STATEMENT OF COVERAGE

This *Pre-Week Guide* is presented in the form of an outline of basic principles which bar reviewees may use as a quick guide on the significant areas of labor law in the 2006 Bar Examinations. This is presented in three (3) parts. PART ONE covers Books 1 to 4 of the Labor Code and some important social legislations. PART TWO covers Book 5 and PART THREE covers Books 6 and 7 of the Labor Code.

LABOR LAWS OF THE PHILIPPINES

PART ONE

LAW ON LABOR STANDARDS

1. What is the protection-to-labor clause in the Constitution?

> **"The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.**
>
> **"The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.**
>
> **"The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth."** *(Section 3 (Labor), Article XIII [Social Justice and Human Rights]* of the 1987 Constitution)

2. What are the basic principles enunciated in the Labor Code on protection to labor?

a. The State shall afford **protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed and regulate the relations between workers and employers**. The State shall assure the rights of workers to **self-organization, collective bargaining, security of tenure, and just and humane conditions of work.**

b. Labor contracts are not ordinary contracts as the relation between capital and labor is impressed with public interest.

c. In case of doubt, labor laws and rules shall be interpreted in favor of labor.

d. Labor Code applies to all workers, whether agricultural or non-agricultural.

e. Applicability of Labor Code to government-owned or controlled corporations:

- When created with original or special charter - Civil Service laws, rules and regulations;
- When created under the Corporation Code - Labor Code applies.

RECRUITMENT AND PLACEMENT OF WORKERS:

3. What is the relevant law on recruitment for overseas employment?

Migrant Workers and Overseas Filipinos Act of 1995 (R. A. No. 8042).

4. What are the entities authorized to engage in recruitment and placement?

a. public employment offices;
b. Philippine Overseas Employment Administration (POEA);
c. private recruitment entities;
d. private employment agencies;
e. shipping or manning agents or representatives;
f. such other persons or entities as may be authorized by the Secretary of Labor and Employment; and
g. construction contractors.

5. Money claims of OFWs.

(SEE PART TWO OF THIS 3-PART PRE-WEEK SERIES FOR MORE EXTENSIVE DISCUSSION OF THIS TOPIC)

6. What is the nature of the liability of local recruitment agency and foreign principal?

1. Local Agency is solidarily liable with foreign principal.
2. Severance of relations between local agent and foreign principal does not affect liability of local recruiter.

7. Who has jurisdiction over claims for death and other benefits of OFWs?

Labor Arbiters have jurisdiction over claims for death, disability and other benefits arising from employment of OFWs. Work-connection is required.

8. What is the basis of compensation for death benefits of OFWs?

Basis of compensation for death generally is whichever is greater between Philippine law or foreign law.

9. Which has jurisdiction over disciplinary action cases of OFWs?

The POEA retains jurisdiction over disciplinary action cases.

10. Is direct-hiring of OFWs allowed? Why?

No. Employers cannot directly hire workers for overseas employment except through authorized entities (see enumeration above).

The reason for the ban is to ensure full regulation of employment in order to avoid exploitation.

(*Note:* Any non-resident foreign corporation directly hiring Filipino workers is doing business in the Philippines and may be sued in the Philippines).

11. What is illegal recruitment?

1. Illegal recruitment under Article 38 applies to both *local* and *overseas* employment.
2. Illegal recruitment may be committed by any person whether licensees or non-licensees or holders or non-holders of authority.

3. ***Elements* of illegal recruitment:**

   a. **First element: *Recruitment and placement activities.***

Any act of canvassing, enlisting, contracting, transporting, utilizing, hiring, or procuring workers and includes referring, contract services, promising or advertising for employment abroad, whether for profit or not, when undertaken by a non-licensee or non-holder of authority: Provided, That any such non-licensee or non-holder who, in any manner, offers or promises for a fee employment abroad to two or more persons shall be deemed as engaged in such act.

b. **Second element:** ***Non-licensee or non-holder of authority*** - means any person, corporation or entity which has not been issued a valid license or authority to engage in recruitment and placement by the Secretary of Labor and Employment, or whose license or authority has been suspended, revoked or canceled by the POEA or the Secretary of Labor and Employment.

Some relevant principles:

- Mere impression that recruiter is capable of providing work abroad is sufficient.
- *"Referral"* of recruits also constitutes recruitment activity.
- Absence of receipt to prove payment is not essential to prove recruitment.
- Only one (1) person recruited is sufficient to constitute recruitment.
- Non-prosecution of another suspect is not material.
- A person convicted for illegal recruitment may still be convicted for estafa.

12. When is illegal recruitment considered economic sabotage?

Illegal recruitment is considered economic sabotage - when the commission thereof is attended by the qualifying circumstances as follows:

a. **By a syndicate** - if carried out by a group of 3 or more persons conspiring and confederating with one another;

b. **In large scale** - if committed against 3 or more persons individually or as a group.

13. What is the prescriptive period of illegal recruitment cases?

Under R. A. 8042, the prescriptive period of illegal recruitment cases is **five (5) years** ***except*** *illegal recruitment involving* **economic sabotage** which prescribes in **twenty (20) years**.

14. What are the requirements before a non-resident alien may be employed in the Philippines?

Any alien seeking admission to the Philippines for employment purposes and any domestic or foreign employer who desires to engage an alien for employment in the Philippines shall obtain an employment permit from the Department of Labor.

The employment permit may be issued to a non-resident alien or to the applicant employer after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services for which the alien is desired.

For an enterprise registered in preferred areas of investments, said employment permit may be issued upon recommendation of the government agency charged with the supervision of said registered enterprise.

15. May an alien employee transfer his employment after issuance of permit?

After the issuance of an employment permit, the alien shall not transfer to another job or change his employer without prior approval of the Secretary of Labor.

TRAINING AND EMPLOYMENT OF SPECIAL WORKERS

APPRENTICE:

16. What is an apprenticeship? Who is an apprentice?

"Apprenticeship" means any training on the job supplemented by related theoretical instruction involving apprenticeable occupations and trades as may be approved by the Secretary of Labor and Employment.

17. Who is an apprentice?

An **"apprentice"** is a worker who is covered by a written apprenticeship agreement with an employer.

18. What are the qualifications of an apprentice?

a. be at least fifteen (15) years of age, provided those who are at least fifteen (15) years of age but less than eighteen (18) may be eligible for apprenticeship only in non-hazardous occupation;
b. be physically fit for the occupation in which he desires to be trained;
c. possess vocational aptitude and capacity for the particular occupation as established through appropriate tests; and
d. possess the ability to comprehend and follow oral and written instructions.

19. What are the important principles related to apprenticeship?

a. Wage rate of apprentices - 75% of the statutory minimum wage.
b. Apprentices become regular employees if program is not approved by DOLE.
c. *Ratio* of theoretical instructions and on-the-job training - 100 hours of theoretical instructions for every 2,000 hours of practical training on-the-job.

LEARNERS:

20. Who is a learner?

A **"learner"** is a person hired as a trainee in industrial occupations which are non-apprenticeable and which may be learned through practical training on the job for a period not exceeding three (3) months, whether or not such practical training is supplemented by theoretical instructions.

Wage rate of learners is 75% of the statutory minimum wage.

21. What are the pre-requisites before learners may be hired?

Pre-requisites before learners may be validly employed:

a. when no experienced workers are available;
b. the employment of learners is necessary to prevent curtailment of employment opportunities; and
c. the employment does not create unfair competition in terms of labor costs or impair or lower working standards.

HANDICAPPED WORKERS:

22. Who is a handicapped worker?

A **"handicapped worker"** is one whose earning capacity is impaired:

a. by age; or
b. physical deficiency; or
c. mental deficiency; or
d. injury.

- If disability is not related to the work for which he was hired, he should not be so considered as handicapped worker. He may have a disability but since the same is not related to his work, he cannot be considered a handicapped worker insofar as that particular work is concerned.

- Wage rate - 75% of the statutory minimum wage.

WORKING CONDITIONS:

23. What are the provisions of the Labor Code on working conditions?

The following provisions are covered under Book III of the Labor Code:

Article 83	**-**	**Normal hours of work;**
Article 84	**-**	**Hours worked;**
Article 85	**-**	**Meal periods;**
Article 86	**-**	**Night shift differential;**
Article 87	**-**	**Overtime work;**
Article 88	**-**	**Undertime not offset by overtime;**
Article 89	**-**	**Emergency overtime work;**
Article 90	**-**	**Computation of additional compensation;**
Article 91	**-**	**Right to weekly rest period;**
Article 92	**-**	**When employer may require work on a rest day;**
Article 93	**-**	**Compensation for rest day, Sunday or holiday work;**
Article 94	**-**	**Right to holiday pay;**
Article 95	**-**	**Right to service incentive leave; and**
Article 96	**-**	**Service charges.**

24. Who are covered (and not covered) by the said provisions on working conditions?

1. **Employees covered** - applicable to all employees in all establishments whether operated for profit or not.

2. **Employees *not* covered:**
   a. Government employees;
   b. Managerial employees;
   c. Other officers or members of a managerial staff;
   d. Domestic servants and persons in the personal service of another;
   e. Workers paid by results;
   f. Non-agricultural field personnel; and
   g. Members of the family of the employer.

25. What is the most important requirement in order for the Labor Code provisions on working conditions to apply?

The existence of employer-employee relationship is necessary. Without this relationship, the Labor Code does not apply.

26. What is the test of employment relationship?

There is no uniform test of employment relationship but the four (4) elements of an employer-employee relationship are as follows:

(a) Selection and engagement of employee;
(b) Payment of wages;
(c) Power of dismissal; and
(d) Power of control (the most important test).

27. What is the quantum of evidence required to prove employment relationship?

The quantum of evidence required to prove employment relationship is mere **substantial evidence** (*e.g.*, I. D. card, Cash Vouchers for salaries, inclusion in payroll, reporting to SSS).

NORMAL HOURS OF WORK:

28. What is meant by "normal hours of work"?

1. **"Normal"** hours of work of employees -eight (8) hours per day.
2. **"Work day"** means 24 consecutive-hour period which commences from the time the employee regularly starts to work. It does not necessarily mean the ordinary calendar day from 12:00 midnight to 12:00 midnight unless the employee starts to work at this unusual hour.
3. **"Work week"** is a week consisting of 168 consecutive hours or 7 consecutive 24-hour work days beginning at the same hour and on the same calendar day each calendar week.
4. **Reduction of eight-hour working day** - not prohibited by law provided there is no reduction in pay of workers.
5. **Shortening of work week** - allowed provided employees voluntarily agree thereto; there is no diminution in pay; and only on temporary duration.
6. **Hours of work of *part-time* workers** - payment of wage should be in proportion only to the hours worked.
7. **Hours of work of hospital and clinic personnel** - The Supreme Court has voided Policy Instructions No. 54 in *San Juan de Dios Hospital Employees Association vs. NLRC (G. R. No. 126383, Nov. 28, 1997)*. Consequently, the rule that hospital employees who worked for only 40 hours/5 days in any given workweek should be compensated for full weekly wage for 7 days is no longer applicable.

Prerogative to change working hours.

Well-settled is the rule that management retains the prerogative, whenever exigencies of the service so require, to change the working hours of its employees. *(Sime Darby Pilipinas, Inc. vs. NLRC, G.R. No. 119205, 15 April 1998, 289 SCRA 86).*

The employer has the prerogative to control all aspects of employment in his business organization such as hiring, work assignments, working methods, time, place and manner of work, tools to be used, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay-off of workers and the discipline, dismissal and recall of workers. *(Consolidated Food Corporation, et al. vs. NLRC, et al., G. R. No. 118647, Sept. 23, 1999).*

In the 2001 case of **Interphil Laboratories Employees Union-FFW vs. Interphil Laboratories, Inc.,** [G. R. No. 142824, December 19, 2001], the parties to the CBA stipulated:

> "Section 1. *Regular Working Hours* - A normal workday shall consist of not more than eight (8) hours. The regular working hours for the Company shall be from 7:30 A.M. to 4:30 P.M. The schedule of shift work shall be maintained; however the company may change the prevailing work time at its discretion, should such change be necessary in the operations of the Company. All employees shall observe such rules as have been laid down by the company for the purpose of effecting control over working hours." *(Article VI of the CBA).*

According to the Supreme Court, it is evident from the foregoing provision that the working hours may be changed, *at the discretion of the company*, should such change be necessary for its operations, and that *the employees shall observe such rules as have been laid down by the company*. In the instant case, the Labor Arbiter found that respondent company had to adopt a continuous 24-hour work daily schedule by reason of the nature of its business and the demands of its clients. It was established that the employees adhered to the said work schedule since 1988. The employees are deemed to have waived the eight-hour schedule since they followed, without any question or complaint, the two-shift schedule while their CBA was still in force and even prior thereto. The two-shift schedule effectively changed the working hours stipulated in the CBA. As the employees assented by practice to this arrangement, they cannot

now be heard to claim that the overtime boycott is justified because they were not obliged to work beyond eight hours. As the Labor Arbiter elucidated in his report:

> "Respondents' attempt to deny the existence of such regular overtime schedule is belied by their own awareness of the existence of the regular overtime schedule of 6:00 A.M. to 6:00 P.M. and 6:00 P.M. to 6:00 A.M. of the following day that has been going on since 1988. Proof of this is the case undisputedly filed by the union for and in behalf of its members, wherein it is claimed that the company has not been computing correctly the night premium and overtime pay for work rendered between 2:00 A.M. and 6:00 A.M. of the 6:00 P.M. to 6:00 A.M. shift. xxx In fact, the union Vice-President Carmelo C. Santos, demanded that the company make a recomputation of the overtime records of the employees from 1987 xxx. Even their own witness, union Director Enrico C. Gonzales, testified that when in 1992 he was still a Quality Control Inspector at the Sucat Plant of the company, his schedule was sometime at 6:00 A.M. to 6:00 P.M., sometime at 6:00 A.M. to 2:00 P.M., at 2:00 P.M. to 10:00 P.M. and sometime at 6:00 P.M. to 6:00 A.M., and when on the 6 to 6 shifts, he received the commensurate pay xxx. Likewise, while in the overtime permits, dated March 1, 6, 8, 9 to 12, 1993, which were passed around daily for the employees to sign, his name appeared but without his signatures, he, however, had rendered overtime during those dates and was paid because unlike in other departments, it has become a habit to them to sign the overtime schedule weekly xxx."

29. May workdays be reduced on account of losses?

Yes, in situations where the reduction in the number of regular working days is resorted to by the employer to prevent serious losses due to causes beyond his control, such as when there is a substantial slump in the demand for his goods or services or when there is lack of raw materials. This is more humane and in keeping with sound business operations than the outright termination of the services or the total closure of the enterprise. *(Explanatory Bulletin on the Effect of Reduction of Workdays on Wages/Living Allowances issued by the DOLE on July 23, 1985).*

40. What is the effect of reduction of workdays on wages/living allowances?

In situations where there is valid reduction of workdays, the employer may deduct the wages and living allowances corresponding to the days taken off from the workweek, in the absence of an agreement specifically providing that a reduction in the number of workdays will not adversely affect the remuneration of the employees. This view is consistent with the principle of "no-work-no-pay." Furthermore, since the reduction of workdays is resorted to as a cost-saving measure, it would be unfair to require the employer to pay the wages and living allowances even on unworked days that were taken off from the regular workweek. *(Explanatory Bulletin on the Effect of Reduction of Workdays on Wages/Living Allowances issued by the DOLE on July 23, 1985).*

41. What is meant by "hours worked"?

1. The following are the compensable hours worked:

    a. All time during which an employee is required to be on duty or to be at the employer's premises or to be at a prescribed workplace; and

    b. All time during which an employee is suffered or permitted to work.

2. **Coffee breaks and rest period of short duration** - considered compensable hours worked.
3. **Waiting time** - considered compensable if waiting is an integral part of the employee's work or he is required or engaged by the employer to wait.
4. **Sleeping** while on duty is compensable if the nature of the employee's work allows sleeping without interrupting or prejudicing work or when there is an agreement between the employee and his employer to that effect. For example, a truck helper

may sleep after performing his task and while his truck is traveling on its way to its assignment. But the same may not be done by the driver.

5. **Working while on call** - compensable if employee is required to remain on call in the employer's premises or so close thereto that he cannot use the time effectively and gainfully for his own purpose.
7. **Travel time:**

    a. *Travel from home to work* -not compensable working time
    b. *Travel that is all in the day's work* - compensable hours worked.
    c. *Travel away from home* - compensable hours worked.

8. Attendance in lectures, meetings, and training periods sanctioned by employer - considered hours worked.
9. Power interruptions or brown-outs, basic rules:
    - Brown-outs of short duration not exceeding twenty (20) minutes - compensable hours worked.
    - Brown-outs running for more than twenty (20) minutes may not be treated as hours worked provided any of the following conditions are present:
        a. The employees can leave their workplace or go elsewhere whether within or without the work premises; or
        b. The employees can use the time effectively for their own interest.
10. Attendance in CBA negotiations or grievance meeting - compensable hours worked.
11. Attendance in hearings in cases filed by employee - not compensable hours worked.
12. Participation in strikes - not compensable working time.

MEAL PERIOD:

42. What is "meal period"?

1. Every employee is entitled to not less than one (1) hour (or 60 minutes) time-off for regular meals. Being time-off, it is not compensable hours worked and employee is free to do anything he wants, except to work. If he is required to work while eating, he should be compensated therefor.
2. If meal time is shortened to not less than twenty (20) minutes - compensable hours worked. If shortened to less than 20 minutes, it is considered coffee break or rest period of short duration and, therefore, compensable.

NIGHT-SHIFT DIFFERENTIAL:

43. What is "night-shift differential"?

1. Night shift differential is equivalent to 10% of employee's regular wage for each hour of work performed between 10:00 p.m. and 6:00 a.m. of the following day.
2. *Night shift differential and overtime pay, distinguished* - When the work of an employee falls at nighttime, the receipt of overtime pay shall not preclude the right to receive night differential pay. The reason is, the payment of the night differential pay is for the work done during the night; while the payment of the overtime pay is for work in excess of the regular eight (8) working hours.
3. Computation of Night Shift Differential Pay:

    a. ***Where night shift (10 p.m. to 6 a.m.) work is regular work.***

        1. **On an ordinary day:** Plus 10% of the basic hourly rate or a total of 110% of the basic hourly rate.
        2. **On a rest day, special day or regular holiday:** Plus 10% of the regular hourly rate on a rest day, special day or regular holiday or a total of 110% of the regular hourly rate.

    b. ***Where night shift (10 p.m. to 6 a.m.) work is overtime work.***

1. **On an ordinary day:** Plus 10% of the overtime hourly rate on an ordinary day or a total of 110% of the overtime hourly rate on an ordinary day.
2. **On a rest day or special day or regular holiday:** Plus 10% of the overtime hourly rate on a rest day or special day or regular holiday.

c. ***For overtime work in the night shift.*** Since overtime work is not usually eight (8) hours, the compensation for overtime night shift work is also computed on the basis of the hourly rate.

1. **On an ordinary day.** Plus 10% of 125% of basic hourly rate or a total of 110% of 125% of basic hourly rate.
2. **On a rest day or special day or regular holiday.** Plus 10% of 130% of regular hourly rate on said days or a total of 110% of 130% of the applicable regular hourly rate.

OVERTIME WORK:

44. What is "overtime work"?

1. Work rendered *after* normal eight (8) hours of work is called overtime work.
2. In computing overtime work, *"regular wage"* or *"basic salary"* means *"cash"* wage only *without* deduction for *facilities* provided by the employer.
3. *"Premium pay"* means the additional compensation required by law for work performed within 8 hours on non-working days, such as rest days and special days.
4. *"Overtime pay"* means the additional compensation for work performed beyond 8 hours. Every employee entitled to premium pay is also entitled to the benefit of overtime pay.
5. Illustrations on how overtime is computed:

a. **For overtime work performed on an ordinary day**, the overtime pay is *plus 25% of the basic hourly rate*.

b. **For overtime work performed on a rest day or on a special day**, the overtime pay is *plus 30% of the basic hourly rate which includes 30% additional compensation as provided in Article 93 [a] of the Labor Code.*

c. **For overtime work performed on a rest day which falls on a special day**, the overtime pay is *plus 30% of the basic hourly rate which includes 50% additional compensation as provided in Article 93 [c] of the Labor Code*.

d. **For overtime work performed on a regular holiday**, the overtime pay is *plus 30% of the basic hourly rate which includes 100% additional compensation as provided in Article 94 [b] of the Labor Code*.

e. **For overtime work performed on a rest day which falls on a regular holiday**, the overtime pay is *plus 30% of the basic hourly rate which includes 160% additional compensation.*

Judicial admission by employer of overtime work, effect.

In the 2000 case of **Damasco vs. NLRC**, [G. R. No. 115755, December 4, 2000], the employer admitted in his pleadings that the employee's work starts at 8:30 in the morning and ends up at 6:30 in the evening daily, except holidays and Sundays. However, the employer claims that the employee's basic salary of P140.00 a day is more than enough to cover the "one hour excess work" which is the compensation they allegedly agreed upon. The Supreme Court ruled that in view of the employer's formal admission that the employee worked beyond eight hours daily, the latter is entitled to overtime compensation. No further proof is required. The employer already admitted she worked an extra hour daily. Judicial admissions made by parties in the

pleadings, or in the course of the trial or other proceedings in the same case are conclusive, no further evidence being required to prove the same, and cannot be contradicted unless previously shown to have been made through palpable mistake or that no such admission was made. *(Citing Philippine American General Insurance Inc. vs. Sweet Lines Inc., 212 SCRA 194, 204 [1992]).*

Premium and overtime pay, distinguished.

"Premium pay" refers to the additional compensation required by law for work performed within eight (8) hours on non-working days, such as rest days and special days. *(No. III, DOLE Handbook on Workers Statutory Monetary Benefits).*

"Overtime pay" refers to the additional compensation for work performed beyond eight (8) hours a day. Every employee who is entitled to premium pay is likewise entitled to the benefit of overtime pay. *(No. IV, Ibid.).*

UNDERTIME NOT OFFSET BY OVERTIME:

45. What is meant by "undertime not offset by overtime"?

1. Undertime work on any particular day shall not be offset by overtime on any other day.
2. Permission given to the employee to go on leave on some other day of the week shall not exempt the employer from paying the additional compensation required by law such as overtime pay or night shift differential pay.

EMERGENCY OVERTIME WORK:

46. When may an employee be compelled to perform overtime work?

1. The general rule remains that no employee may be compelled to render overtime work against his will.

2. Exceptions when employee may be compelled to render overtime work:

   a. When the country is at war or when any other national or local emergency has been declared by the National Assembly or the Chief Executive;
   b. When overtime work is necessary to prevent loss of life or property or in case of imminent danger to public safety due to actual or impending emergency in the locality caused by serious accident, fire, floods, typhoons, earthquake, epidemic or other disasters or calamities;
   c. When there is urgent work to be performed on machines, installations or equipment, or in order to avoid serious loss or damage to the employer or some other causes of similar nature;
   d. When the work is necessary to prevent loss or damage to perishable goods;
   e. When the completion or continuation of work started before the 8th hour is necessary to prevent serious obstruction or prejudice to the business or operations of the employer; and
   f. When overtime work is necessary to avail of favorable weather or environmental conditions where performance or quality of work is dependent thereon.

47. May an employee validly refuse to render overtime work under any of the afore-said circumstances?

An employee cannot validly refuse to render overtime work if any of the afore-mentioned circumstances is present. When an employee refuses to render emergency overtime work under any of the foregoing conditions, he may be dismissed on the ground of insubordination or willful disobedience of the lawful order of the employer.

WEEKLY REST PERIOD:

48. What is "weekly rest period"?

1. Every employer shall give his employees a rest period of not less than 24 consecutive hours after every 6 consecutive normal work days.
2. If business is open on Sundays/holidays, rest day may be scheduled on another day.
3. Preference of employee as to his rest day should be respected if based on religious grounds.
4. Waiver of compensation for work on rest days and holidays is not valid.

49. When may an employer compel his employees to render work on a rest day?

Under any of the following circumstances:

a. In case of actual or impending emergencies caused by serious accident, fire, flood, typhoon, earthquake, epidemic or other disaster or calamity, to prevent loss of life and property, or in case of *force majeure* or imminent danger to public safety;
b. In case of urgent work to be performed on machineries, equipment, or installations, to avoid serious loss which the employer would otherwise suffer;
c. In the event of abnormal pressure of work due to special circumstances, where the employer cannot ordinarily be expected to resort to other measures;
d. To prevent serious loss of perishable goods;
e. Where the nature of the work is such that the employees have to work continuously for seven (7) days in a week or more, as in the case of the crew members of a vessel to complete a voyage and in other similar cases; and
f. When the work is necessary to avail of favorable weather or environmental conditions where performance or quality of work is dependent thereon.

COMPENSATION FOR WORK ON REST DAY, SUNDAY OR HOLIDAY:

50. How is premium computed for work rendered on a rest day, Sunday or holiday?

a. Premium pay for work on scheduled rest day.
A covered employee who is made or permitted to work on his scheduled rest day shall be paid with an additional compensation of at least thirty percent (30%) of his regular wage.

b. Premium pay for work on Sunday when it is employee's rest day.
A covered employee shall be entitled to such additional compensation of thirty percent (30%) of his regular wage for work performed on a Sunday only when it is his established rest day.

c. Premium pay for work performed on Sundays and holidays when employee has no regular workdays and no scheduled regular rest days.
Where the nature of the work of the employee is such that he has no regular workdays and no regular rest days can be scheduled, he shall be paid an additional compensation of at least thirty percent (30%) of his regular wage for work performed on Sundays and holidays.

d. Premium pay for work performed on special holidays (now special days) which fall on employee's scheduled rest day.
Work performed on any special holiday (now special day) shall be paid with an additional compensation of at least thirty percent (30%) of the regular wage of the employee. Where such holiday work falls on the employee's scheduled rest day, he shall be entitled to additional compensation of at least fifty percent (50%) of his regular wage.

e. Higher rate provided in agreements.
Where the collective bargaining agreement or other applicable employment contract stipulates the payment of higher premium pay than that prescribed by law, the employer shall pay such higher rate.

HOLIDAY PAY:

51. What is holiday pay?

Holiday pay is a premium given to employees pursuant to law even if he is not suffered to work on a regular holiday.

- If worker did not work on regular holiday, he is entitled to 100% of his basic pay;
- If he worked, he is entitled to 200% thereof.

Entitlement of monthly-paid employees to regular holiday pay.

The Labor Code does not exclude monthly-paid employees from the benefits of holiday pay. However, the implementing rules on holiday pay excluded monthly-paid employees from the said benefits by inserting under Rule IV, Book III of the said rules, Section 2 which provides that monthly-paid employees are presumed to be paid for all days in the month, whether worked or not. In Policy Instructions No. 9, the Secretary of Labor categorically declared that the benefit is intended primarily for daily-paid employees when the law clearly states that every worker should be paid their regular holiday pay. This is a flagrant violation of the mandatory directive of Article 4 of the Labor Code which states that doubts in the implementation and interpretation of the Code, including its implementing rules, shall be resolved in favor of labor. Moreover, it shall always be presumed that the legislature intended to enact a valid and permanent statute which would have the most beneficial effect that its language permits. *(Insular Bank of Asia and America Employees Union [IBAAEU] vs. Inciong, et al., G. R. No. L-52415, Oct. 23, 1984).*

An administrative interpretation which diminishes the benefits of labor more than what the statute delimits or withholds is obviously *ultra vires*. *(The Chartered Bank Employees Association vs. Ople, et al., G. R. No. L-44717, Aug. 28, 1985).*

But in the 2004 case of **Odango vs. NLRC***,* (G. R. No. 147420, June 10, 2004)*,* both the petitioners and respondent firm anchored their respective arguments on the validity of Section 2, Rule IV of Book III of the Omnibus Rules Implementing the Labor Code. Indeed, it is deplorable, said the Supreme Court, that both parties (the petitioners and the respondent employer) premised their arguments on an implementing rule that the Court had declared void twenty years ago in *Insular Bank of Asia vs. Inciong,* [supra]. This case is cited prominently in basic commentaries. And yet, counsel for both parties failed to consider this. This does not speak well of the quality of representation they rendered to their clients. This controversy should have ended long ago had either counsel first checked the validity of the implementing rule on which they based their contentions. The High Court declared:

> "We have long ago declared void Section 2, Rule IV of Book III of the Omnibus Rules Implementing the Labor Code. In ***Insular Bank of Asia v. Inciong***, [G. R. No. L-52415, October 23, 1984; 217 Phil. 629 (1984)], we ruled as follows:
>
> > 'Section 2, Rule IV, Book III of the Implementing Rules and Policy Instructions No. 9 issued by the Secretary (then Minister) of Labor are null and void since in the guise of clarifying the Labor Code's provisions on holiday pay, they in effect amended them by enlarging the scope of their exclusion.
> >
> > 'The Labor Code is clear that monthly-paid employees are not excluded from the benefits of holiday pay. However, the implementing rules on holiday pay promulgated by the then Secretary of Labor excludes monthly-paid employees from the said benefits by inserting, under Rule IV, Book III of the implementing rules, Section 2 which provides that monthly-paid employees are presumed to be paid for all days in the month whether worked or not.'
>
> "Thus, Section 2 cannot serve as basis of any right or claim. Absent any other legal basis, petitioners' claim for wage differentials must fail.
>
> "Even assuming that Section 2, Rule IV of Book III is valid, petitioners' claim will still fail. The basic rule in this jurisdiction is "no work, no pay." The right to be paid for un-worked days is generally limited to the ten legal holidays in a year. *(See Article 94 of the Labor Code and Executive Order No. 223).*

Petitioners' claim is based on a mistaken notion that Section 2, Rule IV of Book III gave rise to a right to be paid for un-worked days beyond the ten legal holidays. In effect, petitioners demand that ANTECO should pay them on Sundays, the un-worked half of Saturdays and other days that they do not work at all. Petitioners' line of reasoning is not only a violation of the "no work, no pay" principle, it also gives rise to an invidious classification, a violation of the equal protection clause. Sustaining petitioners' argument will make monthly-paid employees a privileged class who are paid even if they do not work.

"The use of a divisor less than 365 days cannot make ANTECO automatically liable for underpayment. The facts show that petitioners are required to work only from Monday to Friday and half of Saturday. Thus, the minimum allowable divisor is 287, which is the result of 365 days, less 52 Sundays and less 26 Saturdays (or 52 half Saturdays). Any divisor below 287 days means that ANTECO's workers are deprived of their holiday pay for some or all of the ten legal holidays. The 304 days divisor used by ANTECO is clearly above the minimum of 287 days.

"Finally, petitioners cite ***Chartered Bank Employees Association v. Ople,*** [G.R. No. L-44717, 28 August 1985, 138 SCRA 273], as an analogous situation. Petitioners have misread this case.

"In ***Chartered Bank***, the workers sought payment for un-worked **legal** holidays as a right guaranteed by a valid law. In this case, petitioners seek payment of wages for un-worked **non-legal** holidays citing as basis a void implementing rule. The circumstances are also markedly different. In ***Chartered Bank,*** there was a collective bargaining agreement that prescribed the divisor. No CBA exists in this case. In ***Chartered Bank***, the employer was liable for underpayment because the divisor it used was 251 days, a figure that clearly fails to account for the ten legal holidays the law requires to be paid. Here, the divisor ANTECO uses is 304 days. This figure does not deprive petitioners of their right to be paid on legal holidays." *(Odango vs. NLRC, et al., G. R. No. 147420, June 10, 2004).*

52. What are the regular holidays and special days?

List of eleven (11) regular holidays and two (2) special days under **R.A . No. 9177 (November 13, 2002)**:

(a) <u>REGULAR HOLIDAYS</u>

New Year's Day	**- January 1**
Maundy Thursday	**- Movable Date**
Good Friday	**- Movable Date**
Eidul Fitr	**- Movable Date**
Araw ng Kagitingan (Bataan and Corregidor Day)	**- April 9**
Labor Day	**- May 1**
Independence Day	**- June 12**
National Heroes Day	**- Last Sunday of August**
Bonifacio Day	**- November 30**
Christmas Day	**- December 25**
Rizal Day	**- December 30**

(b) NATIONWIDE SPECIAL HOLIDAYS

All Saints Day	**- November 1**
Last Day of the Year	**- December 31**

[NOTE: R.A. No. 9177 declares the first day of *Shawwal*, the tenth month of the Islamic calendar, a national holiday for the observance of *Eidul Fitr*, and the tenth day of *Zhul Hijja*, the twelfth month of the Islamic calendar, a regional holiday in the Autonomous Region in Muslim Mindanao (ARMM) for the observance of *Eidul Adha. Eidul Fitr* is the first day marking the end of the thirty (30)-day fasting period of *Ramadhan Eidul Adha* is a tenth day in the month of *Hajj* or Islamic Pilgrimage to Mecca wherein Muslims pay homage to Abraham's supreme act of sacrifice and signifies mankind's obedience to God.

The approximate date of these Islamic holidays may be determined in accordance with the Islamic calendar (*Hijra*) or the lunar calendar, or upon Islamic astronomical calculations, whichever is possible or convenient.]

53. What are the distinctions between "regular holidays" and "special days"?

The following are the distinctions between *"regular holidays"* and *"special days"*:

a. A covered employee who does not work during *regular holidays* is paid 100% of his regular daily wage; while a covered employee who does not work during a *special day* does not receive any compensation under the principle of *"no work, no pay."*

b. A covered employee who works during *regular holidays* is paid 200% of his regular daily wage; while a covered employee who works during *special days* is only paid an additional compensation of not less than 30% of the basic pay or a total of 130% and at least 50% over and above the basic pay or a total of 150%, if the worker is permitted or suffered to work on *special days* which fall on his scheduled rest day.

54. What is the distinction between "special holidays" and "special days"?

There is none. *"Special holidays"* are now known as *"special days."* (NOTE: R. A. 9177 uses *"Special Holidays"* instead of *"Special Days"* in describing *All Saints Day* and *Last Day of the Year* which were described as such under Executive Order No. 203 [June 30, 1987]).

55. What is the application of the principle of "no work, no pay" to entitlement to holiday pay?

The principle of *"no work, no pay"* applies to *special days* but not to ***unworked*** *regular holidays* where the employees are always paid the equivalent of 100% of their basic pay.

56. What are the premium pay for working on holidays?

1. Premium pay for work performed during *special days* - **30%** on top of basic pay.
2. Premium pay for work performed during *special days* falling on scheduled rest day - **50%** over and above the basic pay.

57. What are the effects of absences on entitlement to regular holiday pay?

The following are the effect of *absences* on entitlement to *regular* holiday pay:

a. **Employees on leave of absence with pay** - entitled to regular holiday pay.
b. **Employees on leave of absence without pay on the day immediately preceding a regular holiday -** may not be paid the required holiday pay if he has not worked on such regular holiday.

c. **Employees on leave while on SSS or employee's compensation benefits-** Employers shall grant the same percentage of the holiday pay as the benefit granted by competent authority in the form of employee's compensation or social security payment, whichever is higher, if they are not reporting for work while on such benefits.

d. **When the day preceding regular holiday is a non-working day or scheduled rest day -** Employee shall not be deemed to be on leave of absence on that day, in which case, he shall be entitled to the regular holiday pay if he worked on the day immediately preceding the non-working day or rest day.

58. What is the rule in case of absence during successive regular holidays?

The *rule in case of successive regular holidays* is as follows: An employee may not be paid for both holidays if he absents himself from work on the day immediately preceding the first holiday, unless he works on the first holiday, in which case, he is entitled to his holiday pay on the second holiday.

59. What is the rule in case two regular holidays falling on the same day?

DOLE Explanatory Bulletin on Workers' Entitlement to Holiday Pay on 9 April 1993, Araw ng Kagitingan and Good Friday enunciated the following rule in case of two regular holidays falling on the same day *(e.g., Araw ng Kagitingan and Good Friday falling on April 9, 1993)*:

1. If employee did not work: 200% of basic pay;
2. If employee worked: 300% of basic pay.

Said bulletin dated March 11, 1993, including the manner of computing the holiday pay, was reproduced on January 23, 1998, when April 9, 1998 was both Maundy Thursday and *Araw ng Kagitingan.*

In the 2004 case of **Asian Transmission Corporation vs. CA**, [G. R. No. 144664, March 15, 2004], the petitioner sought the nullification of the said March 11, 1993 Explanatory Bulletin. The Supreme Court, in affirming the validity thereof, ruled that Article 94 of the Labor Code, as amended, affords a worker the enjoyment of ten paid regular holidays. The provision is mandatory, regardless of whether an employee is paid on a monthly or daily basis.

Unlike a bonus, which is a management prerogative, holiday pay is a statutory benefit demandable under the law. Since a worker is entitled to the enjoyment of ten paid regular holidays, the fact that two holidays fall on the same date should not operate to reduce to nine the ten holiday pay benefits a worker is entitled to receive.

It is elementary, under the rules of statutory construction, that when the language of the law is clear and unequivocal, the law must be taken to mean exactly what it says. *(Insular Bank of Asia and America Employees Union (IBAAEU) vs. Inciong, G.R. No. L-52415, Oct. 23, 1984, 132 SCRA 663, 673).*

In the case at bar, there is nothing in the law which provides or indicates that the entitlement to ten days of holiday pay shall be reduced to nine when two holidays fall on the same day.

60. What is the rule in case of regular Muslim holidays?

In the 2002 case of **San Miguel Corporation vs. The Hon. CA**, [G. R. No. 146775, January 30, 2002], a routine inspection conducted by the Department of Labor and Employment in the premises of San Miguel Corporation (SMC) in Sta. Filomena, Iligan City revealed that there was underpayment by SMC of regular Muslim holiday pay to its employees. Petitioner SMC asserts that Article 3(3) of Presidential Decree No. 1083 provides that *"(t)he provisions of this Code shall be applicable only to Muslims x x x."*

The Supreme Court, however, ruled that there should be no distinction between Muslims and non-Muslims as regards payment of benefits for Muslim holidays. The Court of Appeals did not err in sustaining Undersecretary Español who stated:

> "Assuming arguendo that the respondent's position is correct, then by the same token, Muslims throughout the Philippines are also not entitled to holiday pays on Christian holidays declared by law as regular holidays. We must remind the respondent-appellant that wages and other emoluments granted by law to the working man are determined on the basis of the criteria laid down by laws and certainly not on the basis of the worker's faith or religion."

At any rate, Article 3(3) of Presidential Decree No. 1083 also declares that "x x x nothing herein shall be construed to operate to the prejudice of a non-Muslim."

SERVICE INCENTIVE LEAVE:

61. What are the basic principles governing the grant of service incentive leave?

1. Every covered employee who has rendered at least one (1) year of service shall be entitled to a yearly service incentive leave of five (5) days with pay.
2. Meaning of *"one year of service"* - service within twelve (12) months, whether continuous or broken, reckoned from the date the employee started working, including authorized absences and paid regular holidays, unless the number of working days in the establishment as a matter of practice or policy, or that provided in the employment contract, is less than twelve (12) months, in which case, said period shall be considered as one (1) year for the purpose of determining entitlement to the service incentive leave.
3. Service incentive leave is commutable to cash if unused at the end of the year.
4. The basis of computation of service incentive leave is the salary rate *at the date of commutation.*
5. Grant of vacation leave or sick leave may be considered substitute for service incentive leave. (*Note:* there is no provision in the Labor Code granting vacation or sick leave).

In the 2000 case of **Imbuido vs. NLRC***,* [G. R. No. 114734, March 31, 2000], where one of the issues pertained to the entitlement of an illegally dismissed employee to service incentive leave pay, it was held that having already worked for more than three (3) years at the time of her unwarranted dismissal, petitioner is undoubtedly entitled to service incentive leave benefits, computed from 1989 until the date of her actual reinstatement. As ruled in *Fernandez vs. NLRC,* [285 SCRA 149, 176 (1998)] "[s]ince a service incentive leave is clearly demandable after one year of service - whether continuous or broken - or its equivalent period, and it is one of the 'benefits' which would have accrued if an employee was not otherwise illegally dismissed, it is fair and legal that its computation should be up to the date of reinstatement as provided under Section [Article] 279 of the Labor Code, as amended."

This *Imbuido* ruling was cited in the 2005 case of **Integrated Contractor and Plumbing Works, Inc. vs. NLRC***,* [G. R. No. 152427, August 9, 2005] which involves a project employee who later on became a regular employee after a series of re-hiring. Accordingly, it was held that private respondent's service incentive leave credits of five (5) days for every year of service, based on the actual service rendered to the petitioner in accordance with each contract of employment, should be computed up to the date of reinstatement pursuant to Article 279.

But in another 2005 case, **JPL Marketing Promotions vs. CA**, [G. R. No. 151966, July 8, 2005], where an employee was never paid his service incentive leave during all the time he was employed, it was held that the same should be computed not from the start of employment but a year after commencement of service, for it is only then that the employee is entitled to said benefit. This is because the entitlement to said benefit accrues only from the time he has rendered at least one year of service to his employer. It must be noted that this benefit is given by law on the basis of the service actually rendered by the employee, and in the particular case of the service incentive leave, it is granted as a motivation for the employee to stay longer with the employer. Moreover, the computation thereof should only be up to the date of termination of employment.

There is no cause for granting said incentive to one who has already terminated his relationship with the employer.

Rationale for leave credit accumulation and cash conversion.

In a case involving the accumulation of leave credits and their conversion into cash, as provided in the Collective Bargaining Agreement, the Supreme Court observed that the conversion of leave credits into their cash equivalent is aimed primarily to encourage workers to work continuously and with dedication for the company. Companies offer incentives, such as the conversion of the accumulated leave credits into their cash equivalent, to lure employees to stay with the company. Leave credits are normally converted into their cash equivalent based on the last prevailing salary received by the employee. *(Republic Planters Bank, now known as PNB-Republic Bank, vs. NLRC, et al., G. R. No. 117460, Jan. 6, 1997).*

In the 2005 case of **Auto Bus Transport System, Inc. vs. Bautista**, [G. R. No. 156367, May 16, 2005], the Supreme Court observed that the service incentive leave is a curious animal in relation to other benefits granted by the law to every employee. In the case of service incentive leave, the employee may choose to either use his leave credits or commute it to its monetary equivalent if not exhausted at the end of the year. Furthermore, if the employee entitled to service incentive leave does not use or commute the same, he is entitled upon his resignation or separation from work to the commutation of his accrued service incentive leave.

As enunciated by the Supreme Court in **Fernandez vs. NLRC**, [G.R. No. 105892, January 28, 1998, 349 Phil 65], the clear policy of the Labor Code is to grant service incentive leave pay to workers in all establishments, subject to a few exceptions. *Section 2, Rule V, Book III* of the *Implementing Rules and Regulations* provides that "[e]very employee who has rendered at least one year of service shall be entitled to a yearly service incentive leave of five days with pay." Service incentive leave is a right which accrues to every employee who has served "within 12 months, whether continuous or broken reckoned from the date the employee started working, including authorized absences and paid regular holidays unless the working days in the establishment as a matter of practice or policy, or that provided in the employment contracts, is less than 12 months, in which case said period shall be considered as one year." It is also "commutable to its money equivalent if not used or exhausted at the end of the year." In other words, an employee who has served for one year is entitled to it. He may use it as leave days or he may collect its monetary value. To limit the award to three years, as the solicitor general recommends, is to unduly restrict such right.

SERVICE CHARGES:

62. What are service charges?

The rule on service charges applies only to establishments collecting service charges, such as hotels, restaurants, lodging houses, night clubs, cocktail lounges, massage clinics, bars, casinos and gambling houses, and similar enterprises, including those entities operating primarily as private subsidiaries of the government. It applies to all employees of covered employers, regardless of their positions, designations or employment status, and irrespective of the method by which their wages are paid.

63. How is service charge distributed?

Service charges are distributed in accordance with the following percentage of sharing:

a. *eighty-five percent* (85%) for the employees to be distributed equally among them; and
b. *fifteen percent* (15%) for the management to answer for losses and breakages and distribution to managerial employees.

- The P2,000.00 salary ceiling for entitlement thereto is no longer applicable.
- The shares shall be distributed to employees not less often than once every 2 weeks or twice a month at intervals not exceeding 16 days.

Service charge is not profit share and may thus not be deducted from wage.

In the 2005 case of **Mayon Hotel & Restaurant vs. Adana**, [G. R. No. 157634, May 16, 2005], the employer alleged that the five (5) percent of the gross income of the establishment being given to the respondent-employees can be considered as part of their wages. The Supreme Court was not persuaded. It quoted with approval the Labor Arbiter on this matter, to wit:

> "While complainants, who were employed in the hotel, receive[d] various amounts as profit share, the same cannot be considered as part of their wages in determining their claims for violation of labor standard benefits. Although called profit share[,] such is in the nature of share from service charges charged by the hotel. This is more explained by [respondents] when they testified that what they received are not fixed amounts and the same are paid not on a monthly basis (pp. 55, 93, 94, 103, 104; vol. II, rollo). Also, [petitioners] failed to submit evidence that the amounts received by [respondents] as profit share are to be considered part of their wages and had been agreed by them prior to their employment. Further, how can the amounts receive[d] by [respondents] be considered as profit share when the same [are] based on the gross receipt of the hotel[?] No profit can as yet be determined out of the gross receipt of an enterprise. Profits are realized after expenses are deducted from the gross income."

WAGES:

64. What are the attributes of wage?

1. Attributes of wage:

   a. it is the remuneration or earnings, however designated, for work done or to be done or for services rendered or to be rendered;
   b. it is capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the same;
   c. it is payable by an employer to an employee under a written or unwritten contract of employment for work done or to be done, or for services rendered or to be rendered; and
   d. it includes the fair and reasonable value, as determined by the Secretary of Labor and Employment, of board, lodging, or other facilities customarily furnished by the employer to the employee. *"Fair and reasonable value"* shall not include any profit to the employer, or to any person affiliated with the employer.

2. *"Wage", "salary"* and *"pay"; **distinction*** - they are synonymous in meaning and usage.
3. *Commission* - may or may not be treated as part of wage depending on the circumstances.
4. Actual work is the basis of claim for wages (*"No work, no pay"*).

FACILITIES AND SUPPLEMENTS:

65. What are "facilities"?

1. *"Facilities"* shall include articles or services for the benefit of the employee or his family but shall not include tools of the trade or articles or services primarily for the benefit of the employer or necessary to the conduct of the employer's business.
2. Value of facilities - the fair and reasonable value of board, lodging and other facilities customarily furnished by an employer to his employees both in agricultural and non-agricultural enterprises.

66. What are "supplements"?

1. *"Supplements"* means extra remuneration or special privileges or benefits given to or received by the laborers over and above their ordinary earnings or wages.

In the same 2005 case of **Mayon Hotel & Restaurant vs. Adana**, [G. R. No. 157634, May 16, 2005] it was noted by the Supreme Court the uncontroverted testimony of respondents on record that they were required to eat in the hotel and restaurant so that they will not go home and there is no interruption in the services of Mayon Hotel & Restaurant. As ruled in *Mabeza* [infra], food or snacks or other convenience provided by the employers are deemed as supplements if they are granted for the convenience of the employer. The criterion in making a distinction between a supplement and a facility does not so much lie in the kind (food, lodging) but the purpose. Considering, therefore, that hotel workers are required to work different shifts and are expected to be available at various odd hours, their ready availability is a necessary matter in the operations of a small hotel, such as petitioners' business. The deduction of the cost of meals from respondents' wages, therefore, should be removed.

Legal requirements must be complied with before deducting facilities from wages.

As stated in *Mabeza vs. NLRC,* [G.R. No. 118506, April 18, 1997 (271 SCRA 670)], the employer simply cannot deduct the value from the employee's wages without satisfying the following: (a) proof that such facilities are customarily furnished by the trade; (b) the provision of deductible facilities is voluntarily accepted in writing by the employee; and (c) the facilities are charged at fair and reasonable value.

Consequently, as held in *Mayon Hotel & Restaurant* [supra], even granting that meals and snacks were provided by the hotel to its employees and indeed constituted facilities, such facilities could not be deducted without compliance with certain legal requirements. The records are clear that petitioners failed to comply with these requirements. There was no proof of respondents' written authorization. Indeed, the Labor Arbiter found that while the respondents admitted that they were given meals and *merienda*, the quality of food served to them was not what was provided for in the Facility Evaluation Orders and it was only when they filed the cases that they came to know of this supposed Facility Evaluation Orders. Considering the failure to comply with the above-mentioned legal requirements, the Labor Arbiter therefore erred when he ruled that the cost of the meals actually provided to respondents should be deducted as part of their salaries, on the ground that respondents have availed themselves of the food given by petitioners. The law is clear that mere availment is not sufficient to allow deductions from employees' wages.

Voluntary acceptance of facilities required.

In order that the cost of facilities furnished by the employer may be charged against an employee, his acceptance of such facilities must be voluntary. *(Section 7, Rule VII, Book III, Rules to Implement the Labor Code).*

67. What is the distinction between "facilities" and "supplements"?

> *"Facilities"* and *"supplements"*, **distinction:** The benefit or privilege given to the employee which constitutes an extra remuneration over and above his basic or ordinary earning or wage, is *supplement*; and when said benefit or privilege is part of the laborer's basic wage, it is a *facility*. The criterion is not so much with the kind of the benefit or item (food, lodging, bonus or sick leave) given but its purpose. Thus, free meals supplied by the ship operator to crew members, out of necessity, cannot be considered as facilities but supplements which could not be reduced having been given not as part of wages but as a necessary matter in the maintenance of the health and efficiency of the crew personnel during the voyage.

68. What is the rule on deductibility of "facilities" or "supplements" from wages?

Facilities may be charged to or deducted from wages. Supplements, on the other hand, may not be so charged. Thus, when meals are freely given to crew members of a vessel while they were on the high seas, not as part of their wages but as a necessary matter in the maintenance of the health and efficiency of the crew personnel during the voyage, the deductions made therefrom for the meals should be returned to them, and the operator of the coastwise vessels affected should continue giving the same benefit. *(State Marine Cooperation and Royal Line, Inc. vs. Cebu Seamen's Association, Inc., G. R. No. L-12444, Feb. 28, 1963).*

In another case where the company used to pay to its drivers and conductors, who were assigned outside of the city limits, aside from their regular salary, a certain percentage of their daily wage, as allowance for food, it was ruled that the company should continue granting the said privilege. *(Cebu Autobus Company vs. United Cebu Autobus Employees Association, G. R. No. L-9742, Oct. 27, 1955).*

GRATUITY AND ALLOWANCES:

69. What is a gratuity?

"Gratuity" is a gift freely given by the employer in appreciation of certain favors or services rendered. It is not part of wages since, strictly speaking, it is not intended as compensation for actual work. It is further not demandable as a matter of right.

70. Are allowances part of wage?

"Allowances" are not part of wages. Therefore, in the computation of the amount of retirement and other benefits, allowances shall not be included therein.

BONUS:

71. What is bonus? Is it demandable?

"Bonus" is an amount granted and paid *ex gratia* to the employee for his industry or loyalty, hence, generally not demandable or enforceable. If there is no profit, there should be no bonus. If profit is reduced, bonus should likewise be reduced, absent any agreement making such bonus part of the compensation of the employees.

72. When is bonus demandable and enforceable?

On the basis of equitable considerations, long practice, agreement (e.g., CBA) and other peculiar circumstances, bonus may become demandable and enforceable. Consequently, if bonus is given as an additional compensation which the employer agreed to give without any condition such as success of business or more efficient or more productive operation, it is deemed part of wage or salary, hence, demandable.

Unlike 13th month pay, bonus may be forfeited in case employee is found guilty of an administrative charge.

Bonus, when considered a company practice.

To be considered a *"regular practice,"*, the giving of the bonus should have been done over a long period of time, and must be shown to have been consistent and deliberate. *(Globe Mackay Cable and Radio Corporation vs. NLRC, G.R. No. L-74156, 163 SCRA 71).*

The test or rationale of this rule on long practice requires an indubitable showing that the employer agreed to continue giving the benefits knowing fully well that said employees are not covered by the law requiring payment thereof. *(National Sugar Refineries Corporation v. NLRC, G.R. No. 101761, 220 SCRA 452).*

Thus, even if the bonus has been given for quite some time or since *"time-immemorial"* as asserted by the union, in an amount equivalent to two (2) months gross pay for mid-year bonus and three (3) months gross pay for the year-end bonus, the employer may validly reduce it to two (2) months basic pay for mid-year bonus, and two-months for year-end bonus, without violating the non-diminution clause in the law since bonuses are not part of labor standards in the same class as salaries, cost-of-living allowances, holiday pay and leave benefits, provided under the Labor Code. The contention of the union that the granting of said bonuses had ripened into a company practice that may no longer be adjusted to the prevailing condition of the bank has no legal and moral bases. Its fiscal condition having declined, the bank may not be forced to distribute bonuses which it can no longer afford to pay and, in effect, be penalized for its past

generosity to its employees. *(Traders Royal Bank vs. NLRC, et al., G. R. No. 88168, Aug. 30, 1990, 189 SCRA 274).*

13th MONTH PAY:

73. What is 13th month pay?

"Thirteenth-month pay" shall mean one-twelfth (1/12) of the ***basic salary*** of an employee within a calendar year.

The *"basic salary"* of an employee for the purpose of computing the 13th-month pay shall include all remunerations or earnings paid by the employer for services rendered but does not include allowances and monetary benefits which are not considered or integrated as part of the regular or basic salary, such as the cash equivalent of unused vacation and sick leave credits, overtime, premium, night differential and holiday pay and cost-of-living allowances. However, these salary-related benefits should be included as part of the basic salary in the computation of the 13th-month pay if by individual or collective agreement, company practice or policy, the same are treated as part of the basic salary of the employees. *(No. 4 [a], Revised Guidelines on the Implementation of the 13th-Month Pay Law; No. X [C], DOLE Handbook on Workers Statutory Monetary Benefits).*

Premium pay is not included in the computation of the 13th-month pay. *(Davao Fruits Corporation vs. Associated Labor Union, G. R. No. 85073, Aug. 24, 1993, 225 SCRA 562).*

In the 2005 case of **Honda Phils., Inc. vs. Samahan ng Malayang Manggagawa sa Honda**, [G. R. No. 145561, June 15, 2005], it was ruled that for employees receiving regular wage, *"basic salary"* has been interpreted to mean, not the amount *actually received* by an employee, but 1/12 of their standard monthly wage multiplied by their length of service within a given calendar year. Thus, excluded from the computation of "basic salary" are payments for sick, vacation and maternity leaves, night differentials, regular holiday pay and premiums for work done on rest days and special holidays as held previously in *San Miguel Corporation [Cagayan Coca-Cola Plant] vs. Inciong, et al.,* [103 SCRA 139 (1981)].

In **Hagonoy Rural Bank vs. NLRC**, [349 Phil. 220 (1998)], **St. Michael Academy vs. NLRC**, [354 Phil. 491 (1998)], **Consolidated Food Corporation vs. NLRC**, [373 Phil. 751 (1999)] and similar cases, the 13th month pay due an employee was computed based on the employee's basic monthly wage multiplied by the number of months worked in a calendar year prior to separation from employment. *(Honda Phils., Inc. vs. Samahan ng Malayang Manggagawa sa Honda, G. R. No. 145561, June 15, 2005).*

But in a case where the employer, from 1975 to 1981, freely, voluntarily and continuously included in the computation of its employees' thirteenth-month pay, payments for sick, vacation and maternity leaves, regular holiday pay and premiums for work done on rest days and special holidays, despite the fact that the law and the government issuances expressly excluded the same, it was ruled that such act of the employer, being favorable to the employees, had ripened into a practice and, therefore, they can no longer be withdrawn, reduced, diminished, discontinued or eliminated. *(Davao Fruits Corporation vs. Associated Labor Unions, et al., G. R. No. 85073, Aug. 24, 1993, 225 SCRA 562).*

And the same holding was made in the 2004 case of **Sevilla Trading Company vs. A. V. A. Semana,** G. R. No. 152456, April 28, 2004], where the employer, for two to three years prior to 1999, added to the base figure, in its computation of the 13th-month pay of its employees, the amount of other benefits received by the employees which are beyond the basic pay. These benefits included overtime premium for regular overtime, legal and special holidays; legal holiday pay, premium pay for special holidays; night premium; bereavement leave pay; union leave pay; maternity leave pay; paternity leave pay; company vacation and sick leave pay; and cash conversion of unused company vacation and sick leave. Petitioner-employer claimed that it entrusted the preparation of the payroll to its office staff, including the computation and payment of the 13th-month pay and other benefits. When it changed its person in charge of the payroll in the process of computerizing its payroll, and after audit was conducted, it allegedly discovered the error of including non-basic pay or other benefits in the base figure used in the computation of the 13th-month pay of its employees.

The Supreme Court, however, was unconvinced. It affirmed the ruling of the Voluntary Arbitrator that petitioner's stance of mistake or error in the computation of the thirteenth month pay is unmeritorious. Petitioner's submission of financial statements every year requires the services of a certified public accountant to audit its finances. It is quite impossible to suggest that they have discovered the alleged error in the payroll only in 1999. This implies that in previous years it does not know its cost of labor and operations. This is merely basic cost accounting. Also, petitioner failed to adduce any other relevant evidence to support its contention. Aside from its bare claim of mistake or error in the computation of the thirteenth month pay, petitioner merely appended to its petition a copy of the 1997-2002 Collective Bargaining Agreement and an alleged "corrected" computation of the thirteenth month pay. There was no explanation whatsoever why its inclusion of non-basic benefits in the base figure in the computation of their 13th-month pay in the prior years was made by mistake, despite the clarity of statute and jurisprudence at that time. *(Sevilla Trading Company vs. A. V. A. Semana, et al., G. R. No. 152456, April 28, 2004).*

74. Who are entitled to 13th month pay?

> All rank-and-file employees are entitled to a 13th-month pay regardless of the amount of basic salary that they receive in a month and regardless of their designation or employment status, and irrespective of the method by which their wages are paid, provided that they have worked for at least **one (1) month** during a calendar year.

13th-month pay of resigned or separated employee.

An employee who has resigned or whose services were terminated at any time before the time for payment of the 13th-month pay is entitled to this monetary benefit in proportion to the length of time he worked during the year, reckoned from the time he started working during the calendar year up to the time of his resignation or termination from service. Thus, if he worked only from January up to September, his proportionate 13th-month pay should be the equivalent of 1/12 of his total basic salary which he earned during that period. *(No. 6, Revised Guidelines on the Implementation of the 13th-Month Pay Law; No. X [G], DOLE Handbook on Workers Statutory Monetary Benefits; International School of Speech vs. NLRC, et al., G. R. No. 112658, March 18, 1995; Villarama vs. NLRC, et al., G. R. No. 106341, Sept. 2, 1994, 236 SCRA 280).*

In the 2005 case of **Clarion Printing House, Inc. vs. NLRC**, [G. R. No. 148372, June 27, 2005], an employee who was receiving ₱6,500.00 in monthly salary and who had worked for at least six (6) months at the time of her retrenchment, was held to be entitled to her proportionate 13th month pay computed as follows:

(Monthly Salary x 6) / 12 = Proportionate 13th month pay

(₱6,500.00 x 6) / 12 = ₱3,250.00

The payment of the 13th-month pay may be demanded by the employee upon the cessation of employer-employee relationship. This is consistent with the principle of equity that as the employer can require the employee to clear himself of all liabilities and property accountability, so can the employee demand the payment of all benefits due him upon the termination of the relationship. *(No. 6, Revised Guidelines on the Implementation of the 13th-Month Pay Law).*

Regarding pro-ration of the 13th month pay, the Supreme Court in **Honda Phils., Inc. vs. Samahan ng Malayang Manggagawa sa Honda**, [G. R. No. 145561, June 15, 2005], took cognizance of the fact that the said *Revised Guidelines on the Implementation of the 13th Month Pay Law* provided for a pro-ration of this benefit only in cases of resignation or separation from work. As the rules state, under these circumstances, an employee is entitled to a pay in proportion to the length of time he worked during the year, reckoned from the time he started working during the calendar year. *(Section 6 thereof).* The Court of Appeals thus held that:

> "Considering the foregoing, the computation of the 13th month pay should be based on the length of service and not on the actual wage earned by the worker. In the present case, *there being no gap in the service of the workers during the*

calendar year in question, the computation of the 13th month pay should not be pro-rated but should be given in full." (Emphasis supplied)

More importantly, it has not been refuted that Honda has not implemented any pro-rating of the 13th month pay before the instant case. Honda did not adduce evidence to show that the 13th month, 14th month and financial assistance benefits were previously subject to deductions or pro-rating or that these were dependent upon the company's financial standing. As held by the Voluntary Arbitrator:

> "The Company (Honda) explicitly accepted that it was the strike held that prompt[ed] them to adopt a pro-rata computation, aside [from] being in [a] state of rehabilitation due to 227M substantial losses in 1997, 114M in 1998 and 215M lost of sales in 1999 due to strike. This is an implicit acceptance that prior to the strike, a full month basic pay computation was the "present practice" intended to be maintained in the CBA."

The memorandum dated November 22, 1999 which Honda issued shows that it was the first time a pro-rating scheme was to be implemented in the company. It was a convenient coincidence for the company that the work stoppage held by the employees lasted for thirty-one (31) days or exactly one month. This enabled them to devise a formula using 11/12 of the total annual salary as base amount for computation instead of the entire amount for a 12-month period.

That a full month payment of the 13th month pay is the established practice at Honda is further bolstered by the affidavits executed by Feliteo Bautista and Edgardo Cruzada. Both attested that when they were absent from work due to motorcycle accidents, and after they have exhausted all their leave credits and were no longer receiving their monthly salary from Honda, they still received the full amount of their 13th month, 14th month and financial assistance pay.

The case of **Davao Fruits Corporation vs. Associated Labor Unions, et al.** [G.R. No. 85073, August 24, 1993, 225 SCRA 562] presented an example of a voluntary act of the employer that has ripened into a company practice. In that case, the employer, from 1975 to 1981, freely and continuously included in the computation of the 13th month pay those items that were expressly excluded by the law. It was held that this act, which was favorable to the employees though not conforming to law, has ripened into a practice and, therefore, can no longer be withdrawn, reduced, diminished, discontinued or eliminated. Furthermore, in **Sevilla Trading Company vs. Semana**, [G.R. No. 152456, 28 April 2004, 428 SCRA 239], it was stated:

> "With regard to the length of time the company practice should have been exercised to constitute voluntary employer practice which cannot be unilaterally withdrawn by the employer, we hold that jurisprudence has not laid down any rule requiring a specific minimum number of years. In the above quoted case of *Davao Fruits Corporation vs. Associated Labor Unions*, the company practice lasted for six (6) years. In another case, *Davao Integrated Port Stevedoring Services vs. Abarquez*, the employer, for three (3) years and nine (9) months, approved the commutation to cash of the unenjoyed portion of the sick leave with pay benefits of its intermittent workers. While in *Tiangco vs. Leogardo, Jr.* the employer carried on the practice of giving a fixed monthly emergency allowance from November 1976 to February 1980, or three (3) years and four (4) months. *In all these cases, this Court held that the grant of these benefits has ripened into company practice or policy which cannot be peremptorily withdrawn.* In the case at bar, petitioner Sevilla Trading kept the practice of including non-basic benefits such as paid leaves for unused sick leave and vacation leave in the computation of their 13th-month pay for at least two (2) years. *This, we rule likewise constitutes voluntary employer practice which cannot be unilaterally withdrawn by the employer without violating Art. 100 of the Labor Code.*" (Emphasis supplied)

Lastly, the foregoing interpretation of law and jurisprudence is more in keeping with the underlying principle for the grant of this benefit. It is primarily given to alleviate the plight of workers and to help them cope with the exorbitant increases in the cost of living. To allow the pro-ration of the 13th month pay in this case is to undermine the wisdom behind the law and the mandate that the workingman's welfare should be the primordial and paramount consideration.

[Citing Santos vs. Velarde, 450 Phil. 381, 390-391 [2003]). What is more, the factual milieu of this case is such that to rule otherwise inevitably results to dissuasion, if not a deterrent, for workers from the free exercise of their constitutional rights to self-organization and to strike in accordance with law. *(Section 3, Article XIII-Social Justice and Human Rights, Philippine Constitution; Honda Phils., Inc. vs. Samahan ng Malayang Manggagawa sa Honda, G. R. No. 145561, June 15, 2005).*

But the rule is different if an employee was never paid his 13th month pay during his employment. A case in point is **JPL Marketing Promotions vs. CA**, [G. R. No. 151966, July 8, 2005], where the Supreme Court ruled that, in such a case, the computation for the 13th month pay should properly begin from the first day of employment up to the last day of work of the employee. This benefit is given by law on the basis of the service actually rendered by the employee.

75. Who are exempted employers from the coverage of 13th month pay?

The following are *exempted employers:*

a. The government and any of its political subdivisions, including government-owned and controlled corporations, except those corporations operating essentially as private subsidiaries of the government.
b. Employers already paying their employees 13th-month pay or more in a calendar year or its equivalent at the time of this issuance.
c. Employers of household helpers and persons in the personal service of another in relation to such workers.
d. Employers of those who are paid on *purely* commission, boundary, or task basis, and those who are paid a fixed amount for performing a specific work, irrespective of the time consumed in the performance thereof, except where the workers are paid on piece-rate basis in which case, the employer shall be covered by the 13th month pay law insofar as such workers are concerned.

76. What is meant by the phrase "its equivalent" in the 13th month pay law?

The term *"its equivalent"* shall include Christmas bonus, mid-year bonus, profit-sharing payments and other cash bonuses amounting to not less than 1/12th of the basic salary but shall not include cash and stock dividends, cost of living allowances and all other allowances regularly enjoyed by the employee, as well as non-monetary benefits. Where an employer pays less than 1/12th of the employee's basic salary, the employer shall pay the difference.

In the 2005 case of **JPL Marketing Promotions vs. CA**, [G. R. No. 151966, July 8, 2005], the petitioner-employer contends that the employees are no longer entitled to the payment of 13th month pay as well as service incentive leave pay because they were provided salaries which were over and above the minimum wage. Admittedly, private respondent-employees were not given their 13th month pay and service incentive leave pay while they were under the employ of JPL. The Supreme Court ruled that the difference between the minimum wage and the actual salary received by private respondents cannot be deemed as their 13th month pay and service incentive leave pay as such difference is not equivalent to or of the same import as the said benefits contemplated by law. Thus, as properly held by the Court of Appeals and by the NLRC, private respondents are entitled to the 13th month pay and service incentive leave pay.

77. When should the 13th month pay be paid?

The required 13th month pay shall be paid not later than December 24 of each year.

78. What is the rule in case an employee has multiple employers?

Government employees working part-time in a private enterprise, including private educational institutions, as well as employees working in two or more private firms, whether on full or part-time basis, are entitled to the required 13th-month pay from all their private employers regardless of their total earnings from each or all their employers.

79. Is 13th month pay tax-exempt?

Yes. The 13th month pay is tax exempt (R.A. 7833).

80. May payment of bonus be credited as payment of 13th month pay?

a. *Marcopper Mining Corp. vs. Ople, et al.* case - **No**
b. *NFSW vs. Ovejera, et al.* case - **Yes**
c. *DOLE Philippines vs. Leogardo, et al.* case - **Yes**
d. *Brokenshire Memorial Hospital, Inc. vs. NLRC, et al.* case - **Yes**
e. *United CMC Textile Workers Union vs. Valenzuela, et al.* case - **No**
f. *Universal Corn Products vs. NLRC, et al.* case - **Yes**
g. *FEU Employees Labor Union vs. FEU* case (involving transportation allowance which was treated as compliance with 13th month pay)
h. *Framanlis Farms, Inc. vs. Minister of Labor, et al.* case - **No**
i. *Kamaya Point Hotel vs. NLRC, et al.* case - **Yes**
j. *UST Faculty Union vs. NLRC, et al.* case - **No**

14th MONTH PAY:

81. What is a 14th month pay?

There is no law mandating the payment of 14th-month pay. It is, therefore, in the nature of a bonus which may not be imposed upon the employer. It is a gratuity to which the recipient has no right to make a demand. *(Kamaya Point Hotel vs. NLRC, et al., G. R. No. 75289, August 31, 1989, 177 SCRA 160).*

MINIMUM WAGE:

82. What is meant by "statutory minimum wage"?

The term *"statutory minimum wages"* refers simply to the lowest basic wage rate fixed by law that an employer can pay his workers.

83. How is the minimum wage fixed?

The minimum wage rates for agricultural and non-agricultural workers and employees in every region shall be those prescribed by the Regional Tripartite Wages and Productivity Boards (RTWPB) which shall in no case be lower than the statutory minimum wage rates.

84. What is the basis of the computation of the "statutory minimum wage"?

The basis of the minimum wage rates prescribed by law shall be the normal working hours which shall not be more than eight (8) hours a day.

85. What is the principle of non-elimination or non-diminution of benefits?

This principle mandates that the reduction or diminution or withdrawal by employers of any benefits, supplements or payments as provided in existing laws, individual agreements or collective bargaining agreements between workers and employers or voluntary employer practice or policy, is not allowed.

86. What is a "Wage Order"?

"Wage order" refers to the Order promulgated by the Regional Tripartite Wages and Productivity Board (RTWPB) pursuant to its wage fixing authority.

87. When is a "Wage Order" necessary?

Whenever conditions in a particular region so warrant, the RTWPB shall investigate and study all pertinent facts and based on the standards and criteria herein prescribed, shall proceed to determine whether a Wage Order should be issued.

88. When does a "Wage Order" become effective?

Any Wage Order shall take effect after fifteen (15) days from its complete publication in at least one (1) newspaper of general circulation in the region.

89. What is the mode of appeal from a "Wage Order" issued by the RTWPB?

Any party aggrieved by the Wage Order issued by the RTWPB may appeal such order to the National Wages and Productivity Commission within ten (10) calendar days from the publication of such order. The filing of the appeal does not stay the order or suspend the effectivity thereof unless the person appealing such order shall file with the Commission, an undertaking with a surety or sureties satisfactory to the Commission for the payment to the employees affected by the order of the corresponding increase, in the event such order is affirmed.

90. What are the standards/criteria for minimum wage fixing?

In the determination of regional minimum wages, the Regional Board shall, among other relevant factors, consider the following:

(a) The demand for living wages;
(b) Wage adjustment *vis-à-vis* the consumer price index;
(c) The cost of living and changes or increases therein;
(d) The needs of workers and their families;
(e) The need to induce industries to invest in the countryside;
(f) Improvements in standards of living;
(g) The prevailing wage levels;
(h) Fair return of the capital invested and capacity to pay of employers;
(i) Effects on employment generation and family income; and
(j) The equitable distribution of income and wealth along the imperatives of economic and social development.

91. What is "wage distortion"?

"Wage distortion" is a situation where an increase in prescribed wage rates results in the elimination or severe contraction of intentional quantitative differences in wage or salary rates between and among employee groups in an establishment as to effectively obliterate the distinctions embodied in such wage structure based on skills, length of service, or other logical bases of differentiation.

The issue of whether or not a wage distortion exists is a question of fact that is within the jurisdiction of the quasi-judicial tribunals.

PAYMENT OF WAGES:

92. What are the forms of payment of wages?

1. Under the Civil Code, it is mandated that the laborer's wages shall be paid in legal currency. Under the Labor Code and its implementing rules, as a general rule, wages shall be paid in legal tender and the use of tokens, promissory notes, vouchers, coupons or any other form alleged to represent legal tender is prohibited even when expressly requested by the employee.

2. **Exceptions :**

A. Payment through **automated teller machine (ATM)** of banks provided the following conditions are met:

1. the ATM system of payment is with the written consent of the employees concerned;
2. The employees are given reasonable time to withdraw their wages from the bank facility which time, if done during working hours, shall be considered compensable hours worked;
3. The system shall allow workers to receive their wages within the period or frequency and in the amount prescribed under the Labor Code, as amended;
4. There is a bank or ATM facility within a radius of one (1) kilometer to the place of work;
5. Upon request of the concerned employee/s, the employer shall issue a record of payment of wages, benefits and deductions for a particular period;
6. There shall be n additional expenses and no diminution of benefits and privileges as a result of the ATM system of payment;
7. The employer shall assume responsibility in case the wage protection provisions of law and regulations are not complied with under the arrangement. *(Explanatory Bulletin issued by DOLE Secretary Leonardo Quisumbing dated November 25, 1996).*

B. Payment by **check or money order**, (the foregoing conditions on existence of bank facility and other factors should also concur).

Payslips as evidence of payment.

Ideally, according to the Supreme Court in **Kar Asia, Inc., et al. vs. Corona***, (G. R. No. 154985, Aug. 24, 2004),* the signatures of the employees should appear in the payroll as evidence of actual payment. However, the absence of such signatures does not necessarily lead to the conclusion that the amount due the employees was not received. More so in a case where it appears that the payslips for the same period bear the signatures of the employees plus a certification that they received the full compensation for the services rendered. While ordinarily a payslip is only a statement of the gross monthly income of the employee, his signature therein coupled by an acknowledgement of full compensation alter the legal complexion of the document. The payslip becomes a substantial proof of actual payment. Moreover, there is no hard-and-fast rule requiring that the employee's signature in the payroll is the only acceptable proof of payment. By implication, the employees, in signing the payslips with their acknowledgement of full compensation, unqualifiedly admitted the receipt thereof.

In the 2005 case of **G & M [Phils.], Inc. vs. Cruz***, (G. R. No. 140495, April 15, 2005),* the Supreme Court affirmed the finding of both the Labor Arbiter and the NLRC on the admissibility as evidence of the pay slips. As a general rule, the Court is not duty-bound to delve into the accuracy of the NLRC's factual findings in the absence of a clear showing that these were arbitrary and bereft of any rational basis. In the present case, petitioner failed to demonstrate any arbitrariness or lack of rational basis on the part of the NLRC.

Article 221 of the Labor Code provides that proceedings before the NLRC are not covered by the technical rules of evidence and procedure. The probative value of the copy of the pay slips is aptly justified by the NLRC, as follows:

> "… the payslips are original duplicates of computerized payslips issued by the employer, Salim Al Yami Est., to its workers which contain entries such as pay date, employee's I.D. number, employee name, category, basic rate, overtime hours and other relevant information, including an itemization of earnings (basic pay, overtime pay, meal allowance for the period covered) and deductions. The fact that the payslips are not authenticated will not militate against complainant's claim, considering that in presenting the payslips, complainant has established the fact of underpayment, and the burden has shifted to the respondent to prove that complainant was totally compensated for actual services rendered."

Payroll.

Under *Section 6[a], Rule X, Book III* of the *Rules Implementing the Labor Code,* every employer is required to pay his employees by means of payroll. The payroll should show, among other things, the employee's rate of pay, deductions made, and the amount actually paid to the

employee. Interestingly, the failure of the employer to present the payroll to support his claim that the petitioner was not his employee, raises speculation whether this omission proves that its presentation would be adverse to his case. *(Chavez vs. NLRC, et al., G. R. No. 146530, Jan. 17, 2005 citing Tan vs. Lagrama, 387 SCRA 393 [2002]).*

93. What is the time of payment of wages?

1. *Time of payment; exception*. - The general rule is, wages shall be paid not less often than once every two (2) weeks or twice a month at intervals not exceeding sixteen (16) days. No employer shall make payment with less frequency than once a month. The exception to above rule is when payment cannot be made with such regularity due to *force majeure* or circumstances beyond the employer's control, in which case, the employer shall pay the wages immediately after such *force majeure* or circumstances have ceased.

94. What is the place of payment of wages?

1. As a general rule, the place of payment shall be at or near the place of undertaking.
2. Exceptions:

   a. When payment cannot be effected at or near the place of work by reason of the deterioration of peace and order conditions, or by reason of actual or impending emergencies caused by fire, flood, epidemic or other calamity rendering payment thereat impossible;
   b. When the employer provides free transportation to the employees back and forth; and
   c. Under any other analogous circumstances, provided that the time spent by the employees in collecting their wages shall be considered as compensable hours worked.
3. Payment of wages in bars, massage clinics or nightclubs is prohibited *except* in the case of employees thereof.
4. Payment through banks - allowed in businesses and other entities with twenty five (25) or more employees and located within one (1) kilometer radius to a commercial, savings or rural bank.

95. To whom should wages be paid?

1. *General rule:* payment of wages shall be made directly to the employee entitled thereto and to nobody else.
2. *Exceptions*.
   a. Where the employer is authorized in writing by the employee to pay his wages to a member of his family;
   b. Where payment to another person of any part of the employee's wages is authorized by existing law, including payments for the insurance premiums of the employee and union dues where the right to check-off has been recognized by the employer in accordance with a collective agreement or authorized in writing by the individual employees concerned; or
   c. In case of death of the employee, in which case, the same shall be paid to his heirs *without necessity of intestate proceedings.*

Payment of wages and other monetary claims, burden of proof.

In **Jimenez vs. NLRC**, [G.R. No. 116960, April 2, 1996, 256 SCRA 84] which involves a claim for unpaid wages/commissions, separation pay and damages against an employer, the Supreme Court ruled that where a person is sued for a debt admits that the debt was originally owed, and pleads payment in whole or in part, it is incumbent upon him to prove such payment. This is based on the principle of evidence that each party must prove his affirmative allegations. Since petitioner asserts that respondent has already been fully paid of his stipulated salary, the burden is upon petitioner to prove such fact of full payment. *(See also National Semiconductor [HK] vs. NLRC, et al., G. R. No. 123520, June 26, 1998),*

Thus, it was stated in the *Jimenez* case that:

> "As a general rule, one who pleads payment has the burden of proving it. Even where the plaintiff must allege non-payment, the general rule is that the burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. The debtor has the burden of showing with legal certainty that the obligation has been discharged by payment.
>
> "When the existence of a debt is fully established by the evidence contained in the record, the burden of proving that it has been extinguished by payment devolves upon the debtor who offers such a defense to the claim of the creditor. Where the debtor introduces some evidence of payment, the burden of going forward with the evidence - as distinct from the general burden of proof - shifts to the creditor, who is then under a duty of producing some evidence to show non-payment."

In the 2005 case of **G & M [Phils.], Inc. vs. Cruz**, [G. R. No. 140495, April 15, 2005], petitioner merely denied respondent's claim of underpayment. It did not present any controverting evidence to prove full payment. Hence, the findings of the Labor Arbiter, the NLRC and the Court of Appeals that respondent was not fully paid of his wages stand.

The positive testimony of a creditor may be sufficient of itself to show non-payment, even when met by indefinite testimony of the debtor. Similarly, the testimony of the debtor may also be sufficient to show payment, but, where his testimony is contradicted by the other party or by a disinterested witness, the issue may be determined against the debtor since he has the burden of proof. The testimony of the debtor creating merely an inference of payment will not be regarded as conclusive on that issue.

Hence, for failure to present evidence to prove payment, petitioners defaulted in their defense and in effect admitted the allegations of private respondents. *(G & M [Phils.], Inc. vs. Cruz, G. R. No. 140495, April 15, 2005).*

The reason for the rule, according to the 2000 case of **Villar vs. NLRC**, [G.R. No. 130935, 11 May 2000], is that the pertinent personnel files, payrolls, records, remittances and other similar documents – which will show that overtime, differentials, service incentive leave and other claims of workers have been paid – are not in the possession of the worker but in the custody and absolute control of the employer

RULE ON CONTRACTING OR SUBCONTRACTING:

96. What is contracting or subcontracting?

> **Contracting or subcontracting -** It refers to an arrangement whereby a principal agrees to put out or farm out with a contractor or subcontractor the performance or completion of 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.

Employment and independent contracting, distinguished.

The 2005 case of **Chavez vs. NLRC**, [G. R. No. 146530, January 17, 2005], is instructive as far as the distinction between employment and independent contracting is concerned. In debunking the contention of the employer that the truck driver is an independent contractor and not an employee, the Supreme Court ruled:

> "Fourth. As earlier opined, of the four elements of the employer-employee relationship, the 'control test' is the most important. Compared to an employee, an independent contractor is one who carries on a distinct and independent business and undertakes to perform the job, work, or service on its own account and under its own responsibility according to its own manner and method, free from the control and direction of the principal in all matters connected with the performance of the work except as to the results thereof. Hence, while an independent contractor enjoys independence and freedom from the control and supervision of his principal, an employee is subject to the employer's power to

control the means and methods by which the employee's work is to be performed and accomplished.

"Although the respondents denied that they exercised control over the manner and methods by which the petitioner accomplished his work, a careful review of the records shows that the latter performed his work as truck driver under the respondents' supervision and control. Their right of control was manifested by the following attendant circumstances:

1. The truck driven by the petitioner belonged to respondent company;
2. There was an express instruction from the respondents that the truck shall be used exclusively to deliver respondent company's goods;
3. Respondents directed the petitioner, after completion of each delivery, to park the truck in either of two specific places only, to wit: at its office in Metro Manila at 2320 Osmeña Street, Makati City or at BEPZ, Mariveles, Bataan; and
4. Respondents determined how, where and when the petitioner would perform his task by issuing to him gate passes and routing slips.
   a. The routing slips indicated on the column REMARKS, the chronological order and priority of delivery such as 1st drop, 2nd drop, 3rd drop, etc. This meant that the petitioner had to deliver the same according to the order of priority indicated therein.
   b. The routing slips, likewise, showed whether the goods were to be delivered urgently or not by the word RUSH printed thereon.
   c. The routing slips also indicated the exact time as to when the goods were to be delivered to the customers as, for example, the words 'tomorrow morning' was written on slip no. 2776.

"These circumstances, to the Court's mind, prove that the respondents exercised control over the means and methods by which the petitioner accomplished his work as truck driver of the respondent company. On the other hand, the Court is hard put to believe the respondents' allegation that the petitioner was an independent contractor engaged in providing delivery or hauling services when he did not even own the truck used for such services. Evidently, he did not possess substantial capitalization or investment in the form of tools, machinery and work premises. Moreover, the petitioner performed the delivery services exclusively for the respondent company for a continuous and uninterrupted period of ten years.

"The contract of service to the contrary notwithstanding, the factual circumstances earlier discussed indubitably establish the existence of an employer-employee relationship between the respondent company and the petitioner. It bears stressing that the existence of an employer-employee relationship cannot be negated by expressly repudiating it in a contract and providing therein that the employee is an independent contractor when, as in this case, the facts clearly show otherwise. Indeed, the employment status of a person is defined and prescribed by law and not by what the parties say it should be." *(Chavez vs. NLRC, et al., G. R. No. 146530, Jan. 17, 2005).*

In the 2002 case of **Tan vs. Lagrama**, [G. R. No. 151228, August 15, 2002], the Supreme Court distinguished employment from independent contracting. According to the Court, compared to an employee, an independent contractor is one who carries on a distinct and independent business and undertakes to perform the job, work, or service on its own account and under its own responsibility according to its own manner and method, free from the control and direction of the principal in all matters connected with the performance of the work except as to the results thereof. *(Citing De los Santos v. NLRC, G.R. No. 121327, Dec. 20, 2001).* Hence, while an independent contractor enjoys independence and freedom from the control and supervision of his principal, an employee is subject to the employer's power to control the means and methods by which the employee's work is to be performed and accomplished.

Following the control test, the High Court held in *Tan vs. Lagrama* [supra] that albeit petitioner Tan claims that private respondent Lagrama was an independent contractor and never

his employee, the evidence shows that the latter performed his work as a painter, making ad billboards and murals for the motion pictures shown at the Empress, Supreme, and Crown Theaters for more than 10 years, under the supervision and control of petitioner. Lagrama worked in a designated work area inside the Crown Theater of petitioner, for the use of which petitioner prescribed rules. The rules included the observance of cleanliness and hygiene and a prohibition against urinating in the work area and any place other than the toilet or the rest rooms. Petitioner's control over Lagrama's work extended not only to the use of the work area, but also to the result of Lagrama's work, and the manner and means by which the work was to be accomplished.

The Supreme Court further ruled:

"Moreover, it would appear that petitioner not only provided the workplace, but supplied as well the materials used for the paintings, because he admitted that he paid Lagrama only for the latter's services.

"Private respondent Lagrama claimed that he worked daily, from 8 o'clock in the morning to 5 o'clock in the afternoon. Petitioner disputed this allegation and maintained that he paid Lagrama ₱1,475.00 per week for the murals for the three theaters which the latter usually finished in 3 to 4 days in one week. Even assuming this to be true, the fact that Lagrama worked for at least 3 to 4 days a week proves regularity in his employment by petitioner.

"*Second.* That petitioner had the right to hire and fire was admitted by him in his position paper submitted to the NLRC, the pertinent portions of which stated:

> 'Complainant did not know how to use the available comfort rooms or toilets in and about his work premises. He was urinating right at the place where he was working when it was so easy for him, as everybody else did and had he only wanted to, to go to the comfort rooms. But no, the complainant had to make a virtual urinal out of his work place! The place then stunk to high heavens, naturally, to the consternation of respondents and everyone who could smell the malodor.
>
> . . .
>
> 'Given such circumstances, the respondents had every right, nay all the compelling reason, to fire him from his painting job upon discovery and his admission of such acts. Nonetheless, though thoroughly scolded, he was not fired. It was he who stopped to paint for respondents.

"By stating that he had the right to fire Lagrama, petitioner in effect acknowledged Lagrama to be his employee. For the right to hire and fire is another important element of the employer-employee relationship. Indeed, the fact that, as petitioner himself said, he waited for Lagrama to report for work but the latter simply stopped reporting for work reinforces the conviction that Lagrama was indeed an employee of petitioner. For only an employee can nurture such an expectancy, the frustration of which, unless satisfactorily explained, can bring about some disciplinary action on the part of the employer.

"*Third.* Payment of wages is one of the four factors to be considered in determining the existence of employer-employee relation. Wages are defined as 'remuneration or earnings, however designated, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the same, which is payable by an employer to an employee under a written or unwritten contract of employment for work done or to be done, or for services rendered or to be rendered.' That Lagrama worked for Tan on a fixed piece-work basis is of no moment. Payment by result is a method of compensation and does not define the essence of the relation. It is a method of computing compensation, not a basis for determining the existence or absence of employer-employee relationship. One may be paid on the basis of results or time expended on the work, and may or may not acquire

an employment status, depending on whether the elements of an employer-employee relationship are present or not.

"The Rules Implementing the Labor Code require every employer to pay his employees by means of payroll. *(Book III, Rule X, Sec. 6[a])*. The payroll should show among other things, the employee's rate of pay, deductions made, and the amount actually paid to the employee. In the case at bar, petitioner did not present the payroll to support his claim that Lagrama was not his employee, raising speculations whether his failure to do so proves that its presentation would be adverse to his case. *(Citing Revised Rules on Evidence, Rule 131, Section 3(e). See (Tan vs. Lagrama, et al., G. R. No. 151228, Aug. 15, 2002; Villaruel vs. NLRC, 284 SCRA 399 [1998])*.

"The primary standard for determining regular employment is the reasonable connection between the particular activity performed by the employee in relation to the usual trade or business of the employer. In this case, there is such a connection between the job of Lagrama painting billboards and murals and the business of petitioner. To let the people know what movie was to be shown in a movie theater requires billboards. Petitioner in fact admits that the billboards are important to his business.

"The fact that Lagrama was not reported as an employee to the SSS is not conclusive on the question of whether he was an employee of petitioner. *(Citing Lambo vs. NLRC, 317 SCRA 420 [1999])*. Otherwise, an employer would be rewarded for his failure or even neglect to perform his obligation. *(See Santos vs. NLRC, 293 SCRA 113 [1998])*.

"Neither does the fact that Lagrama painted for other persons affect or alter his employment relationship with petitioner. That he did so only during weekends has not been denied by petitioner. On the other hand, Samuel Villalba, for whom Lagrama had rendered service, admitted in a sworn statement that he was told by Lagrama that the latter worked for petitioner." *(Tan vs. Lagrama, et al., G. R. No. 151228, Aug. 15, 2002)*.

Moreover, in **Escario, et al. vs. NLRC***,* [G. R. No. 124055, June 8, 2000], the Supreme Court also used the so-called *"four-fold test"* in determining employer-employee relationship, to establish that the legitimate independent contractor is the true employer of petitioners. The elements of this test are (1) the selection and engagement of employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employee's conduct.

Case of independent contractor [Sonza vs. ABS-CBN case].

The 2004 case of **Sonza vs. ABS-CBN Broadcasting Corporation***,* [G. R. No. 138051, June 10, 2004] is one of first impression. Although Philippine labor laws and jurisprudence define clearly the elements of an employer-employee relationship, this is the first time that the Supreme Court has resolved the nature of the relationship between a television and radio station and one of its *"talents."* There is no case law stating that a radio and television program host is an employee of the broadcast station.

In May 1994, respondent ABS-CBN Broadcasting Corporation ("ABS-CBN") signed an Agreement ("Agreement") with the Mel and Jay Management and Development Corporation ("MJMDC"). ABS-CBN was represented by its corporate officers while MJMDC was represented by Sonza, as President and General Manager, and Carmela Tiangco ("TIANGCO"), as EVP and Treasurer. Referred to in the Agreement as "AGENT," MJMDC agreed to provide SONZA's services exclusively to ABS-CBN as talent for radio and television. The Agreement listed the services Sonza would render to ABS-CBN, as follows:

a. Co-host for Mel & Jay radio program, 8:00 to 10:00 a.m., Mondays to Fridays;
b. Co-host for Mel & Jay television program, 5:30 to 7:00 p.m., Sundays.

ABS-CBN agreed to pay for Sonza's services a monthly talent fee of ₱310,000 for the first year and ₱317,000 for the second and third year of the Agreement. ABS-CBN would pay the talent fees on the 10th and 25th days of the month.

On 30 April 1996, Sonza filed a complaint against ABS-CBN before the Department of Labor and Employment, National Capital Region in Quezon City. Sonza complained that ABS-CBN did not pay his salaries, separation pay, service incentive leave pay, 13th month pay, signing bonus, travel allowance and amounts due under the Employees Stock Option Plan ("ESOP").

On 10 July 1996, ABS-CBN filed a Motion to Dismiss on the ground that no employer-employee relationship existed between the parties. Sonza filed an Opposition to the motion on 19 July 1996.

Meanwhile, ABS-CBN continued to remit Sonza's monthly talent fees through his account at PCIBank, Quezon Avenue Branch, Quezon City. In July 1996, ABS-CBN opened a new account with the same bank where ABS-CBN deposited Sonza's talent fees and other payments due him under the Agreement.

The Labor Arbiter rendered his Decision dated 8 July 1997 dismissing the complaint for lack of jurisdiction. The NLRC, on appeal, affirmed the Labor Arbiter's ruling. On certiorari, the Court of Appeals affirmed the NLRC's finding that no employer-employee relationship existed between Sonza and ABS-CBN.

The basic issue presented here is whether Sonza is an employee or an independent contractor.

In affirming the said decision of the Court of Appeals and holding that Sonza was not an employee but an independent contractor, the Supreme Court used the four-fold test of determining the existence of an employer-employee relationship, more particularly, the control test.

A. Selection and Engagement of Employee

Independent contractors often present themselves to possess unique skills, expertise or talent to distinguish them from ordinary employees. The specific selection and hiring of Sonza, **because of his unique skills, talent and celebrity status not possessed by ordinary employees**, is a circumstance indicative, but not conclusive, of an independent contractual relationship. If Sonza did not possess such unique skills, talent and celebrity status, ABS-CBN would not have entered into the Agreement with Sonza but would have hired him through its personnel department just like any other employee.

B. Payment of Wages

All the talent fees and benefits paid to Sonza were the result of negotiations that led to the Agreement. If Sonza were ABS-CBN's employee, there would be no need for the parties to stipulate on benefits such as "SSS, Medicare, x x x and 13th month pay" which the law automatically incorporates into every employer-employee contract. Whatever benefits Sonza enjoyed arose from contract and not because of an employer-employee relationship.

Sonza's talent fees, amounting to ₱317,000 monthly in the second and third year, are so huge and out of the ordinary that they indicate more an independent contractual relationship rather than an employer-employee relationship. ABS-CBN agreed to pay Sonza such huge talent fees precisely because of Sonza's unique skills, talent and celebrity status not possessed by ordinary employees.

C. Power of Dismissal

For violation of any provision of the Agreement, either party may terminate their relationship. Sonza failed to show that ABS-CBN could terminate his services on grounds other than breach of contract, such as retrenchment to prevent losses as provided under labor laws. During the life of the Agreement, ABS-CBN agreed to pay Sonza's talent fees as long as "AGENT and Jay Sonza shall faithfully and completely perform each condition of this

Agreement." Even if it suffered severe business losses, ABS-CBN could not retrench Sonza because ABS-CBN remained obligated to pay Sonza's talent fees during the life of the Agreement. This circumstance indicates an independent contractual relationship between Sonza and ABS-CBN.

D. Power of Control

Since there is no local precedent on whether a radio and television program host is an employee or an independent contractor, reference to foreign case law in analyzing the present case is necessary. The United States Court of Appeals, First Circuit, recently held in Alberty-Vélez vs. Corporación De Puerto Rico Para La Difusión Pública ("WIPR"), [361 F.3d 1, 2 March 2004] that a television program host is an independent contractor, thus:

First, a television actress is a skilled position requiring talent and training not available on-the-job.

Second, the actress provided the "tools and instrumentalities" necessary for her to perform.

Third, WIPR could not assign the actress work in addition to filming "Desde Mi Pueblo."

Applying the control test, Sonza is not an employee but an independent contractor. The control test is the most important test the courts apply in distinguishing an employee from an independent contractor. This test is based on the extent of control the hirer exercises over a worker. The greater the supervision and control the hirer exercises, the more likely the worker is deemed an employee. The converse holds true as well - the less control the hirer exercises, the more likely the worker is considered an independent contractor.

First, Sonza contends that ABS-CBN exercised control over the means and methods of his work.

Sonza's argument is misplaced. ABS-CBN engaged Sonza's services specifically to co-host the "Mel & Jay" programs. ABS-CBN did not assign any other work to Sonza. To perform his work, Sonza only needed his skills and talent. How Sonza delivered his lines, appeared on television, and sounded on radio were outside ABS-CBN's control. Sonza did not have to render eight hours of work per day. The Agreement required Sonza to attend only rehearsals and tapings of the shows, as well as pre- and post-production staff meetings. ABS-CBN could not dictate the contents of Sonza's script. However, the Agreement prohibited Sonza from criticizing in his shows ABS-CBN or its interests. The clear implication is that Sonza had a free hand on what to say or discuss in his shows provided he did not attack ABS-CBN or its interests. Moreover, ABS-CBN was not involved in the actual performance that produced the finished product of Sonza's work. ABS-CBN did not instruct Sonza how to perform his job. ABS-CBN merely reserved the right to modify the program format and airtime schedule "for more effective programming." ABS-CBN's sole concern was the quality of the shows and their standing in the ratings. Clearly, ABS-CBN did not exercise control over the means and methods of performance of Sonza's work.

Sonza claims that ABS-CBN's power not to broadcast his shows proves ABS-CBN's power over the means and methods of the performance of his work. Although ABS-CBN did have the option not to broadcast Sonza's show, ABS-CBN was still obligated to pay Sonza's talent fees. Thus, even if ABS-CBN was completely dissatisfied with the means and methods of Sonza's performance of his work, or even with the quality or product of his work, ABS-CBN could not dismiss or even discipline Sonza. All that ABS-CBN could do is not to broadcast Sonza's show but ABS-CBN must still pay his talent fees in full.

Clearly, ABS-CBN's right not to broadcast Sonza's show, burdened as it was by the obligation to continue paying in full Sonza's talent fees, did not amount to control over the means and methods of the performance of Sonza's work. ABS-CBN could not terminate or discipline Sonza even if the means and methods of performance of his work - how he delivered his lines and appeared on television - did not meet ABS-CBN's approval. This proves that ABS-CBN's control was limited only to the result of Sonza's work, whether to broadcast the final product or

not. In either case, ABS-CBN must still pay Sonza's talent fees in full until the expiry of the Agreement.

In *Vaughan, et al. vs. Warner, et al.*, [157 F.2d 26, 8 August 1946], the United States Circuit Court of Appeals ruled that vaudeville performers were independent contractors although the management reserved the right to delete objectionable features in their shows. Since the management did not have control over the manner of performance of the skills of the artists, it could only control the result of the work by deleting objectionable features.

Sonza further contends that ABS-CBN exercised control over his work by supplying all equipment and crew. No doubt, ABS-CBN supplied the equipment, crew and airtime needed to broadcast the "Mel & Jay" programs. However, the equipment, crew and airtime are not the "tools and instrumentalities" Sonza needed to perform his job. What Sonza principally needed were his talent or skills and the costumes necessary for his appearance. Even though ABS-CBN provided Sonza with the place of work and the necessary equipment, Sonza was still an independent contractor since ABS-CBN did not supervise and control his work. ABS-CBN's sole concern was for Sonza to display his talent during the airing of the programs.

A radio broadcast specialist who works under minimal supervision is an independent contractor. Sonza's work as television and radio program host required special skills and talent, which Sonza admittedly possesses. The records do not show that ABS-CBN exercised any supervision and control over how Sonza utilized his skills and talent in his shows.

Second, Sonza urges the Court to rule that he was ABS-CBN's employee because ABS-CBN subjected him to its rules and standards of performance. Sonza claims that this indicates ABS-CBN's control "not only [over] his manner of work but also the quality of his work."

The Agreement stipulates that Sonza shall abide with the rules and standards of performance "covering talents" of ABS-CBN. The Agreement does not require Sonza to comply with the rules and standards of performance prescribed for employees of ABS-CBN. The code of conduct imposed on Sonza under the Agreement refers to the "Television and Radio Code of the Kapisanan ng mga Broadcaster sa Pilipinas (KBP), which has been adopted by the COMPANY (ABS-CBN) as its Code of Ethics." The KBP code applies to broadcasters, not to employees of radio and television stations. Broadcasters are not necessarily employees of radio and television stations. Clearly, the rules and standards of performance referred to in the Agreement are those applicable to talents and not to employees of ABS-CBN.

In any event, not all rules imposed by the hiring party on the hired party indicate that the latter is an employee of the former. *(AFP Mutual Benefit Association, Inc. v. NLRC, G.R. No. 102199, 28 Jan. 1997, 267 SCRA 47)*. In this case, Sonza failed to show that these rules controlled his performance. We find that these general rules are merely guidelines towards the achievement of the mutually desired result, which are top-rating television and radio programs that comply with standards of the industry.

The *Vaughan* case also held that one could still be an independent contractor although the hirer reserved certain supervision to insure the attainment of the desired result. The hirer, however, must not deprive the one hired from performing his services according to his own initiative.

Lastly, Sonza insists that the "exclusivity clause" in the Agreement is the most extreme form of control which ABS-CBN exercised over him.

This argument is futile. Being an exclusive talent does not by itself mean that Sonza is an employee of ABS-CBN. Even an independent contractor can validly provide his services exclusively to the hiring party. In the broadcast industry, exclusivity is not necessarily the same as control.

The hiring of exclusive talents is a widespread and accepted practice in the entertainment industry. This practice is not designed to control the means and methods of work of the talent, but simply to protect the investment of the broadcast station. The broadcast station normally spends substantial amounts of money, time and effort "in building up its talents as well as the programs they appear in and thus expects that said talents remain exclusive with the station for a

commensurate period of time." Normally, a much higher fee is paid to talents who agree to work exclusively for a particular radio or television station. In short, the huge talent fees partially compensates for exclusivity, as in the present case. *(Sonza vs. ABS-CBN Broadcasting Corporation, G. R. No. 138051, June 10, 2004).*

Individuals as independent contractors.

The law does not preclude individuals from engaging as independent contractors. Individuals with special skills, expertise or talent enjoy the freedom to offer their services as independent contractors. The right to life and livelihood guarantees this freedom to contract as independent contractors. The right of labor to security of tenure cannot operate to deprive an individual, possessed with special skills, expertise and talent, of his right to contract as an independent contractor. An individual like an artist or talent has a right to render his services without any one controlling the means and methods by which he performs his art or craft. The Supreme Court will not interpret the right of labor to security of tenure to compel artists and talents to render their services only as employees. If radio and television program hosts can render their services only as employees, the station owners and managers can dictate to the radio and television hosts what they say in their shows. This is not conducive to freedom of the press. *(Sonza vs. ABS-CBN Broadcasting Corporation, G. R. No. 138051, June 10, 2004).*

Consequently, a television program host is deemed an independent contractor. *(Alberty-Vélez vs. Corporación De Puerto Rico Para La Difusión Pública [361 F.3d 1, 2 March 2004] United States Court of Appeals, First Circuit).*

In another case, it was ruled by the United States Circuit Court of Appeals that vaudeville performers are independent contractors. *(Vaughan, et al. vs. Warner, et al., [157 F.2d 26, 8 Aug. 1946]).*

In *Zhengxing vs. Nathanson*, [215 F.Supp.2d 114, 5 August 2002], the plaintiff *Zhengxing*, a Chinese language broadcaster and translator was deemed an independent contractor because she worked under minimal supervision.

In the insurance industry, an insurance adjuster or a commission agent of insurance firms is not considered an employee thereof but an independent contractor in the light of the absence of control by the latter over the work of the former except as to the results of such work. *(AFP Mutual Benefit Association, Inc. vs. NLRC, et al., G. R. No. 102199, Jan. 28, 1997; Insular Life Assurance Co., Ltd. vs. NLRC, et al., G. R. No. 84484, Nov. 15, 1989).*

In case of doubt, one must be classified as employee, not as independent contractor.

In the 2000 case of **SSS vs. CA**, [G. R. No. 100388, December 14, 2000], the Supreme Court reiterated its ruling in the case of **Dy Keh Beng vs. International Labor**, [90 SCRA 161 (1979)], where the long-standing ruling in **Sunripe Coconut Products Co. vs. Court of Industrial Relations**, [83 Phil. 518, 523, L-2009, April 30, 1949], was cited, to wit:

> "When a worker possesses some attributes of an employee and others of an independent contractor, which make him fall within an intermediate area, he may be classified under the category of an employee when the economic facts of the relations make it more nearly one of employment than one of independent business enterprise with respect to the ends sought to be accomplished."

Employment of security guards in the security service industry.

The Supreme Court had occasion to discuss once again the issue of employment status of security guards in the 2005 case of **Manila Electric Company vs. Benamira**, [G. R. No. 145271, July 14, 2005]. In emphasizing the fact that there was no employer-employee relationship between petitioner Meralco and the security guards assigned to it by the security agency employing them, it cited the case of **Social Security System vs. Court of Appeals**, [No. L-28134, June 30, 1971, 39 SCRA 629] that:

> "...The guards or watchmen render their services to private respondent by allowing themselves to be assigned by said respondent, which furnishes them

arms and ammunition, to guard and protect the properties and interests of private respondent's clients, thus enabling that respondent to fulfill its contractual obligations. Who the clients will be, and under what terms and conditions the services will be rendered, are matters determined not by the guards or watchmen, but by private respondent. On the other hand, the client companies have no hand in selecting who among the guards or watchmen shall be assigned to them. It is private respondent that issues assignment orders and instructions and exercises control and supervision over the guards or watchmen, so much so that if, for one reason or another, the client is dissatisfied with the services of a particular guard, the client cannot himself terminate the services of such guard, but has to notify private respondent, which either substitutes him with another or metes out to him disciplinary measures. That in the course of a watchman's assignment the client conceivably issues instructions to him, does not in the least detract from the fact that private respondent is the employer of said watchman, for in legal contemplation such instructions carry no more weight than mere requests, the privity of contract being between the client and private respondent, not between the client and the guard or watchman. Corollarily, such giving out of instructions inevitably spring from the client's right predicated on the contract for services entered into by it with private respondent.

"In the matter of compensation, there can be no question at all that the guards or watchmen receive compensation from private respondent and not from the companies or establishments whose premises they are guarding. The fee contracted for to be paid by the client is admittedly not equal to the salary of a guard or watchman; such fee is arrived at independently of the salary to which the guard or watchman is entitled under his arrangements with private respondent.

Said ruling in *SSS* was reiterated in **American President Lines vs. Clave**, [No. L-51641, June 29, 1982, 114 SCRA 826], thus:

"In the light of the foregoing standards, We fail to see how the complaining watchmen of the Marine Security Agency can be considered as employees of the petitioner. It is the agency that recruits, hires, and assigns the work of its watchmen. Hence, a watchman can not perform any security service for the petitioner's vessels unless the agency first accepts him as its watchman. With respect to his wages, the amount to be paid to a security guard is beyond the power of the petitioner to determine. Certainly, the lump sum amount paid by the petitioner to the agency in consideration of the latter's service is much more than the wages of any one watchman. In point of fact, it is the agency that quantifies and pays the wages to which a watchman is entitled.

"Neither does the petitioner have any power to dismiss the security guards. In fact, We fail to see any evidence in the record that it wielded such a power. It is true that it may request the agency to change a particular guard. But this, precisely, is proof that the power lies in the hands of the agency.

"Since the petitioner has to deal with the agency, and not the individual watchmen, on matters pertaining to the contracted task, it stands to reason that the petitioner does not exercise any power over the watchmen's conduct. Always, the agency stands between the petitioner and the watchmen; and it is the agency that is answerable to the petitioner for the conduct of its guards."

And as held in said Meralco case:

"Under the security service agreement, it was ASDAI which (a) selected, engaged or hired and discharged the security guards; (b) assigned them to MERALCO according to the number agreed upon; (c) provided the uniform, firearms and ammunition, nightsticks, flashlights, raincoats and other paraphernalia of the security guards; (d) paid them salaries or wages; and, (e) disciplined and supervised them or principally controlled their conduct. The agreement even explicitly provided that "[n]othing herein contained shall be understood to make the security guards under this Agreement, employees of the COMPANY, it being clearly understood that such security guards shall be

considered as they are, employees of the AGENCY alone." Clearly, the individual respondents are the employees of ASDAI.

"As to the provision in the agreement that MERALCO reserved the right to seek replacement of any guard whose behavior, conduct or appearance is not satisfactory, such merely confirms that the power to discipline lies with the agency. It is a standard stipulation in security service agreements that the client may request the replacement of the guards to it. Service-oriented enterprises, such as the business of providing security services, generally adhere to the business adage that "the customer or client is always right" and, thus, must satisfy the interests, conform to the needs, and cater to the reasonable impositions of its clients.

"Neither is the stipulation that the agency cannot pull out any security guard from MERALCO without its consent an indication of control. It is simply a security clause designed to prevent the agency from unilaterally removing its security guards from their assigned posts at MERALCO's premises to the latter's detriment.

"The clause that MERALCO has the right at all times to inspect the guards of the agency detailed in its premises is likewise not indicative of control as it is not a unilateral right. The agreement provides that the agency is principally mandated to conduct inspections, without prejudice to MERALCO's right to conduct its own inspections.

"Needless to stress, for the power of control to be present, the person for whom the services are rendered must reserve the right to direct not only the end to be achieved but also the means for reaching such end.[26] Not all rules imposed by the hiring party on the hired party indicate that the latter is an employee of the former.[27] Rules which serve as general guidelines towards the achievement of the mutually desired result are not indicative of the power of control.[28]

"Verily, the security service agreements in the present case provided that all specific instructions by MERALCO relating to the discharge by the security guards of their duties shall be directed to the agency and not directly to the individual respondents. The individual respondents failed to show that the rules of MERALCO controlled their performance.

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"The individual respondents can not be considered as regular employees of the MERALCO for, although security services are necessary and desirable to the business of MERALCO, it is not directly related to its principal business and may even be considered unnecessary in the conduct of MERALCO's principal business, which is the distribution of electricity."

97. Who are the parties to a contracting or subcontracting arrangement?

Parties. - There are 3 parties: ***principal***, the ***contractor*** or ***subcontractor***, and the ***workers*** engaged by the latter. The principal and the contractor or subcontractor may be a natural or juridical person.

- ***"Principal"*** refers to any employer who puts out or farms out a job, service, or work to a contractor or subcontractor, whether or not the arrangement is covered by a written contract.

- ***"Contractor"*** or ***"subcontractor"*** refers to any person or entity engaged in a legitimate contracting or subcontracting arrangement.

- ***"Contractual employee"*** includes one employed by a contractor or subcontractor to perform or complete a job, work or service pursuant to an arrangement between the latter and a principal called *"contracting"* or *"subcontracting"*.

98. When is contracting or subcontracting legitimate?

Contracting or subcontracting shall be legitimate if the following circumstances concur:

(i) The contractor or subcontractor carries on a distinct and independent business and undertakes to perform the job, work or service on its own account and under its own responsibility, according to its own manner and method, and free from the control and directions of the principal in all matters connected with the performance of the work except as to the results thereof;
(ii) The contractor or subcontractor has substantial capital or investment; and
(iii) The agreement between the principal and the contractor or subcontractor assures the contractual employees' entitlement to all labor and occupational safety and health standards, free exercise of the right to self-organization, security of tenure, and social and welfare benefits.

99. What is permissible contracting or subcontracting arrangement?

The principal may engage the services of a contractor or subcontractor for the performance of any of the following:

(a) Works or services temporarily or occasionally needed to meet abnormal increase in the demand of products or services, provided that the normal production capacity or regular workforce of the principal cannot reasonably cope with such demands;

(b) Works or services temporarily or occasionally needed by the principal for undertakings requiring expert or highly technical personnel to improve the management or operations of an enterprise;

(c) Services temporarily needed for the introduction or promotion of new products, only for the duration of the introductory or promotional period;

(d) Works or services not directly related or not integral to the main business or operation of the principal, including casual work, janitorial, security, landscaping, and messengerial services and work not related to manufacturing processes in manufacturing establishments;

(e) Services involving the public display of manufacturers' products which do not involve the act of selling or issuance of receipts or invoices;

(f) Specialized works involving the use of some particular, unusual or peculiar skills, expertise, tools or equipment the performance of which is beyond the competence of the regular workforce or production capacity of the principal; and

(g) Unless a reliever system is in place among the regular workforce, substitute services for absent regular employees provided that the period of service shall be coextensive with the period of absence and the same is made clear to the substitute employee at the time of engagement. The phrase *"absent regular employees"* includes those who are serving suspensions or other disciplinary measures not amounting to termination of employment meted out by the principal but excludes those on strike where all the formal requisites for the legality of the strike have been *prima facie* complied with based on the records filed with the National Conciliation and Mediation Board. *(Section 6, Rule VIII-A, Book III, Rules to Implement the Labor Code, as amended by Department Order No. 10, Series of 1997).*

100. What are the prohibited acts in the law on contracting and subcontracting?

The following are hereby declared prohibited for being contrary to law or public policy:
(a) Labor-only contracting;
(b) Contracting out of work which will either displace employees of the principal from their jobs or reduce their regular working hours;
(c) Contracting out of work with a *"cabo"*. [A *"cabo"* refers to a person or group of persons or to a labor group which, in the guise of a labor organization, supplies workers to an employer, with or without any monetary or other consideration

whether in the capacity of an agent of the employer or as an ostensible independent contractor.]

(d) Taking undue advantage of the economic situation or lack of bargaining strength of the contractual employee, or undermining his security of tenure or basic rights, or circumventing the provisions of regular employment in any of the following instances:
   (i) In addition to his assigned function, requiring the contractual employee to perform functions which are currently being performed by the regular employee of the principal or of the contractor or subcontractor;
   (ii) Requiring him to sign as a precondition to employment or continued employment, an antedated resignation letter; a blank payroll; a waiver of labor standards including minimum wages and social or welfare benefits; or a quitclaim releasing the principal, contractor or subcontractor from any liability as to payment of the future claims; and
   (iii) Requiring him to sign a contract fixing the period of employment to a term shorter than the term of the contract between the principal and the contractor or subcontractor, unless the latter contract is divisible into phases for which substantially different skills are required and this is made known to the employee at the time of engagement.

(e) Contracting out of a job, work or service through an **in-house agency** as defined herein;

(f) Contracting out of a job, work or service directly related to the business or operation of the principal by reason of a strike or lockout whether actual or imminent; and

(g) Contracting out of a job, work or service when not justified by the exigencies of the business and the same results in the reduction or splitting of the bargaining unit.

101. What is labor-only contracting?

Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal, and any of the following elements are present:

i) the contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or

ii) the contractor does not exercise the right to control over the performance of the work of the contractual employee. *(Article 106, Labor Code; (No. 9, DOLE Primer on Contracting and Subcontracting, Effects of Department Order No. 3, Series of 2001; Manila Water Co., Inc. vs. Pena, et al., G. R. No. 158255, July 8, 2004).*

Effects of a labor-only contracting arrangement.

In summary, the following are the effects of a labor-only contracting arrangement:

a. The subcontractor will be treated as the agent or intermediary of the principal. Since the act of an agent is the act of the principal, representations made by the subcontractor to the employees will bind the principal.

b. The principal will become the employer as if it directly employed the workers engaged to undertake the subcontracted job or service. It will be responsible to them for all their entitlements and benefits under the labor laws.

c. The principal and the subcontractor will be solidarily treated as the employer.

d. The employees will become employees of the principal, subject to the classifications of employees under Article 28 of the Labor Code. *(See Manila Electric Company vs. Benamira, G. R. No. 145271, July 14, 2005).*

If the labor-only contracting activity is undertaken by a legitimate labor organization, a petition for cancellation of union registration may be filed against it, pursuant to Article 239(e) of the Labor Code. *(No. 13, DOLE Primer on Contracting and Subcontracting, Effects of Department Order No. 3, Series of 2001).*

Substantial capital or investment, meaning.

"Substantial capital or investment" refers to capital stocks and subscribed capitalization in the case of corporations, tools, equipment, implements, machineries and work premises, actually and directly used by the contractor or subcontractor in the performance or completion of the job, work or service contracted out. *(Section 5, Department Order No. 18-02, Series of 2002, [Feb. 21, 2002]; No. 8, DOLE Primer on Contracting and Subcontracting, Effects of Department Order No. 3, Series of 2001).*

Right of control, meaning.

The *"right to control"* shall refer to the right reserved to the person for whom the services of the contractual workers are performed, to determine not only the end to be achieved, but also the manner and means to be used in reaching that end. *(Section 5, Department Order No. 18-02, Series of 2002, [Feb. 21, 2002]).*

Substantial capital without investment in tools, equipment, machineries, etc.; effect.

In **Neri vs. NLRC**, [G. R. Nos. 97008-09, July 23, 1993, 224 SCRA 7171], the Supreme Court ruled that the labor contractor is not engaged in labor-only contracting because it has sufficiently proved that it has substantial capital. Having substantial capital in the amount of P1 Million fully subscribed and paid for and is a big firm which services, among others, a university, an international bank, a big local bank, a hospital center, government agencies, etc., it is a highly capitalized venture and cannot be deemed engaged in labor-only contracting. It is a qualified independent contractor. Further, it need not prove that it made investments in the form of tools, equipment, machineries, work premises, among others. The law does not require both substantial capital and investment in such tools, equipment, etc. This is clear from the use of the conjunction *"or"* in the provision of fourth paragraph of Article 106 of the Labor Code.

If the intention was to require the contractor to prove that he has both capital and the requisite investment, then the conjunction *"and"* should have been used. But having established that it has substantial capital, it was no longer necessary for the labor contractor to further adduce evidence to prove that it does not fall within the purview of "labor-only" contracting. There is even no need for it to refute petitioners' contention that the activities they perform are directly related to the principal business of respondent bank (FEBTC). *(Neri vs. NLRC, G. R. Nos. 97008-09, July 23, 1993, 224 SCRA 7171).*

In another similar case, **Filipinas Synthetic Fiber Corporation [FILSYN] vs. NLRC, et al.**, [G. R. No. 113347, June 14, 1996], the Supreme Court ruled that a contractor which is a going-concern duly registered with the Securities and Exchange Commission with substantial capitalization of P1.6 Million, P400,000 of which is actually subscribed, cannot be considered as engaged in labor-only contracting being a highly capitalized venture. Moreover, while the janitorial services performed by the employee pursuant to the agreement between the indirect employer and the contractor may be considered directly related to the principal business of the indirect employer which is the manufacture of polyester fiber, nevertheless, they are not necessary in its operation. *(See also Baguio vs. NLRC, et al., G. R. Nos. 79004-08, Oct. 4, 1991, 202 SCRA 465, 470).*

On the contrary, they are merely incidental thereto, as opposed to being integral, without which production and company sales will suffer. *(Ecal vs. NLRC, et al., G. R. Nos. 92777-78, March 13, 1991, 195 SCRA 224, 223).*

In the 2005 case of **Wack Wack Golf & Country Club vs. NLRC**, [G. R. No. 149793, April 15, 2005], the Supreme Court ruled that there is indubitable evidence showing that Business Staffing and Management, Inc. (BSMI), a corporation engaged in the business as Management Service Consultant, is an independent contractor, engaged in the management of projects, business operations, functions, jobs and other kinds of business ventures, and has sufficient

capital and resources to undertake its principal business. It had provided management services to various industrial and commercial business establishments. Its Articles of Incorporation proves its sufficient capitalization. Moreover, in December 1993, Labor Secretary Bienvenido Laguesma, in the case of *In re Petition for Certification Election Among the Regular Rank-and-File Employees Workers of Byron-Jackson (BJ) Services International Incorporated, Federation of Free Workers (FFW)-Byron Jackson Services Employees Chapter*, recognized BSMI as an independent contractor.

In the 2004 case of **Manila Water Co., Inc. vs. Pena**, [G. R. No. 158255, July 8, 2004], the Supreme Court, in holding that the entity is not an independent contractor but a labor-only contractor, ratiocinated:

> "*First,* [Association Collectors Group, Inc.] (ACGI), [which was contracted by petitioner Manila Water Company, Inc. to collect charges for the Balara Branch], does not have substantial capitalization or investment in the form of tools, equipment, machineries, work premises, and other materials, to qualify as an independent contractor. While it has an authorized capital stock of P1,000,000.00, only P62,500.00 is actually paid-in, which cannot be considered substantial capitalization. The 121 collectors [composing ACGI] subscribed to four shares each and paid only the amount of P625.00 in order to comply with the incorporation requirements. Further, private respondents reported daily to the branch office of the petitioner because ACGI has no office or work premises. In fact, the corporate address of ACGI was the residence of its president, Mr. Herminio D. Peña. Moreover, in dealing with the consumers, private respondents used the receipts and identification cards issued by petitioner.
>
> "*Second*, the work of the private respondents was directly related to the principal business or operation of the petitioner. Being in the business of providing water to the consumers in the East Zone, the collection of the charges therefor by private respondents for the petitioner can only be categorized as clearly related to, and in the pursuit of the latter's business.
>
> "*Lastly,* ACGI did not carry on an independent business or undertake the performance of its service contract according to its own manner and method, free from the control and supervision of its principal, petitioner. Prior to private respondents' alleged employment with ACGI, they were already working for petitioner, subject to its rules and regulations in regard to the manner and method of performing their tasks. This form of control and supervision never changed although they were already under the seeming employ of ACGI. Petitioner issued memoranda regarding the billing methods and distribution of books to the collectors; it required private respondents to report daily and to remit their collections on the same day to the branch office or to deposit them with Bank of the Philippine Islands; it monitored strictly their attendance as when a collector cannot perform his daily collection, he must notify petitioner or the branch office in the morning of the day that he will be absent; and although it was ACGI which ultimately disciplined private respondents, the penalty to be imposed was dictated by petitioner as shown in the letters it sent to ACGI specifying the penalties to be meted on the erring private respondents. These are indications that ACGI was not left alone in the supervision and control of its alleged employees. Consequently, it can be concluded that ACGI was not an independent contractor since it did not carry a distinct business free from the control and supervision of petitioner.
>
> "Under this factual milieu, there is no doubt that ACGI was engaged in labor-only contracting, and as such, is considered merely an agent of the petitioner. xxx." *(Manila Water Co., Inc. vs. Pena., G. R. No. 158255, July 8, 2004).*

In the case of **Philippine Fuji Xerox Corporation, vs. NLRC**, [G. R. No. 111501, March 5, 1996], the Supreme Court ruled that the manpower agency is a labor-only contractor notwithstanding the latter's invocation of the ruling in the *Neri* case *(supra)* that it is a highly-capitalized business venture, registered as an "independent employer" with the Securities and Exchange Commission as well as the Department of Labor and Employment; that it is a member of the Social Security System; that in 1984, it had assets exceeding P5 Million and at least 20

typewriters, office equipment and service vehicles; and that it had employees of its own and a pool of 25 clerks assigned to clients on a temporary basis.

In distinguishing the *Philippine Fuji Xerox Corporation* case [supra] from the *Neri* case, the Supreme Court cited the following:

In the *Neri* case, the High Court considered not only the capitalization of the contractor but also the fact that it was providing specific special services (radio/telex operator and janitor) to the employer; that in another case *(Associated Labor Union-TUCP vs. NLRC, et al., G. R. No. 101784, October 21, 1991)*, the Supreme Court had already found that the said contractor was an independent contractor; that the contractor retained control over the employees and the employer was actually just concerned with the end-result; that the contractor had the power to re-assign the employees and their deployment was not subject to the approval of the employer; and that the contractor was paid in lump sum for the services it rendered.

These features of the *Neri* case make it distinguishable from the *Philippine Fuji Xerox Corporation* case where the service being rendered by the private respondent (contractor's employee) was not a specific or special skill that the contractor was in the business of providing. Although in the *Neri* case, the telex machine operated by the employee belonged to the employer, the service was deemed permissible because it was specific and technical. This cannot be said of the service rendered by the private respondent (contractor's employee) in the *Philippine Fuji Xerox Corporation* case.

The argument in the *Philippine Fuji Xerox Corporation* case that the contractor had typewriters and service vehicles for the conduct of its business independently of the employer does not make it a legitimate job contractor because typewriters and vehicles bear no direct relationship to the job for which the contractor contracted its service of operating copier machines and offering copying services to the public. The fact is that the contractor did not have copying machines of its own. What it did was simply to supply manpower to Fuji Xerox. The phrase "substantial capital and investment in the form of tools, equipment, machineries, work premises and other materials which are necessary in the conduct of his business" in the Implementing Rules, clearly contemplates tools, equipment, etc., which are directly related to the service it is being contracted to render. One who does not have an independent business for undertaking the job contracted for is just an agent of the employer. *(Philippine Fuji Xerox Corporation, et al. vs. NLRC, et al., G. R. No. 111501, March 5, 1996).*

The 2003 case of **San Miguel Corporation vs. Maerc Integrated Services, Inc.**., [G. R. No. 144672, July 10, 2003], where the contractor was adjudged to have engaged in labor-only contracting, further explained the principles of labor-only contracting. The Supreme Court said:

> "Petitioner also ascribes as error the failure of the Court of Appeals to apply the ruling in *Neri vs. NLRC,* [G.R. Nos. 97008-09, July 23, 1993, 224 SCRA 717]. In that case, it was held that the law did not require one to possess both substantial capital and investment in the form of tools, equipment, machinery, work premises, among others, to be considered a job contractor. The second condition to establish permissible job contracting was sufficiently met if one possessed either attribute.
>
> "Accordingly, petitioner alleged that the appellate court and the NLRC erred when they declared MAERC a labor-only contractor despite the finding that MAERC had investments amounting to ₱4,608,080.00 consisting of buildings, machinery and equipment.
>
> "However, in *Vinoya vs. NLRC*, [G.R. No. 126586, February 2, 2000, 324 SCRA 469], we clarified that it was not enough to show substantial capitalization or investment in the form of tools, equipment, machinery and work premises, etc., to be considered an independent contractor. In fact, jurisprudential holdings were to the effect that in determining the existence of an independent contractor relationship, several factors may be considered, such as, but not necessarily confined to, whether the contractor was carrying on an independent business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of specified pieces of work; the control and supervision of the workers; the power of the employer with respect to the hiring, firing and payment of the workers of the contractor; the control of the

premises; the duty to supply premises, tools, appliances, materials and labor; and the mode, manner and terms of payment. *(Citing Ponce v. NLRC, G.R. No. 124643, July 30, 1998, 293 SCRA 366).*

"In *Neri*, the Court considered not only the fact that respondent Building Care Corporation (BBC) had substantial capitalization but noted that BCC carried on an independent business and performed its contract according to its own manner and method, free from the control and supervision of its principal in all matters except as to the results thereof. The Court likewise mentioned that the employees of BCC were engaged to perform specific special services for their principal. The status of BCC had also been passed upon by the Court in a previous case where it was found to be a qualified job contractor because it was 'a big firm which services among others, a university, an international bank, a big local bank, a hospital center, government agencies, etc.' Furthermore, there were only two (2) complainants in that case who were not only selected and hired by the contractor before being assigned to work in the Cagayan de Oro branch of FEBTC but the Court also found that the contractor maintained effective supervision and control over them.

"In comparison, MAERC, as earlier discussed, displayed the characteristics of a labor-only contractor. Moreover, while MAERC's investments in the form of buildings, tools and equipment amounted to more than ₱4 Million, we cannot disregard the fact that it was the SMC which required MAERC to undertake such investments under the understanding that the business relationship between petitioner and MAERC would be on a long term basis. Nor do we believe MAERC to have an independent business. Not only was it set up to specifically meet the pressing needs of SMC which was then having labor problems in its segregation division, none of its workers was also ever assigned to any other establishment, thus convincing us that it was created solely to service the needs of SMC. Naturally, with the severance of relationship between MAERC and SMC followed MAERC's cessation of operations, the loss of jobs for the whole MAERC workforce and the resulting actions instituted by the workers. *(San Miguel Corporation vs. Maerc Integrated Services, Inc., et al., G. R. No. 144672, July 10, 2003).*

Stipulation in the contract; effect.

The existence of employer-employee relationship cannot be made subject of an agreement or contract. The *"labor only"* contractor is considered merely an agent of the employer. Any liability shall devolve upon the *"labor only"* contractor and the employer, jointly and severally. *(Tabas vs. California Marketing Co., Inc., 169 SCRA 497).*

As held in the 2001 case of **De los Santos vs. NLRC***,* [G. R. No. 121327, December 20, 2001], the parties cannot dictate, by the mere expedient of a unilateral declaration in a contract, the character of its business, *i.e.*, whether as *"labor-only"* contractor, or job contractor, it being crucial that its character be measured in terms of and determined by the criteria set by statute.

Thus, notwithstanding that the agreement or contract between the principal employer and the contractor states that the latter is an "independent contractor" and that the workers hired by it "shall not, in any manner and under any circumstances, be considered employees of the Company, and that the Company has no control or supervision whatsoever over the conduct of the Contractor or any of its workers in respect to how they accomplish their work or perform the Contractor's obligations under this Agreement," the contractor may still be considered a labor-only contractor. This was the holding of the Supreme Court in the case of *Philippine Fuji Xerox Corporation* [supra]. The Court cited the analogous case of *Tabas vs. California Manufacturing Company, Inc.,* [169 SCRA 497 (1989)], thus:

"There is no doubt that in the case at bar, Livi performs 'manpower services,' meaning to say, it contracts out labor in favor of clients. We hold that it is one notwithstanding its vehement claims to the contrary, and notwithstanding the provision of the contract that it is 'an independent contractor.' The nature of one's business is not determined by self-serving appellations one attaches thereto but by the tests provided by statute and prevailing case law. The bare fact that Livi maintains a separate line of business does not extinguish the equal fact that it

> has provided California with workers to pursue the latter's own business. In this connection, we do not agree that the petitioners had been made to perform activities 'which are not directly related to the general business of manufacturing,' California's purported 'principal operation activity.' The petitioners had been charged with 'merchandizing [sic] promotion or sale of the products of [California] in the different sales outlets in Metro Manila including task and occasional [sic] price tagging,' an activity that is doubtless, an integral part of the manufacturing business. It is not, then, as if Livi had served as its [California's] promotions or sales arm or agents, or otherwise, rendered a piece of work it [California] could not have itself done; Livi as a placement agency, had simply supplied it with the manpower necessary to carry out its [California's] merchandising activities, using its [California's] premises and equipment.
>
> "xxx.
>
> "The fact that the petitioners have allegedly admitted being Livi's 'direct employees' in their complaints is nothing conclusive. For one thing, the fact that the petitioners were [are], will not absolve California since liability has been imposed by legal operation. For another, and as we indicated, the relations of parties must be judged from case to case and the decree of law, and not by declaration of parties." *(Philippine Fuji Xerox Corporation, et al. vs. NLRC, et al., G. R. No. 111501, March 5, 1996).*

But in the 2000 case of **Escario vs. NLRC***,* [G. R. No. 124055, June 8, 2000], petitioners who were likewise agency-supplied workers in the same company (California Manufacturing Co., Inc. or *"CMC"*) were not similarly fortunate as those in *Tabas* [supra]. Petitioners here relied on the *Tabas* case in claiming that they are employees of said company. The Supreme Court considered such reliance on *Tabas* as misplaced. For in *Tabas,* the Supreme Court ruled that therein contractor Livi Manpower Services was a mere placement agency and had simply supplied CMC with the manpower necessary to carry out the company's merchandising activity. It was, however, further stated in said case that:

> "It would have been different, we believe, had Livi been discretely a promotions firm, and that California had hired it to perform the latter's merchandising activities. For then, Livi would have been truly the employer of its employees and California, its client. x x x."

In other words, CMC can validly farm out its merchandising activities to a legitimate independent contractor. In declaring that D. L. Admark (petitioners' employer) is a legitimate independent contractor, the Supreme Court cited the following circumstances that tend to establish it as such:

1) The SEC registration certificate of D.L. Admark states that it is a firm engaged in promotional, advertising, marketing and merchandising activities.
2) The service contract between CMC and D.L. Admark clearly provides that the agreement is for the supply of sales promoting merchandising services rather than one of manpower placement.
3) D.L. Admark was actually engaged in several activities, such as advertising, publication, promotions, marketing and merchandising. It had several merchandising contracts with companies like Purefoods, Corona Supply, Nabisco Biscuits, and Licron. It was likewise engaged in the publication business as evidenced by it magazine the "Phenomenon."
4) It had its own capital assets to carry out its promotion business. It then had current assets amounting to P6 million and is therefore a highly capitalized venture. It had an authorized capital stock of P500,000.00. It owned several motor vehicles and other tools, materials and equipment to service its clients. It paid rentals of ₱30,020 for the office space it occupied.

In the 2003 case of **San Miguel Corporation vs. Maerc Integrated Services, Inc.***,* [G. R. No. 144672, July 10, 2003], it was stipulated in the contract of services between MAERC and SMC that MAERC was an independent contractor and that the workers hired by it "shall not, in any manner and under any circumstances, be considered employees of the Company, and that the

Company has no control or supervision whatsoever over the conduct of the Contractor or any of its workers in respect to how they accomplish their work or perform the Contractor's obligations under the Contract."

The Supreme Court, however, following the "control test," disregarded the said stipulation in the contract. It ratiocinated, thus:

> "In deciding the question of control, the language of the contract is not determinative of the parties' relationship; rather, it is the totality of the facts and surrounding circumstances of each case.
>
> "Despite SMC's disclaimer, there are indicia that it actively supervised the complainants. SMC maintained a constant presence in the workplace through its own checkers. Its asseveration that the checkers were there only to check the end result was belied by the testimony of Carlito R. Singson, head of the Mandaue Container Service of SMC, that the checkers were also tasked to report on the identity of the workers whose performance or quality of work was not according to the rules and standards set by SMC. According to Singson, 'it (was) necessary to identify the names of those concerned so that the management [referring to MAERC] could call the attention to make these people improve the quality of work.'
>
> "Viewed alongside the findings of the Labor Arbiter that the MAERC organizational set-up in the bottle segregation project was such that the segregators/cleaners were supervised by checkers and each checker was also under a supervisor who was in turn under a field supervisor, the responsibility of watching over the MAERC workers by MAERC personnel became superfluous with the presence of additional checkers from SMC." *(San Miguel Corporation vs. Maerc Integrated Services, Inc., et al., G. R. No. 144672, July 10, 2003).*

In the June 2005 decision in the case of **Abella vs. PLDT**, [G. R. No. 159469, June 8, 2005], the Supreme Court ruled that the security guards supplied by People's Security, Inc. (PSI) to PLDT are the employees of PSI and not of PLDT. In holding that PSI is a legitimate job contractor, the High Court declared:

> "We hasten to add on this score that the Labor Arbiter as well as the NLRC and the Court of Appeals found that PSI is a legitimate job contractor pursuant to Section 8, Rule VII, Book II of the Omnibus Rules Implementing the Labor Code. It is a registered corporation duly licensed by the Philippine National Police to engage in security business. It has substantial capital and investment in the form of guns, ammunitions, communication equipments, vehicles, office equipments like computer, typewriters, photocopying machines, etc., and above all, it is servicing clients other than PLDT like PCIBank, Crown Triumph, and Philippine Cable, among others. Here, the security guards which PSI had assigned to PLDT are already the former's employees prior to assignment and if the assigned guards to PLDT are rejected by PLDT for reasons germane to the security agreement, then the rejected or terminated guard may still be assigned to other clients of PSI as in the case of Jonathan Daguno who was posted at PLDT on 21 February 1996 but was subsequently relieved therefrom and assigned at PCIBank Makati Square effective 10 May 1996. Therefore, the evidence as it stands is at odds with petitioners' assertion that PSI is an "in-house" agency of PLDT so as to call for a piercing of veil of corporate identity as what the Court has done in *De leon, et al. vs. NLRC and Fortune Tobacco Corporation, et al.* [G.R. No. 112661, May 30, 2001]."

Nature of liability of employer and labor-only contractor.

In a labor-only contract, there are three parties involved: (1) the *"labor-only"* contractor; (2) the employee who is ostensibly under the employ of the *"labor-only"* contractor; and (3) the principal who is deemed the real employer. Under this scheme, the *"labor-only"* contractor is the agent of the principal. The law makes the principal responsible to the employees of the *"labor-only"* contractor as if the principal itself directly hired or employed the employees. *(Sonza vs. ABS-CBN Broadcasting Corporation, G. R. No. 138051, June 10, 2004; Sandoval Shipyards, Inc., et al. vs. Pepito, et al., G. R. No. 143428, June 25, 2001).*

It has been consistently held in our jurisdiction that since the *"labor-only"* contractor does not have substantial capital investment in the form of tools, equipment, machineries, work premises and other materials, the workers supplied by him are employees of the owner of the project to whom said labor was supplied. *(Vinoya vs. NLRC, et al., G. R. No. 126586, Feb. 2, 2000; Industrial Timber Corporation vs. NLRC, et al., 169 SCRA 341).*

The reason is, the labor-only contractor is treated as mere agent or intermediary of the employer. Consequently, the nature of the liability of the employer is more direct, the labor-only contractor is treated as agent and the former, the principal. *(Manila Electric Company vs. Benamira, G. R. No. 145271, July 14, 2005; Manila Water Co., Inc. vs. Pena, et al., G. R. No. 158255, July 8, 2004; San Miguel Corporation v. MAERC Integrated Services, Inc., G.R. No. 144672, 10 July 2003).*

The employer is made by the statute responsible to the employees of the labor-only contractor as if such employees had been directly employed by the employer. Thus, where labor-only contracting exists in a given case, the statute itself implies or establishes an employer-employee relationship between the employer (the owner of the project) and the employees of the labor-only contractor, this time for a comprehensive purpose: employer for purposes of the Labor Code, to prevent any violation or circumvention of any provision of said Code. The law, in effect, holds both the employer and the labor-only contractor responsible to the latter's employees for the more effective safeguarding of the employees' rights under the Labor Code. *(Philippine Bank of Communications vs. NLRC, et al., G. R. No. L-66598, Dec. 19, 1986, 146 SCRA 347).*

The statute creates an employer-employee relationship for a comprehensive purpose: to prevent a circumvention of labor laws. *(Manila Water Co., Inc. vs. Pena, et al., G. R. No. 158255, July 8, 2004).*

In a case, a service agency supplied 11 messengers to its client, a bank. The messengers worked in the premises of the client and were paid their salaries through the service agency. The client company controlled the performance of the duties of the messenger. The Supreme Court declared that the service agency is engaged in *"labor-only"* contracting. Consequently, the client was held liable to the complainant messenger as if the latter had been directly employed not only by the agency but also by said client. *(Philippine Bank of Communications vs. NLRC, et al. 146 SCRA 347).*

Liability of legitimate contractor and labor-only contractor, distinguished.

There is a wide gulf of distinction between the liability of a legitimate independent contractor and the liability of a labor-only contractor.

In legitimate job contracting, the law creates an employer-employee relationship for a limited purpose, *i.e.*, to ensure that the employees are paid their wages. The principal employer becomes jointly and severally liable with the job contractor only for the payment of the employees' wages whenever the contractor fails to pay the same. Other than that, the principal employer is not responsible for any claim made by the employees. *(San Miguel Corporation vs. Maerc Integrated Services, Inc., et al., G. R. No. 144672, July 10, 2003).*

On the other hand, in labor-only contracting, the statute creates an employer-employee relationship for a comprehensive purpose: to prevent a circumvention of labor laws. The contractor is considered merely an agent of the principal employer and the latter is responsible to the employees of the labor-only contractor as if such employees had been directly employed by the principal employer. The principal employer, therefore, becomes solidarily liable with the labor-only contractor for all the rightful claims of the employees. *(San Miguel Corporation vs. Maerc Integrated Services, Inc., et al., G. R. No. 144672, July 10, 2003).*

Duty to comply with legal requirements for valid termination in labor-only contracting situations.

Having made the distinction between the liability of a job contractor and that of a labor-only contractor, it is clear that if there is a finding of labor-only contracting, the duty to comply

with the requirements of the law for terminating employees as well as payment of monetary claims of the latter would necessarily devolve on the principal which is deemed the real, direct employer, in solidum with the labor-only contractor.

In a case involving retrenchment of workers effected by the labor-only contractor consequent to the termination of the labor-only contract, it was ruled that the principal was not discharged from paying the separation benefits of the workers inasmuch as the contractor was shown to be a labor-only contractor. Resultantly, the principal should have complied with the requirement of written notice to both the employees concerned and the Department of Labor and Employment (DOLE) which must be given at least one (1) month before the intended date of retrenchment. Hence, the principal should be held liable for the separation pay of said workers, including the fines imposed for violations of the notice requirement. *(San Miguel Corporation vs. Maerc Integrated Services, Inc., et al., G. R. No. 144672, July 10, 2003).*

Illustrative cases of labor-only contracting.

a. An employee who hires dispatchers for the operator of a transportation company, is a labor-only contractor and, therefore, a mere agent of the petitioner-employer. *(Tiu vs. NLRC, et al., G. R. No. 95845, Feb. 21, 1996).*

b. A company which supplies a considerable workforce totaling 120 mechanics, janitors, gardeners, firemen and grasscutters to a garment manufacturer, was declared a labor-only contractor for its failure to prove that it had substantial capital or investment in the form of tools, equipment, machineries, work premises and other materials. Moreover, the work assigned to them are directly related to the business of the latter. *(Guarin, et al. vs. NLRC, et al., G. R. No. 86010, Oct. 3, 1989).*

c. In accordance with the provisions of Article 106 of the Labor Code, the workers supplied by three manpower agencies to a supermarket to work as merchandisers, cashiers, baggers, check-out personnel, sales ladies, warehousemen and so forth were declared employees of the supermarket and the manpower agencies, labor-only contractors. Their work was directly related, necessary and vital to the day-to-day operations of the supermarket; their jobs involved normal and regular functions in the ordinary business of the petitioner corporation and given the nature of their functions and responsibilities, it is improbable that petitioners did not exercise direct control over their work. Moreover, there is no evidence - as in fact, petitioners do not even allege - that aside from supplying the manpower, the labor agencies have "substantial capital or investment in the form of tools, equipment, machineries, work premises, among others." Resultingly, the supermarket is deemed the direct employer of the labor-only contractor's employees and thus liable for all benefits to which such workers are entitled, like wages, separation benefits and so forth. *(Shoppers Gain Supermart, et al. vs. NLRC, et al., G. R. No. 110731, July 26, 1996).*

d. A search company which supplies messengers to a bank is a labor-only contractor considering that the messengers rendered services to the bank, within the premises of the bank and alongside other people also rendering services to the bank. Its argument that it is not so engaged as labor-only contractor since it is possessed of substantial capital or investment in the form of office equipment, tools and trained service personnel was not accepted by the Supreme Court. Said company is not a parcel delivery company, as its name indicates. Messengerial work - the delivery of documents to designated persons whether within or without the bank premises - is directly related to the day-to-day operations of the bank. It is a recruitment and placement corporation placing bodies, as it were, in different client-companies for longer or shorter periods of time. It is this factor that distinguishes this case from *American President Lines vs. Clave, et al.* [114 SCRA 826 (1982)] if indeed such distinguishing way is needed. *(Philippine Bank of Communications vs. NLRC, et al., G. R. No. L-66598, Dec. 19, 1986, 146 SCRA 347).*

e. The person who agreed with a motor company under the terms of their Work Contract to supply only labor and supervision over his contractual workers in doing automotive body-painting work and to hire or bring in additional workers as may be required by the company and to handle additional work load or to accelerate or facilitate completion of work in process is a labor-only contractor in the light of the following circumstances, among others: the company supplied all the tools, equipment, machinery and materials necessary for the performance by the former and his men of the contracted job within the premises of the company; their compensation

was paid in lump sum; they were required to observe regular working hours and render overtime services when needed; defects in the workmanship of their jobs while in progress, are subject to correction by the company's supervisors; and they are required to observe company rules, regulations and policies such as the wearing of identification cards and uniforms. *(Broadway Motors, Inc. vs. NLRC, et al., G. R. No. 98382, Dec. 14, 1987, 156 SCRA 522).*

Principal distinctions between legitimate job contracting and labor-only contracting.

The principal distinctions between legitimate, permissible job contracting, on the one hand, and the prohibited labor-only contracting, on the other.

a. In the former, no employer-employee relationship exists between the employees of the job contractor and the principal employer (indirect employer); while in the latter, an employer-employee relationship is created by law between the principal employer and the employees of the labor-only contractor.
b. In the former, the principal employer is considered only an *"indirect employer"*, as this term is understood under Article 107 of the Labor Code; while in the latter, the principal employer is considered the *"direct employer"* of the employees in accordance with the last paragraph of Article 106 of the Labor Code.
c. In the former, the joint and several obligation of the principal employer and the legitimate job contractor is only for a limited purpose, that is, to ensure that the employees are paid their wages. Other than this obligation of paying the wages, the principal employer is not responsible for any claim made by the employees; while in the latter, the principal employer becomes solidarily liable with the labor-only contractor for all the rightful claims of the employees.
d. In the former, the legitimate job contractor provides specific services; while in the latter, the labor-only contractor provides only manpower.
e. In the former, the legitimate job contractor undertakes to perform a specific job for the principal employer; while in the latter, the labor-only contractor merely provides the personnel to work for the principal employer.

102. What is "in-house agency"?

Similarly prohibited under the law is the operation of an ***"in-house agency"*** whereby a contractor or subcontractor is engaged in the supply of labor which:

(i) is owned, managed or controlled by the principal; and
(ii) operates solely for the principal owning, managing, or controlling it.

A finding that a contractor is a *"labor-only"* contractor is equivalent to a finding that there exists an employer-employee relationship between the owner of the project and the employees of the *"labor-only"* contractor since that relationship is defined and prescribed by law itself.

103. Who is an indirect employer in a contracting or subcontracting arrangement?

The principal is considered the indirect employer of the workers supplied by independent contractor or subcontractor.

104. What is the nature of the liability of an indirect employer?

The nature of the liability of the principal is joint and solidary with the contractor or subcontractor for any violation of any provision of the Labor Code. For purposes of determining the extent of their civil liability for the payment of wages, the indirect employer shall be considered as direct employer. *(Article 109, Labor Code).*

The best illustration of these principles is the 2005 case of **Manila Electric Company vs. Benamira**, [G. R. No. 145271, July 14, 2005] where it was held, thus:

> "The fact that there is no actual and direct employer-employee relationship between MERALCO and the individual respondents does not exonerate MERALCO from liability as to the monetary claims of the individual

respondents. When MERALCO contracted for security services with ASDAI as the security agency that hired individual respondents to work as guards for it, MERALCO became an indirect employer of individual respondents pursuant to Article 107 of the Labor Code.

xxx

"When ASDAI as contractor failed to pay the individual respondents, MERALCO as principal becomes jointly and severally liable for the individual respondents' wages, under Articles 106 and 109 of the Labor Code.

xxx

"ASDAI is held liable by virtue of its status as direct employer, while MERALCO is deemed the indirect employer of the individual respondents for the purpose of paying their wages in the event of failure of ASDAI to pay them. This statutory scheme gives the workers the ample protection consonant with labor and social justice provisions of the 1987 Constitution.

"However, as held in *Mariveles Shipyard Corp. vs. Court of Appeals,* [G.R. No. 144134, November 11, 2003, 415 SCRA 573], the solidary liability of MERALCO with that of ASDAI does not preclude the application of Article 1217 of the Civil Code on the right of reimbursement from his co-debtor by the one who paid, which provides:

> 'ART. 1217. Payment made by one of the solidary debtors extinguishes the obligation. If two or more solidary debtors offer to pay, the creditor may choose which offer to accept.
>
> 'He who made the payment may claim from his co-debtors only the share which corresponds to each, with the interest for the payment already made. If the payment is made before the debt is due, no interest for the intervening period may be demanded.
>
> 'When one of the solidary debtors cannot, because of his insolvency, reimburse his share to the debtor paying the obligation, such share shall be borne by all his co-debtors, in proportion to the debt of each.'

"ASDAI may not seek exculpation by claiming that MERALCO's payments to it were inadequate for the individual respondents' lawful compensation. As an employer, ASDAI is charged with knowledge of labor laws and the adequacy of the compensation that it demands for contractual services is its principal concern and not any other's."

105. What is meant by worker preference in case of bankruptcy?

1. The right to preference given to workers under Article 110 cannot exist in any effective way *prior* to the time of its presentation in distribution proceedings. Article 110 applies only in case of *bankruptcy* or *judicial liquidation* of the employer.
2. *Judicial* proceedings *in rem* is required for creditors' claims against debtors to become operative.
3. To contend that Article 110 of the Labor Code is applicable also to *extrajudicial* proceedings would be putting the worker in a better position than the State which could only assert its own prior preference in case of a *judicial* proceeding.
4. The right of preference as regards unpaid wages recognized by Article 110 of the Labor Code does *not* constitute a *lien* on the property of the insolvent debtor in favor of the workers but a right to a *first preference* in the discharge of the funds of the judgment debtor.
5. Article 110 of the Labor Code does not purport to create a lien in favor of workers or employees for unpaid wages either upon all of the properties or upon any particular property owned by their employer. Claims for unpaid wages do *not*, therefore, fall at all within the category of specially preferred claims established under Articles 2241

and 2242 of the Civil Code, except to the extent that such claims for unpaid wages are already covered by *Article 2241, number 6*: "claims for laborer's wages, on the goods manufactured or the work done;" or by *Article 2242, number 3*: "claims of laborers and other workers engaged in the construction, reconstruction or repair of buildings, canals and other works, upon said buildings, canals or other works." To the extent that claims for unpaid wages fall *outside* the scope of Article 2241, number 6 and 2242, number 3, they would come within the ambit of the category of *ordinary preferred credits* under Article 2244.

6. **Mortgage credit. -** A mortgage credit is a *special preferred credit* under Article 2241 of the Civil Code while workers' preference is an *ordinary preferred credit.*
7. **Preference of taxes.** In one case, it was held that there is no merit in the contention of the NLRC that taxes are also absolutely preferred claims only with respect to movable and immovable properties on which they are due. The claim of the government predicated on a tax lien is superior to the claim of a private litigant predicated on a judgment. The tax lien attaches not only from the service of the warrant of distraint of personal property but from the time the tax became due and payable.

REHABILITATION RECEIVERSHIP:

106. What is the effect of rehabilitation receivership on monetary claims of employees?

RUBBERWORLD (PHILS.), INC. VS. NLRC, ET AL., (G. R. NO. 128003, JULY 26, 2000)

ALEMAR'S SIBAL AND SONS, INC. VS. NLRC, ET AL. (G. R. NO. 114761, JANUARY 19, 2000)

(SEE ALSO RUBBERWORLD (PHILS.), INC. VS. NLRC, ET AL., (G. R. NO. 126773, APRIL 14, 1999) where the same issue is discussed and further PREFERENCE IN CASE OF BANKRUPTCY OR LIQUIDATION UNDER ARTICLE 110 OF THE LABOR CODE.

[SEE DISCUSSION IN PART TWO OF THIS PRE-WEEK SERIES]

ATTORNEY'S FEES:

107. What is the amount of attorney's fees that may be allowed by law?

1. In cases of unlawful withholding of wages, the employer may be assessed attorney's fees equivalent to ten percent (10%) of the amount of wages recovered.
2. It shall be unlawful for any person to demand or accept, in any judicial or administrative proceedings for the recovery of wages, attorney's fees which exceed ten percent (10%) of the amount of wages recovered.
3. The attorney's fees may be awarded only when the withholding of wages is declared unlawful.
4. The basis of the 10% attorney's fees is the amount of wages recovered. Should there be any other monetary awards given in the proceedings, the same may not be assessed or subjected to the 10% attorney's fees.

PROHIBITIONS REGARDING WAGES:

108. What is meant by the principle of non-interference in disposal of wages?

Employers are not allowed to interfere in the disposal of wages of employees.

109. What are allowable wage deductions?

Deductions from the wages of the employees may be made by the employer in any of the following cases:

a. When the deductions are authorized by law, (*e.g.*, SSS, Pag-IBIG), including deductions for the insurance premiums advanced by the employer in behalf of the employee as well as union dues where the right to check-off has been recognized by the employer or authorized in writing by the individual employee himself;
b. When the deductions are with the written authorization of the employees for payment to a third person and the employer agrees to do so, provided that the latter does not receive any pecuniary benefit, directly or indirectly, from the transaction;
c. Withholding tax mandated under the National Internal Revenue Code;
d. Withholding of wages because of employee's debt to the employer which is already due;
e. Deductions made pursuant to a judgment against the worker under circumstances where the wages may be the subject of attachment or execution but only for debts incurred for food, clothing, shelter and medical attendance.
f. When deductions from wages are ordered by the court;
g. Deductions made for agency fee from non-union members who accept the benefits under the CBA negotiated by the bargaining union. This form of deduction does not require the written authorization of the non-union member.

110. What are deposits for loss or damage?

No employer shall require his worker to make deposits from which deductions shall be made for the reimbursement of loss of or damage to tools, materials, or equipment supplied by the employer, except when the employer is engaged in such trades, occupations or business where the practice of making deductions or requiring deposits is a recognized one, or is necessary or desirable as determined by the Secretary of Labor and Employment in appropriate rules and regulations.

111. Is withholding of wages and kickback allowed?

No. It shall be unlawful for any person, directly or indirectly, to withhold any amount from the wages of a worker or induce him to give up any part of his wages by force, stealth, intimidation, threat or by any other means whatsoever without the worker's consent.

112. May deduction be allowed to ensure employment or retention of employment?

It shall be unlawful to make any deduction from the wages of any employee for the benefit of the employer or his representative or intermediary as consideration of a promise of employment or retention in employment.

113. What are the retaliatory measures prohibited under the law?

It shall be unlawful for an employer to refuse to pay or reduce the wages and benefits, discharge or in any manner discriminate against any employee who has filed any complaint or instituted any proceeding or has testified or is about to testify in such proceedings.

ADMINISTRATION AND ENFORCEMENT OF LABOR LAWS:

114. What is the legal basis for the exercise by the Secretary of Labor of his visitorial and enforcement powers?

The legal basis is *Article 128* which involves the exercise by the Secretary of Labor and Employment or his duly authorized representatives, of the visitorial and enforcement powers provided therein. *Article 128* applies to inspection cases involving findings of the labor employment and enforcement officers or industrial safety engineers regarding violations of labor standards provisions of the Labor Code and other labor legislation.

Article 128 contemplates situations where the case for violation of labor standards laws and other labor legislations, arose from the routine inspection conducted by the labor employment and enforcement officer or industrial safety engineers of the Department of Labor and Employment, with or without a complaint initiated by an interested party. Here, it is generally the Department of Labor and Employment which initiates the action.

EMPLOYMENT OF WOMEN:

115. What is nightwork prohibition?

Regardless of age, no woman shall be employed or permitted or suffered to work, with or without compensation:

(a) In any industrial undertaking or branch thereof between 10:00 o'clock at night and 6 o'clock in the morning of the following day; or
(b) In any commercial or non-industrial undertaking or branch thereof, other than agricultural, between midnight and 6 o'clock in the morning of the following day; or
(c) In any agricultural undertaking at nighttime unless she is given a period of rest of not less than nine (9) consecutive hours.

116. What are the exceptions to nightwork prohibition?

The nightwork prohibition shall not apply in any of the following cases:

(a) In cases of actual or impending emergencies caused by serious accident, fire, flood, typhoon, earthquake, epidemic or other disasters or calamity, to prevent loss of life or property, or in cases of *force majeure* or imminent danger to public safety;
(b) In case of urgent work to be performed on machineries, equipment or installation, to avoid serious loss which the employer would otherwise suffer;
(c) Where the work is necessary to prevent serious loss of perishable goods;
(d) Where the woman employee holds a responsible position of managerial or technical nature, or where the woman employee has been engaged to provide health and welfare services;
(e) Where the nature of the work requires the manual skill and dexterity of women workers and the same cannot be performed with equal efficiency by male workers;
(f) Where the women employees are immediate members of the family operating the establishment or undertaking; and
(g) Under other analogous cases exempted by the Secretary of Labor and Employment in appropriate regulations.

117. What are the required facilities for women?

Employers are required to:

(a) Provide seats proper for women and permit them to use such seats when they are free from work and during working hours, provided they can perform their duties in this position without detriment to efficiency;
(b) To establish separate toilet rooms and lavatories for men and women and provide at least a dressing room for women;
(c) To establish a nursery in a workplace for the benefit of the women employees therein; and
(d) To determine appropriate minimum age and other standards for retirement or termination in special occupations such as those of flight attendants and the like.

118. What are the acts of discrimination against women expressly prohibited under R. A. 6725 (May 12, 1989)?

It shall be unlawful for any employer to discriminate against any woman employee with respect to terms and conditions of employment solely on account of her sex.

The following are acts of discrimination:

(a) Payment of a lesser compensation, including wage, salary or other form of remuneration and fringe benefits, to a female employee as against a male employee, for work of equal value; and

(b) Favoring a male employee over a female employee with respect to promotion, training opportunities, study and scholarship grants solely on account of their sexes.

There is criminal liability for the willful commission of any of the foregoing unlawful act. *(R. A. 6725, id.)*.

MATERNITY LEAVE BENEFITS:

119. What are maternity leave benefits?

A covered female employee who has paid at least three monthly maternity contributions in the twelve-month period preceding the semester of her childbirth, abortion or miscarriage and who is currently employed shall be paid a daily maternity benefit equivalent to one hundred percent (100%) of her present basic salary, allowances and other benefits or the cash equivalent of such benefits for sixty (60) days subject to the following conditions:

(a) That the employee shall have notified her employer of her pregnancy and the probable date of her childbirth which notice shall be transmitted to the SSS in accordance with the rules and regulations it may provide;
(b) That the payment shall be advanced by the employer in two equal installments within thirty (30) days from the filing of the maternity leave application;
(c) That in case of caesarian delivery, the employee shall be paid the daily maternity benefit for 78 days;
(d) That payment of daily maternity benefits shall be a bar to the recovery of sickness benefits provided by this Act for the same compensable period of sixty (60) days for the same childbirth, abortion or miscarriage;
(e) That the maternity benefits shall be paid only for the first four deliveries after March 13, 1973;
(f) That the SSS shall immediately reimburse the employer of one hundred percent (100%) of the amount of maternity benefits advanced to the employee by the employer upon receipt of satisfactory proof of such payment and legality thereof; and
(g) That if an employee should give birth or suffer abortion or miscarriage without the required contributions having been remitted for her by her employer to the SSS, or without the latter having been previously notified by the employer of the time of the pregnancy, the employer shall pay to the SSS damages equivalent to the benefits which said employee would otherwise have been entitled to, and the SSS shall in turn pay such amount to the employee concerned. *(R. A. 7322, March 3, 1992).*

120. Is an unmarried pregnant woman entitled to maternity leave benefits?

Every pregnant woman in the private sector, whether married or unmarried, is entitled to the maternity leave benefits.

121. Are maternity leave benefits included in the computation of 13th month pay?

Maternity benefits, like other benefits granted by the SSS, are granted to employees in lieu of wages and, therefore, may not be included in computing the employee's 13th-month pay for the calendar year.

122. Are voluntary or self-employed members of the SSS entitled to maternity leave benefits?

Voluntary or self-employed members are not entitled to the maternity benefit because to be entitled thereto, corresponding maternity contributions should be paid by employers. Voluntary or self-employed members have no employers so they do not have maternity contributions.

PATERNITY LEAVE:

123. What is paternity leave?

"Paternity leave" refers to the benefit granted to a married male employee allowing him not to report for work for seven (7) days (for each delivery for the first 4 deliveries) but continues to earn the compensation therefor, on the condition that his spouse has delivered a child or suffered miscarriage for purposes of enabling him to effectively lend support to his wife in her period of recovery and/or in the nursing of the newly-born child. If paternity leave is not availed of, it is not convertible to cash.

124. What is "delivery"?

"Delivery" shall include childbirth or any miscarriage.

125. What is meant by "spouse"?

"Spouse" refers to the lawful wife. For this purpose, lawful wife refers to a woman who is legally married to the male employee concerned.

126. What is meant by "cohabiting"?

"Cohabiting" refers to the obligation of the husband and wife to live together.

THE SOLO PARENTS' WELFARE ACT OF 2000:

127. What is parental leave?

Republic Act No. 8972 (An Act Providing for Benefits and Privileges to Solo Parents and Their Children, Appropriating Funds Therefor and for Other Purposes), otherwise known as *"The Solo Parents' Welfare Act of 2000,"* was approved on November 7, 2000 providing for parental leave of seven (7) days. It is defined as follows:

> "(d) '*Parental leave'* - shall mean leave benefits granted to a solo parent to enable him/her to perform parental duties and responsibilities where physical presence is required."

It bears noting that this leave privilege is an additional leave benefit which is separate and distinct from any other leave benefits provided under existing laws or agreements. Thus, under Section 8 thereof, it is provided:

> "Sec. 8. *Parental Leave.* - In addition to leave privileges under existing laws, parental leave of not more than seven (7) working days every year shall be granted to any solo parent employee who has rendered service of at least one (1) year."

128. What is meant by flexible work schedule under R. A. No. 8972?

Under Republic Act No. 8972, solo parents are allowed to work on a flexible schedule, thus:

> "Sec. 6. *Flexible Work Schedule.* – The employer shall provide for a flexible working schedule for solo parents: *Provided,* That the same shall not affect individual and company productivity: *Provided, further,* That any employer may request exemption from the above requirements from the DOLE on certain meritorious grounds." *(Section 6, Republic Act No. 8972).*

The phrase "*flexible work schedule"* is defined in the same law as follows:

> (e) *"Flexible work schedule"* - is the right granted to a solo parent employee to vary his/her arrival and departure time without affecting the core work hours as defined by the employer. *(Section 3[e], Republic Act No. 8972).*

DISCRIMINATION AGAINST WOMEN:

129. What are the acts considered discriminatory against women under the law?

It shall be unlawful for any employer:

(1) To deny any woman employee the benefits provided for in the law or to discharge any woman employed by him for the purpose of preventing her from enjoying any of the benefits provided under the Labor Code.
(2) To discharge such woman on account of her pregnancy, or while on leave or in confinement due to her pregnancy;
(3) To discharge or refuse the admission of such woman upon returning to her work for fear that she may again be pregnant;
(4) To pay lesser compensation to a female employee as against a male employee for work of equal value.
(3) To favor a male employee over a female employee with respect to promotion, training opportunities, study and scholarship grants solely on account of their sexes.

130. What are stipulations against marriage?

It shall be unlawful for an employer to require as a condition of employment or continuation of employment that a woman employee **shall not get married**, or to stipulate expressly or tacitly **that upon getting married, a woman employee shall be deemed resigned or separated,** or to actually dismiss, discharge, discriminate or otherwise prejudice a woman employee merely **by reason of her marriage**.

131. What is the status of women working in nightclubs, massage clinics, and similar establishments?

Any woman who is permitted or suffered to work, with or without compensation, in any night club, cocktail lounge, massage clinic, bar or similar establishments under the effective control or supervision of the employer for a substantial period of time as determined by the Secretary of Labor and Employment, shall be considered as an employee of such establishment for purposes of labor and social legislation.

They are considered regular employees of said establishments except when the night club operator does not control nor direct the details and manner of their work in the entertainment of night club patrons and, having no fixed hours of work, they may come and go as they please.

EMPLOYMENT OF CHILDREN:

132. What are the relevant terms defined in the law?

(a) *"Child"* refers to any person under 18 years of age.

(b) *"Child labor"* refers to any work or economic activity performed by a child that subjects him/her to any form of exploitation or is harmful to his/her health and safety or physical, mental or psychosocial development.

(c) *"Working Child"* refers to any child engaged as follows:

i. when the child is below eighteen (18) years of age, in work or economic activity that is not child labor as defined in the immediately preceding sub-paragraph, and

ii. when the child below fifteen (15) years of age, (i) in work where he/she is directly under the responsibility of his/her parents or legal guardian and where only members of the child's family are employed; or (ii)in public entertainment or information.

(d) *"Hours of work"* include (1) all time during which a child is required to be at a prescribed workplace, and (2) all time during which a child is suffered or permitted to work. Rest periods of short duration during working hours shall be counted as hours worked.

(e) *"Workplace"* refers to the office, premises or worksite where a child is temporarily or habitually assigned. Where there is no fixed or definite workplace, the term shall include the place where the child actually performs work to render service or to take an assignment, to include households employing children.

(f) *"Public entertainment or information"* refers to artistic, literary, and cultural performances for television show, radio program, cinema or film, theater, commercial advertisement, public relations activities or campaigns, print materials, internet, and other media.

(g) *"Forced labor and slavery"* refers to the extraction of work or services from any person by means of enticement, violence, intimidation or threat, use of force or coercion, including deprivation of freedom, abuse of authority or moral ascendancy, debt bondage or deception.

(h) *"Child pornography"* refers to any representation of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

133. What is the minimum employable age of children?

Children below **fifteen (15) years of age** shall not be employed except:

(1) When a child works directly under the sole responsibility of his/her parents or legal guardian and where only members of his/her family are employed: *Provided, however,* That his/her employment neither endangers his/her life, safety, health, and morals, nor impairs his/her normal development: *Provided, further,* That the parent or legal guardian shall provide the said child with the prescribed primary and/or secondary education; or

(2) Where a child's employment or participation in public entertainment or information through cinema, theater, radio, television or other forms of media is essential: Provided, That the employment contract is concluded by the child's parents or legal guardian, with the express agreement of the child concerned, if possible, and the approval of the Department of Labor and Employment: Provided, further, That the following requirements in all instances are strictly complied with:

(a) The employer shall ensure the protection, health, safety, morals and normal development of the child;

(b) The employer shall institute measures to prevent the child's exploitation or discrimination taking into account the system and level of remuneration, and the duration and arrangement of working time; and

(c) The employer shall formulate and implement, subject to the approval and supervision of competent authorities, a continuing program for training and skills acquisition of the child.

In the above exceptional cases where any such child may be employed, the employer shall first secure, before engaging such child, a work permit from the Department of Labor and Employment which shall ensure observance of the above requirements. *(Section 12, R.A. No. 7610, as amended by R. A. No. 9231, December 19, 2003).*

[NOTE: The term *"child"* shall apply to all persons under **eighteen (18) years of age**.]

134. What is the working hours of a working child?

(1) A child below fifteen (15) years of age may be allowed to work for not more than twenty (20) hours a week: Provided, That the work shall not be more than four (4) hours at any given day;

(2) A child fifteen (15) years of age but below eighteen (18) shall not be allowed to work for more than eight (8) hours a day, and in no case beyond forty (40) hours a week;

(3) No child below fifteen (15) years of age shall be allowed to work between eight o'clock in the evening and six o'clock in the morning of the following day and no child fifteen (15) years of age but below eighteen (18) shall be allowed to work between ten o'clock in the evening and six o'clock in the morning of the following day. *(Section 12-A, R.A. No. 7610, as amended by R. A. No. 9231, December 19, 2003).*

135. How is the working child's income be used or administered?

The wages, salaries, earnings and other income of the working child shall belong to him/her in ownership and shall be set aside primarily for his/her support, education or skills acquisition and secondarily to the collective needs of the family: *Provided,* That not more than **twenty percent (20%)** of the child's income may be used for the collective needs of the family.

The income of the working child and/or the property acquired through the work of the child shall be administered by both parents. In the absence or incapacity of either of the parents, the other parent shall administer the same. In case both parents are absent or incapacitated, the order of preference on parental authority as provided for under the Family Code shall apply. *(Section 12-B, R.A. No. 7610, as amended by R. A. No. 9231, December 19, 2003).*

Trust Fund to Preserve Part of the Working Child's Income. - The parent or legal guardian of a working child below eighteen (18) years of age shall set up a trust fund for at least thirty percent (30%) of the earnings of the child whose wages and salaries from work and other income amount to at least two hundred thousand pesos (P200,000.00) annually, for which he/she shall render a semi-annual accounting of the fund to the Department of Labor and Employment, in compliance with the provisions of this Act. The child shall have full control over the trust fund upon reaching the age of majority. *(Section 12-C, R.A. No. 7610, as amended by R. A. No. 9231, December 19, 2003).*

136. What is meant by "worst form of child labor" under R. A. No. 9231 (December 19, 2003)?

No child shall be engaged in the worst forms of child labor. The phrase **"worst forms of child labor"** shall refer to any of the following:

(1) All forms of slavery, as defined under the *"Anti-trafficking in Persons Act of 2003"*, or practices similar to slavery such as sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including recruitment of children for use in armed conflict; or

(2) The use, procuring, offering or exposing of a child for prostitution, for the production of pornography or for pornographic performances; or

(3) The use, procuring or offering of a child for illegal or illicit activities, including the production and trafficking of dangerous drugs and volatile substances prohibited under existing laws; or

(4) Work which, by its nature or the circumstances in which it is carried out, is hazardous or likely to be harmful to the health, safety or morals of children, such that it:

   (a) Debases, degrades or demeans the intrinsic worth and dignity of a child as a human being; or

   (b) Exposes the child to physical, emotional or sexual abuse, or is found to be highly stressful psychologically or may prejudice morals; or

(c) Is performed underground, underwater or at dangerous heights; or

(d) Involves the use of dangerous machinery, equipment and tools such as power-driven or explosive power-actuated tools; or

(e) Exposes the child to physical danger such as, but not limited to the dangerous feats of balancing, physical strength or contortion, or which requires the manual transport of heavy loads; or

(f) Is performed in an unhealthy environment exposing the child to hazardous working conditions, elements, substances, co-agents or processes involving ionizing, radiation, fire, flammable substances, noxious components and the like, or to extreme temperatures, noise levels, or vibrations; or

(g) Is performed under particularly difficult conditions; or

(h) Exposes the child to biological agents such as bacteria, fungi, viruses, protozoans, nematodes and other parasites; or

(i) Involves the manufacture or handling of explosives and other pyrotechnic products.

137. Who may file a complaint in case of unlawful acts committed against children?

Complaints on cases of unlawful acts committed against children as enumerated herein may be filed by the following:

(a) Offended party;
(b) Parents or guardians;
(c) Ascendant or collateral relative within the third degree of consanguinity;
(d) Officer, social worker or representative of a licensed child-caring institution;
(e) Officer or social worker of the Department of Social Welfare and Development;
(f) Barangay chairman of the place where the violation occurred, where the child is residing or employed; or
(g) At least three (3) concerned, responsible citizens where the violation occurred.

138. Is the employment of children in advertisements prohibited?

No child shall be employed as a model in any advertisement directly or indirectly promoting alcoholic beverages, intoxicating drinks, tobacco and its byproducts, gambling or any form of violence or pornography. *(Section 14, R.A. No. 7610, as amended by R. A. No. 9231, December 19, 2003).*

EMPLOYMENT OF HOUSEHELPERS:

139. Who is a "househelper" or "domestic servant"?

"Househelper" or *"domestic servant"* shall refer to any person, whether male or female, who renders services in and about the employer's home and which services are usually necessary or desirable for the maintenance and enjoyment thereof, and ministers exclusively to the personal comfort and enjoyment of the employer's family.

Household services include the services of family drivers, cooks, nursemaids or family servants, but not the services of laborers in a commercial or industrial enterprise.

The original contract of domestic service shall not last for more than two (2) years but it may be mutually renewed for such periods by the parties.

140. What should be paid by way of compensation to the househelper?

The minimum wage rates of househelpers shall be the basic cash wages which shall be paid to the househelpers in addition to lodging, food and medical attendance.

141. What is the time and manner of payment of wages?

Wages shall be paid directly to the househelper to whom they are due at least once a month. No deductions therefrom shall be made by the employer unless authorized by the househelper himself or by existing laws.

142. May a househelper be assigned to non-household work?

No. Househelper shall be assigned to work in a commercial, industrial or agricultural enterprise at a wage or salary rate lower than that provided for agricultural or non-agricultural workers as prescribed herein.

143. Is an employer obligated to provide a househelper the opportunity for education?

If the househelper is under the age of eighteen (18) years, the employer shall give him or her an opportunity for at least *elementary* education. The cost of education shall be part of the househelper's compensation, unless there is a stipulation to the contrary.

144. Is an employer obligated to provide board and lodging to a househelper?

The employer shall furnish the househelper, free of charge, suitable and sanitary living quarters as well as adequate food and medical attendance.

145. How should a househelper be treated?

A househelper should be treated in a just and humane manner and no physical violence should be inflicted on him.

146. What is the indemnity for unjust termination of services of a househelper?

If the period of household service is fixed, neither the employer nor the househelper may terminate the contract before the expiration of the term, except for a just cause. If the househelper is unjustly dismissed, he or she shall be paid the compensation already earned plus that for fifteen (15) days by way of indemnity. If the househelper leaves without justifiable reason, he or she shall forfeit any unpaid salary due him or her not exceeding fifteen (15) days.

EMPLOYMENT OF HOMEWORKERS & FIELD PERSONNEL:

147. Who is an "industrial homeworker"?

An *industrial homeworker* is a worker who is engaged in industrial homework, a system of production under which work for an employer or contractor is carried out by a homeworker at his/her home. The materials may or may not be furnished by the employer or contractor.

148. Who is a "field personnel"?

A *field personnel* is a non-agricultural employee who regularly performs his duties away from the principal place of business or branch office of the employer and whose actual hours of work in the field cannot be determined with reasonable certainty.

THE SOCIAL SECURITY SYSTEM (SSS):

149. Definition of terms under the SSS Law (R. A. No. 8282).

(a) *Employer*- Any person, natural or juridical, domestic or foreign, who carries on in the Philippines any trade, business, industry, undertaking, or activity of any kind and uses the services of another person who is under his orders as regards the employment,

except the Government and any of its political subdivisions, branches or instrumentalities, including corporations owned or controlled by the Government: Provided, That a self-employed person shall be both employee and employer at the same time.

(b) *Employee* - Any person who performs services for an employer in which either or both mental or physical efforts are used and who receives compensation for such services, where there is an employer-employee relationship: Provided, That a self-employed person shall be both employee and employer at the same time.

(c) *Dependents* - The dependents shall be the following:

(1) The legal spouse entitled by law to receive support from the member;
(2) The legitimate, legitimated or legally adopted, and illegitimate child who is unmarried, not gainfully employed, and has not reached twenty-one (21) years of age, or if over twenty-one (21) years of age, he is congenitally or while still a minor has been permanently incapacitated and incapable of self-support, physically or mentally; and
(3) The parent who is receiving regular support from the member.

(d) *Compensation* - All actual remuneration for employment, including the mandated cost-of-living allowance, as well as the cash value of any remuneration paid in any medium other than cash except that part of the remuneration in excess of the maximum salary credit as provided under Section Eighteen of this Act.

(e) *Monthly salary credit* - The compensation base for contributions and benefits as indicated in the schedule in Section Eighteen of this Act.

(f) *Monthly* - The period from one end of the last payroll period of the preceding month to the end of the last payroll period of the current month if compensation is on hourly, daily or weekly basis; if on any other basis, 'monthly' shall mean a period of one (1) month.

(g) *Contribution* - The amount paid to the SSS by and on behalf of the members in accordance with Section Eighteen of this Act.

(h) *Employment* - Any service performed by an employee for his employer except:

(1) Employment purely casual and not for the purpose of occupation or business of the employer;
(2) Service performed on or in connection with an alien vessel by an employee if he is employed when such vessel is outside the Philippines;
(3) Service performed in the employ of the Philippine Government or instrumentality or agency thereof;
(4) Service performed in the employ of a foreign government or international organization, or their wholly-owned instrumentality: Provided, however, That this exemption notwithstanding, any foreign government, international organization or their wholly-owned instrumentality employing workers in the Philippines or employing Filipinos outside of the Philippines, may enter into an agreement with the Philippine Government for the inclusion of such employees in the SSS except those already covered by their respective civil service retirement systems: Provided, further, That the terms of such agreement shall conform with the provisions of this Act on coverage and amount of payment of contributions and benefits: Provided, finally, That the provisions of this Act shall be supplementary to any such agreement; and
(5) Such other services performed by temporary and other employees which may be excluded by regulation of the Commission. Employees of bona fide independent contractors shall not be deemed employees of the employer engaging the service of said contractors.

(i) *Beneficiaries* - The dependent spouse until he or she remarries, the dependent legitimate, legitimated or legally adopted, and illegitimate children, who shall be the

primary beneficiaries of the member: Provided, That the dependent illegitimate children shall be entitled to fifty percent (50%) of the share of the legitimate, legitimated or legally adopted children: Provided, further, That in the absence of the dependent legitimate, legitimated children of the member, his/her dependent illegitimate children shall be entitled to one hundred percent (100%) of the benefits. In their absence, the dependent parents who shall be the secondary beneficiaries of the member. In the absence of all the foregoing, any other person designated by the member as his/her secondary beneficiary.

(j) *Contingency* - The retirement, death, disability, injury or sickness and maternity of the member.

(k) *Average monthly salary credit* - The result obtained by dividing the sum of the last sixty (60) monthly salary credits immediately preceding the semester of contingency by sixty (60), or the result obtained by dividing the sum of all the monthly salary credits paid prior to the semester of contingency by the number of monthly contributions paid in the same period, whichever is greater: Provided, That the injury or sickness which caused the disability shall be deemed as the permanent disability for the purpose of computing the average monthly salary credit.

(l) *Average daily salary credit* - The result obtained by dividing the sum of the six (6) highest monthly salary credits in the twelve-month period immediately preceding the semester of contingency by one hundred eighty (180).

(m) *Credited years of service* - For a member covered prior to January nineteen hundred and eighty five (1985) minus the calendar year of coverage plus the number of calendar years in which six (6) or more contributions have been paid from January nineteen hundred and eighty five (1985) up to the calendar year containing the semester prior to the contingency. For a member covered in or after January nineteen hundred and eighty five (1985), the number of calendar years in which six (6) or more contributions have been paid from the year of coverage up to the calendar year containing the semester prior to the contingency: Provided, That the Commission may provide for a different number of contributions in a calendar year for it to be considered as a credited year of service.

(n) *Member* - The worker who is covered under Section Nine and Section Nine-A of this Act.

(o) *Self-employed* - Any person whose income is not derived from employment, as defined under this Act, as well as those workers enumerated in Section Nine-A hereof.

(p) *Net earnings* - Net income before income taxes plus non-cash charges such as depreciation and depletion appearing in the regular financial statement of the issuing or assuming institution.

150. Who are covered by the SSS?

(a) Coverage in the SSS shall be **compulsory** upon **all** employees **not** *over sixty (60) years of age and their employers: Provided*, That in the case of **domestic helpers**, their monthly income shall not be less than One thousand pesos (P1,000.00) a month: *Provided, further,* That any benefit already earned by the employees under private benefit plans existing at the time of the approval of this Act shall not be discontinued, reduced or otherwise impaired: *Provided, further,* That private plans which are existing and in force at the time of compulsory coverage shall be integrated with the plan of the SSS in such a way where the employer's contribution to his private plan is more than that required of him in this Act, he shall pay to the SSS only the contribution required of him and he shall continue his contribution to such private plan less his contribution to the SSS so that the employer's total contribution to his benefit plan and to the SSS shall be the same as his contribution to his private benefit plan before the compulsory coverage: *Provided, further,* That any changes, adjustments, modifications, eliminations or improvements in the benefits to be available under the

remaining private plan, which may be necessary to adopt by reason of the reduced contributions thereto as a result of the integration, shall be subject to agreements between the employers and employees concerned: *Provided, further,* That the private benefit plan which the employer shall continue for his employees shall remain under the employer's management and control unless there is an existing agreement to the contrary: *Provided, finally,* That nothing in this Act shall be construed as a limitation on the right of employers and employees to agree on and adopt benefits which are over and above those provided under this Act.

(b) Spouses who devote full time to managing the household and family affairs, unless they are also engaged in other vocation or employment which is subject to mandatory coverage, may be covered by the SSS on a voluntary basis.

(c) Filipinos recruited by foreign-based employers for employment abroad may be covered by the SSS on a voluntary basis.

151. Are self-employed persons covered?

Coverage in the SSS shall also be **compulsory** upon such self-employed persons as may be determined by the Commission under such rules and regulations as it may prescribe, including but not limited to the following:

1. All self-employed professionals;
2. Partners and single proprietors of businesses;
3. Actors and actresses, directors, scriptwriters and news correspondents who do not fall within the definition of the term *"employee"* in Section 8 (d) of this Act;
4. Professional athletes, coaches, trainers and jockeys; and
5. Individual farmers and fishermen.

Unless otherwise specified in the law, all provisions of the SSS LAW applicable to covered employees shall also be applicable to the covered self-employed persons.

152. When does coverage take effect?

Compulsory coverage of the **employer** shall take effect on the **first day** of his operation and that of the **employee** on the **day of his employment**: *Provided,* That the compulsory coverage of the **self-employed person** shall take effect **upon his registration** with the SSS.

153. What is the effect of separation from employment?

When an employee under compulsory coverage is separated from employment, his employer's contribution on his account and his obligation to pay contributions arising from that employment shall **cease** at the **end of the month of separation**, but said employee shall be credited with all contributions paid on his behalf and entitled to benefits according to the provisions of this Act. He may, however, continue to pay the total contributions to maintain his right to full benefit.

154. What is the effect of interruption of business or professional income?

If the self-employed realizes no income in any given month, he shall not be required to pay contributions for that month. He may, however, be allowed to continue paying contributions under the same rules and regulations applicable to a separated employee member: *Provided,* That no retroactive payment of contributions shall be allowed other than as prescribed under Section 22-A of the SSS Law.

155. What are the benefits under the SSS Law?

(1) Monthly pension; (2) Dependents' pension ;(3) Retirement benefits; (4) Death benefits; (5) Permanent disability benefits; (6) Funeral benefit; (7) Sickness benefit; (8) Maternity leave benefit.

THE GOVERNMENT SERVICE INSURANCE SYSTEM (GSIS):

156. Definition of terms under the GSIS Law (R. A. No. 8291).

(a) *Employer*- The national government, its political subdivisions, branches, agencies or instrumentalities, including government-owned or controlled corporations, and financial institutions with original charters, the constitutional commissions and the judiciary;

(b) *Employee or Member*- Any person receiving compensation while in the service of an employer as defined herein, whether by election or appointment, irrespective of status of appointment, including barangay and Sanggunian officials;

(c) *Active Member*- A member who is not separated from the service;

(d) *Dependents*- Dependents shall be the following: (a) the legitimate spouse dependent for support upon the member or pensioner; (b) the legitimate, legitimated, legally adopted child, including the illegitimate child, who is unmarried, not gainfully employed, not over the age of majority, or is over the age of majority but incapacitated and incapable of self-support due to a mental or physical defect acquired prior to age of majority; and (c) the parents dependent upon the member for support;

(e) *Primary beneficiaries*- The legal dependent spouse until he/she remarries and the dependent children;

(f) *Secondary beneficiaries*- The dependent parents and, subject to the restrictions on dependent children, the legitimate descendants;

(g) *Compensation*- The basic pay or salary received by an employee, pursuant to his election/appointment, excluding per diems, bonuses, overtime pay, honoraria, allowances and any other emoluments received in addition to the basic pay which are not integrated into the basic pay under existing laws;

(h) *Contribution*- The amount payable to the GSIS by the member and the employer in accordance with Section 5 of this Act;

(i) *Current Daily Compensation*- The actual daily compensation or the actual monthly compensation divided by the number of working days in the month of contingency but not to exceed twenty-two (22) days;

(j) *Average Monthly Compensation (AMC)*- The quotient arrived at after dividing the aggregate compensation received by the member during his last thirty-six (36) months of service preceding his separation/retirement/ disability/death by thirty-six (36), or by the number of months he received such compensation if he has less than thirty-six (36) months of service: *Provided,* That the average monthly compensation shall in no case exceed the amount and rate as may be respectively set by the Board under the rules and regulations implementing this Act as determined by the actuary of the GSIS: *Provided, further,* That initially the average monthly compensation shall not exceed Ten thousand pesos (P10,000.00), and premium shall be nine percent (9%) and twelve percent (12%) for employee and employer covering the AMC limit and below and two percent (2%) and twelve percent (12%) for employee and employer covering the compensation above the AMC limit;

(k) *Revalued average monthly compensation*- An amount equal to one hundred seventy percent (170%) of the first One thousand pesos (P1,000.00) of the average monthly compensation plus one hundred percent (100%) of the average monthly compensation in excess of One thousand pesos (P1,000.00);

(l) *Lump sum*- The basic monthly pension multiplied by sixty (60);

(m) *Pensioner*- Any person receiving old-age permanent total disability pension or any person who has received the lump sum excluding one receiving survivorship pension benefits as defined in Section 20 of this Act;

(n) *Gainful Occupation*- Any productive activity that provided the member with income at least equal to the minimum compensation of government employees;

(o) *Disability*- Any loss or impairment of the normal functions of the physical and/or mental faculty of a member which reduces or eliminates his/her capacity to continue with his/her current gainful occupation or engage in any other gainful occupation;

(p) *Total Disability*- Complete incapacity to continue with his present employment or engage in any gainful occupation due to the loss or impairment of the normal functions of the physical and/or mental faculties of the member;

(q) *Permanent Total Disability*- Accrues or arises when recovery from the impairment mentioned in Section 2 (Q) is medically remote;

(r) *Temporary Total Disability*- Accrues or arises when the impaired physical and/or mental faculties can be rehabilitated and/or restored to their normal functions;

(s) *Permanent Partial Disability*- Accrues or arises upon the irrevocable loss or impairment of certain portion/s of the physical faculties, despite which the member is able to pursue a gainful occupation.

157. Compulsory membership in the GSIS.

Membership in the GSIS shall be compulsory for all employees receiving compensation who have not reached the compulsory retirement age, irrespective of employment status, except members of the Armed Forces of the Philippines and the Philippine National Police, subject to the condition that they must settle first their financial obligation with the GSIS, and contractuals who have no employer and employee relationship with the agencies they serve.

Except for the members of the judiciary and constitutional commissions who shall have life insurance only, all members of the GSIS shall have life insurance, retirement, and all other social security protections such as disability, survivorship, separation, and unemployment benefits.

158. Effect of Separation from the Service.

A member separated from the service shall continue to be a member, and shall be entitled to whatever benefits he has qualified to in the event of any contingency compensable under this Act.

159. Contributions.

It shall be mandatory for the member and employer to pay the monthly contributions specified in the GSIS Law.

160. GSIS benefits.

Monthly Pension; Separation Benefits; Unemployment or Involuntary Separation Benefits; Retirement Benefits; Permanent Disability Benefits; Temporary Total Disability Benefits; Survivorship Benefits; Funeral Benefits; Compulsory Life Insurance Benefit; Optional Insurance and/or pre-need coverage embracing life, health, hospitalization, education, memorial plans, and such other plans as may be designed by the GSIS, for the member and/or his dependents.

NATIONAL HEALTH INSURANCE PROGRAM (R.A. 7875, as amended by R. A. 9241):

161. Definition of Terms.

(a) *Beneficiary* - Any person entitled to health care benefits under R. A. 7875.

(b) *Benefit Package* - Services that the Program offers to its members.

(c) *Capitation* - A payment mechanism where a fixed rate, whether per person, family, household or group, is negotiated with a health care provider who shall be responsible in delivering or arranging for the delivery of health services required by the covered person under the conditions of a health care provider contract.

(d) *Contribution* - The amount paid by or in behalf of a member to the Program for coverage, based on salaries or wages in the case of **formal sector employees**, and on household earnings and assets, in the case of **self-employed**, or on other criteria as may be defined by the Philippine Health Insurance Corporation ("Corporation").

(e) *Coverage* - The entitlement of an individual, as a member or as a dependent, to the benefits of the program.

(f) *Dependent* - The legal dependents of a member are: 1) the legitimate spouse who is not a member; 2) the unmarried and unemployed legitimate, legitimated, illegitimate, acknowledged children as appearing in the birth certificate; legally adopted or step-children below twenty-one (21) years of age; 3) children who are twenty-one (21) years old and above but suffering from congenital disability, either physical or mental, or any disability acquired that renders them totally dependent on the member of our support; 4) the parents who are sixty (60) years old or above whose monthly income is below an amount to be determined by the Corporation in accordance with the guiding principles set forth in Article I of this Act.

(g) *Diagnostic Procedure* - Any procedure to identify a disease or condition through analysis and examination.

(h) *Emergency* - An unforeseen combination of circumstances which calls for immediate action to preserve the life of a person or to preserve the sight of one or both eyes; the hearing of one or both ears; or one or two limbs at or above the ankle or wrist.

(i) *Employee* - Any person who performs services for an employer in which either or both mental and physical efforts are used and who receives compensation for such services, where there is an employer-employee relationship.

(j) *Employer* - A natural or juridical person who employs the services of an employee.

(k) *Enrollment* - The process to be determined by the Corporation in order to enlist individuals as members or dependents covered by the Program.

(l) *Fee for Service* - A reasonable and equitable health care payment system under which physicians and other health care providers receive a payment that does not exceed their billed charge for each unit of service provided.

(m) *Global Budget* - An approach to the purchase of medical services by which health care provider negotiations concerning the costs of providing a specific package of medical benefits is based solely on a predetermined and fixed budget. Purchase of medical services by which health care provider negotiations concerning the costs of providing a specific package of medical benefits is based solely on a predetermined and fixed budget.

(n) *Health Care Provider* - Refers to:

(1) a health care institution, which is duly licensed and accredited devoted primarily to the maintenance and operation of facilities for health promotion, prevention, diagnosis, injury, disability, or deformity, drug addiction or in need of obstetrical or other medical and nursing care. It shall also be construed as any institution, building, or place where there are installed beds, cribs, or bassinets for twenty-four hour use or longer by patients in the treatment of diseases, injuries, deformities, or abnormal physical and mental states, maternity cases or sanitarial care; or infirmaries, nurseries, dispensaries, rehabilitation centers and such other similar names by which they may be designated; or

(2) a health care professional, who is any doctor of medicine, nurse, midwife, dentist, or other health care professional or practitioner duly licensed to practice in the Philippines and accredited by the Corporation; or

(3) a health maintenance organization, which is entity that provides, offers, or arranges for coverage of designated health services needed by plan members for a fixed prepaid premium; or

(4) a community-based health organization, which is an association of indigenous members of the community organized for the purpose of improving the health status of that community through preventive, promotive and curative health services.

(o) *Health Insurance Identification (ID) Card* - The document issued by the Corporation to members and dependents upon their enrollment to serve as the instrument for proper identification, eligibility verification, and utilization recording.

(p) *Indigent* - A person who has no visible means of income, or whose income is insufficient for the subsistence of his family, as identified by the Local Health Insurance Office and based on specific criteria set by the Corporation in accordance with the guiding principles set forth in Article I of this Act.

(q) *Inpatient Education Package* - A set of informational services made available to an individual who is confined in a hospital to afford him with knowledge about his illness and its treatment, and of the means available, particularly lifestyle changes, to prevent the recurrence or aggravation of such illness and to promote his health in general.

(r) *Member* - Any person whose premiums have been regularly paid to the National Health Insurance Program. He may be a paying member, or a pensioner/retiree member.

(s) *Means Test* - A protocol administered at the barangay level to determine the ability of individuals or households to pay varying levels of contributions to the Program, ranging from the indigent in the community whose contributions should be totally subsidized by the government, to those who can afford to subsidize part but not all the required contributions for the Program.

162. Who are covered by the Philhealth Program?

All citizens of the Philippines shall be covered by the National Health Insurance Program.

163. Benefit package.

The following categories of personal health services granted to the member or his dependents as medically necessary or appropriate, shall include:

(a) ***Inpatient hospital care:***
1) room and board;
2) services of health care professionals;
3) diagnostic, laboratory, and other medical examination services;
4) use of surgical or medical equipment and facilities;
5) prescription drugs and biologicals; subject to the limitations stated in Section 37 of this Act;
6) inpatient education packages;

(b) ***Outpatient care:***
1) services of health care professionals;
2) diagnostic, laboratory, and other medical examination services;
3) personal preventive services; and
4) prescription drugs and biologicals, subject to the limitations described in Section 37 of this Act;

(c) ***Emergency and transfer services***; and
(d) ***Such other health care services that the Corporation shall determine to be appropriate and cost-effective.***.

164. Excluded personal health services.

The benefits granted under the law shall not cover expenses for the services enumerated hereunder *except* when the Corporation, after actuarial studies, recommends their inclusion subject to the approval of the Board:

(a) non-prescription drugs and devices;
(b) alcohol abuse or dependency treatment;
(c) cosmetic surgery;
(d) optometric services;
(e) fifth and subsequent normal obstetrical deliveries; and
(f) cost-ineffective procedures, which shall be defined by the Corporation.

Provided, That, such actuarial studies must be done within a period of three (3) years, and then periodically reviewed, to determine the financial sustainability of including the foregoing personal health services in the benefit package.

165. Who are entitled to the benefits?

A member whose premium contributions for at least three (3) months have been paid within six (6) months prior to the first day of his or his availment, shall be entitled to the benefits of the Program: *Provided,* That such member can show that he contributes thereto with sufficient regularity, as evidenced in his health insurance ID card: and *Provided, further,* That he is not currently subject to legal penalties as provided for in Section 44 of the law.

166. Who are not required to pay monthly contributions to be entitled to the benefits?

The following need not pay the monthly contributions to be entitled to the Program's benefits:

(a) Retirees and pensioners of the SSS and GSIS prior to the effectivity of R. A. 7875;
(b) Members who reach the age of retirement as provided for by law and have paid at least one hundred twenty (120) contributions; and
(c) Enrolled indigents.

-END OF PART ONE-