance process for contractors.

How will this system work? Before any contracting-out of job, work, or service arrangement is implemented, the approval of DOLE for such a scheme must be secured. As such, no contracting-out of job, work, or service can be done by the employer without the necessary clearance from DOLE. This is similar to the clearance that was required before the termination of employment may be effected under the old law.¹⁰¹ This, to some extent, has

96. *De Castro*, 805 SCRA at 287.

97. *See* LABOR CODE, art. 106.

98. SIMON DOMBERGER, *THE CONTRACTING ORGANIZATION: A STRATEGIC GUIDE TO OUTSOURCING* 139 (1998).

99. *See generally* *Fulache v. ABS-CBN Broadcasting Corporation*, G.R. No. 183810, 610 SCRA 567 (2010). *See also* *BPI Employees Union-Davao City-FUBU v. Bank of the Philippine Islands (BPI)*, G.R. No. 174912, 702 SCRA 42, 60 (2013).

100. DOLE D.O. No. 10, s. 1997, art. 1, § 20.

101. *Columbia Development Corporation v. Minister of Labor and Employment*, G.R. No. L-57769, 146 SCRA 421, 425 (1986).

afforded protection to employees,¹⁰² and will likely do the same for employees under job contracting arrangements.

Also, in the processing of the application for clearance, a comprehensive assessment of the contractor or subcontractor can be undertaken. DOLE then will be in a better position to assess the suitability and exigency of the proposed outsourcing arrangement to the current business environment or industry, in general, and to the principal's business, in particular, as well as the impact on the principal's financial resources, and the protection of affected employees.

In addition, the clearance process can ensure the payment of compensation to employees that will be displaced by the proposed outsourcing arrangement. This should be a requirement before any clearance for outsourcing or job contracting arrangement is issued. Of course, this is not to imply that the act of subcontracting can be legitimized by the payment of separation pay because the clearance requirement must first be met.

To conclude, two sectors, labor and business, are involved in the issue of job contracting and labor-only contracting. The interest of one cannot be favored over the other.¹⁰³ The government must seek to strike a balance by protecting the rights of labor even as it supports the business sector and gives it elbow room to flourish.¹⁰⁴ The prerogative to contract out work, jobs, and services will always result to employees' displacement. Thus, its indiscriminate and unbridled exercise must be tempered in order that labor rights are amply protected, especially with regard to security of tenure, self-organization, and just wage.¹⁰⁵

102. *See, e.g.*, *Cebu Institute of Technology v. Minister of Labor*, G.R. No. 50238, 113 SCRA 257 (1982).

103. *See* PHIL. CONST. art. XIII, § 3, paras. 3 & 4.

104. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 93-94 (2009) (citing *SESSION OF NOVEMBER 24, 1972* at 891 (1972)).

105. PHIL. CONST. art. XIII, § 3, para. 4.