



Análisis jurídico de la contratación laboral por horas en el contexto ecuatoriano

Legal analysis of hourly labor contracts in the Ecuadorian context


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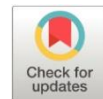
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Palabras clave:

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contratación
laboral por horas,
Ecuador.

Keywords:

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Resumen

Introducción. El presente artículo aborda la temática de contratación laboral por horas, el mismo que, como su nombre lo indica, constituye aquellos en los que las partes acuerdan el monto total de remuneración por cada hora de trabajo. **Objetivo.** Analizar la temática de contratación laboral por horas en el contexto ecuatoriano a partir de la propuesta de gobierno en el referéndum y consulta popular 2024. **Metodología.** Análisis jurídico de la temática de contratación laboral por horas en el contexto ecuatoriano, la cual se basó en un enfoque cualitativo. Se realizó un análisis de la problemática a partir de la revisión de la bibliografía. Se utilizó la técnica de análisis documental para examinar y comprender en detalle la propuesta de enmendar la Constitución de la República y reformar el Código de Trabajo en relación con el contrato de trabajo a plazo fijo y por horas. **Resultados.** En relación con el impacto legal y socioeconómico, la posibilidad de contratar por horas y la flexibilidad laboral conlleva ventajas y desventajas. Por un lado, permite a los empleadores ajustarse a las variaciones del mercado y a los trabajadores, como los estudiantes, adaptar sus horarios laborales a sus necesidades personales. Sin embargo, este tipo de contratación también puede incrementar la inestabilidad laboral, reducir la seguridad en el empleo y perjudicar la protección social de los trabajadores. **Conclusión.** Existen vacíos en el anexo respectivo a la interrogante E del referéndum 2024 en Ecuador. Estos vacíos incluyen temas como la aportación al IESS en esta modalidad, los tiempos mínimos y máximos de las jornadas laborales, los pagos de utilidades y décimos, así como las vacaciones y los pagos por horario nocturno, feriados y fines de semana. Además, no se especifican los mecanismos de control para prevenir la precarización en el sector laboral ni se menciona el costo de la hora/trabajos diferenciados por sector. Estos vacíos dificultan tener una visión generalizada y específica en relación con la enmienda propuesta. **Área de estudio general:** Derecho. **Área de estudio específica:** Derecho laboral. **Tipo de estudio:** Artículo original.

Abstract

Objective. Analyzing the topic of hourly labor contracts in the Ecuadorian context based on the government's proposal in the 2024 referendum and popular consultation. **Methodology.** Legal

analysis of the topic of hourly labor contracts in the Ecuadorian context, which was based on a qualitative approach. An analysis of the problem was conducted based on a review of the literature. The technique of documentary analysis was used to examine and understand in detail the proposal to amend the Constitution of the Republic and reform the Labor Code in relation to fixed term and hourly employment contracts. It is concluded that there are gaps in the respective annex to question E of the 2024 referendum in Ecuador. Results. In relation to the legal and socioeconomic impact, the possibility of hiring by the hour and labor flexibility carries advantages and disadvantages. On the one hand, it allows workers to adjust to market variations and workers, such as students, to adapt their work schedules to their personal needs. However, this type of contracting can also increase job instability, reduce job security and harm workers' social protection. Conclusion. There are gaps in the respective annex to question E of the 2024 referendum in Ecuador. These gaps include issues such as the contribution to the IESS in this modality, the minimum and maximum times of working days, payments of utilities and tenths, as well as vacations and payments for night hours, holidays and weekends. Furthermore, the control mechanisms to prevent precariousness in the labor sector are not specified, nor is the cost of the hour/jobs differentiated by sector mentioned. These gaps make it difficult to have a generalized and specific vision in relation to the proposed amendment.

Introduction

According to the Labor Code (National Congress of Ecuador, 2005), hourly contracts are those in which the parties agree on the total amount of remuneration for each hour of work. These contracts can be used for any type of activity. Either party is free to terminate the contract at any time.

Hourly employment contracts have been a topic of growing interest in the legal and labour fields in recent decades. This form of contracting has emerged as a flexible alternative for employers and workers, allowing them to adapt to the changing needs of the labour market and the demands of a constantly evolving economy. However, its implementation

poses significant challenges and questions from a legal perspective and from the protection of workers' rights.

According to Villacís et al. (2019), labor flexibility is not a new concept, and this debate has arisen and continues as a result of the structural weaknesses of the economy. In this order of ideas, in Europe this topic was discussed in the seventies when oil prices increased. In Latin America, during the nineties, there was a neoliberal wave that promoted flexibility through practices such as outsourcing or hourly contracts, which resulted in job insecurity and lack of social protection, generating various social crises.

In the Ecuadorian context, the acceptance of hourly labor contracts has experienced different stages over time. During certain periods, policies and regulations have been promoted that have facilitated its application, while at other times its impact on job stability and working conditions has been questioned (Nirmal & Fonceca, 2023). It is essential to carry out a detailed analysis of this phenomenon in the specific context of Ecuador, to understand how it has developed and what its influence has been on the labor market.

Some academic studies have addressed hourly labour contracts from various perspectives, providing a theoretical and empirical basis for understanding its legal and socio-economic implications. According to Pohan (2021), the labour flexibility provided by this type of contract can be beneficial for both employers and workers, but it also poses challenges in terms of job security and protection of workers' rights.

On the other hand, Wagenaar et al. (2012) point out that hourly employment can have a significant impact on the quality of life of workers, especially those who depend on this type of employment for their livelihood. These authors highlight the importance of establishing adequate regulations and legal guarantees to protect labour rights and prevent possible abuses.

In the Ecuadorian context, the Organic Law for the Promotion of Youth Employment, Exceptional Regulation of the Working Day, Severance Pay and Unemployment Insurance (Presidency of the Republic of Ecuador, 2016) introduced specific provisions related to hourly employment contracts in the country. This law sought to promote the employability of young people and make working conditions more flexible, allowing hourly contracts in certain cases.

In this regard, according to the National Electoral Council (2024a) regarding the 2024 referendum and specifically, in question E it established:

Do you agree with amending the Constitution of the Republic and reforming the Labor Code for fixed-term and hourly employment contracts, when

entered into for the first time between the same employer and employee, without affecting the acquired rights of workers...?

Likewise, the respective annex establishes the replacement of article 327 of the Constitution of the Republic (National Constituent Assembly, 2008), which establishes that, “The employment relationship between workers and employers will be bilateral and direct.” It also mentions that:

Any form of precarious employment, such as labour intermediation and outsourcing in the company's or employer's own and usual activities, hourly labour contracts, or any other type of employment that affects the rights of workers individually or collectively, is prohibited. Non-compliance with obligations, fraud, simulation, and unjust enrichment in labour matters will be penalized and sanctioned in accordance with the law (p. 102).

As considered within the Popular Consultation carried out by the National Electoral Council (2024a) in which it proposes the replacement of article 327 by:

The employment relationship between workers and employers shall be bilateral and direct. Any form of precarious employment, such as labour intermediation and outsourcing in the company's or employer's own and usual activities, or any other form that affects the rights of workers individually or collectively, is prohibited. Fixed-term contracts by hours, when entered into for the first time between the same employer and worker, without affecting the acquired rights of workers, do not constitute forms of precarious employment. Failure to comply with obligations, fraud, simulation, and unjust enrichment in labour matters shall be penalized and sanctioned in accordance with the law.

On the other hand, within the Popular Consultation 2024, of the National Electoral Council (2024a) in which it proposes the replacement of art. 14 of the Labor Code (National Congress of Ecuador, 2015), which mentions:

The individual open-ended employment contract is typical of stable or permanent employment contracts, and its termination will only occur for the reasons and procedures established in this Code. The following are excepted from the provisions of the previous paragraph: a) Contracts for specific work, which are not usual in the activity of the company or employer; b) Temporary, occasional and seasonal contracts; c) Apprenticeship contracts; and, d) Other contracts determined by law (p. 9).

As described within the 2024 Popular Consultation of the National Electoral Council (2024a) in which it establishes that:

The individual open-ended employment contract is the typical form of stable or permanent employment contract, and its termination will only occur for the reasons and procedures established in this Code. The following are excepted from the provisions of the previous paragraph: a) Fixed-term contracts; b) Hourly contracts; c) Contracts for specific work, which are not usual in the company or employer's activity; d) Temporary, occasional and seasonal contracts; e) Apprenticeship contracts...

In light of the problem analyzed, it is worth highlighting that, on Sunday, April 21, 2024, the 2024 referendum and popular consultation was held in Ecuadorian territory, resulting in the acceptance of nine of the eleven proposed questions. Specifically, with regard to question E, the answer to the study was 30.50% with the yes option and 69.50% with the no option (National Electoral Council, 2024b).

For the reasons stated above, the development of this article arises from the need to analyze the issue of hourly labor contracts in the Ecuadorian context based on the government's proposal in the 2024 referendum and popular consultation, where in question E, it establishes this type of work, as well as its respective amendment in the Constitution of the Republic of Ecuador and the reform of the Labor Code in relation to the fixed-term and hourly employment contract.

Methodology

The methodology used in this study corresponds to a legal analysis of the issue of hourly labor contracts in the Ecuadorian context, which was based on a qualitative approach. An analysis of the problem was carried out based on the review of the existing bibliography on the subject, which included scientific articles, books and relevant legislation. The documentary analysis technique was used to examine and understand in detail the proposal to amend the Constitution of the Republic and reform the Labor Code in relation to the fixed-term and hourly employment contract, through the review of previous research and scientific articles referring to the problem.

The instrument used was the legal and regulatory framework in force in Ecuador, including the Constitution and the Labor Code. The method used was legal analysis, where the arguments and proposals put forward for the legalization of this type of contract in Ecuador were examined and critically evaluated, considering their impact on the acquired rights of workers and job stability.

Results

According to the provisions of the Constitution of the Republic of Ecuador (National Constituent Assembly, 2008) in its article 326, where it is observed that, The labor interaction between employees and employers will be governed by an approach of

equality and direct communication, avoiding any type of precariousness. Likewise, in its art. 327, the prohibition of labor intermediation and outsourcing in usual company activities aims to promote a direct labor relationship and avoid forms of precariousness. This measure seeks to protect the rights of workers and guarantee fair and safe working conditions. If you need more information or assistance on this topic, do not hesitate to ask.

In this context, within the Labor Code in its art. 14 it indicates that the individual indefinite-term employment contract is the usual form of contracting, but exceptions are allowed for contracts for a specific work, eventual, occasional, seasonal and apprenticeship contracts (National Congress of Ecuador, 2015).

In this order of ideas, according to the study carried out by the Latin American Strategic Center for Geopolitics (CELAG, 2021) for more than three decades in Latin American countries, such as Colombia, Brazil and Peru, it has been shown that flexibilization measures, such as hiring labor by hour, reduce workers' rights without stimulating the creation of decent employment.

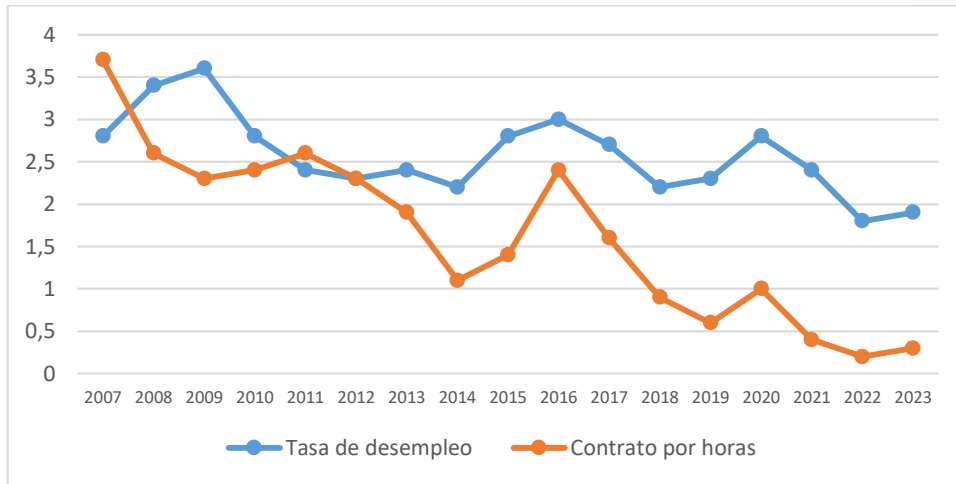
The proposed amendment therefore lacks specificity in several crucial aspects for employees on hourly contracts. First, there is no detail on how contributions to the IESS will be handled, which creates uncertainty and a lack of transparency regarding the social security of these workers. Furthermore, the absence of clear limits on working hours in this modality could lead to exploitation and burnout of employees. The lack of clarity in the payment of benefits such as profits, bonuses, vacations and compensation for night shifts, holidays and weekends poses a risk of violating the basic labor rights of these workers. Finally, the omission of concrete measures to prevent job insecurity and guarantee decent working conditions endangers the well-being and stability of this sector of the workforce. It is essential to address these deficiencies and establish clear and equitable provisions that protect the rights and dignity of workers on hourly contracts.

In terms of legal and socio-economic impact, the possibility of hiring by the hour and flexible working hours has advantages and disadvantages. On the one hand, it allows employers to adjust to market fluctuations and workers, such as students, to adapt their working hours to their personal needs. However, this type of hiring can also increase job instability, reduce job security and undermine workers' social protection.

Regarding the statistics on the decrease in this type of contract in the National Survey of Employment, Unemployment and Underemployment (ENEMDU) between 2007 and 2023, a downward trend is observed in relation to unemployment, as shown in Figure 1 (National Institute of Statistics and Censuses [INEC], 2023).

Figure 1

ENEMDU statistics between 2007-2023 on unemployment and hourly contracts



Note:The figure shows the historical values of hourly contracts versus unemployment.

Fountain:National Institute of Statistics and Census (INEC, 2023)

In fact, there is a positive relationship between both variables, which is quite strong and statistically significant (0.63). This means that as hourly employment increases, unemployment also increases, and vice versa, as can be seen in Figure 2 (INEC, 2023).

Figure 2

ENEMDU statistics between 2007-2023 on unemployment and hourly contracts

		Hourly contract	Rate of performance
Hourly contract	Pearson correlation	1	,634**
	Next (bilateral)		0.006
	N	17	17
Unemployment rate	Pearson correlation	,634**	1
	Next (bilateral)	0.006	
	N	17	17

Note: The figure shows the Pearson correlation between the variables.

Fountain:National Institute of Statistics and Census (INEC, 2023)

On the other hand, in relation to part-time work, Lambert (2008) indicates that the results suggest that companies use part-time contracts to achieve labour flexibility. Furthermore, within companies, workers in certain jobs run a high risk of working part-time with schedules that can vary considerably, which also affects their income (p. 1215).

As regards full-time work, Lambert (2008) mentions that the fact that all the employers studied made it clear that they do not guarantee a minimum number of working hours to employees, even on full-time contracts, suggests that in the future there could be even more variations in the hours provided in low-skilled jobs (p. 1216).

Based on these elements, it can be observed that hourly contracts provide flexibility, but can also generate job insecurity. Therefore, the response "no" in the popular consultation by the majority of the country's working population must be emphatic to avoid the deterioration of the working conditions of people in the country with hourly contracts.

On the other hand, the study carried out by Pohan (2021) found that the elimination of hourly employment contracts through a Legislative Decree violated the right to work. Currently, the unemployment rate is the highest recorded according to INEC data, which has generated economic distress in many Ecuadorian families. Hourly employment previously especially helped university students find employment that fit their study schedules and allowed them to financially support themselves for their subsistence.

Discussion

The popular consultation of April 2024 undoubtedly showed the refusal of Ecuadorians to return to the era of job insecurity, where contracts based on working hours were maintained. However, history has established that the contractual modality of the time only benefited large business groups and was disadvantageous to the group of workers. In this regard, Villacís et al. (2019) indicates that outsourcing or contracts based on hours resulted in job insecurity and a lack of social protection, generating various social crises.

The above is supported by what was mentioned by CELAG (2021), which indicates that flexibilization measures, such as hourly labor contracts, reduce workers' rights without stimulating the creation of decent employment. Furthermore, in the Ecuadorian context, the ENEMDU figures between 2007 and 2023 show a downward trend in relation to unemployment.

Partially, Mendieta's study (2023) mentions that this type of contract provides benefits for both employers and workers, however, it emphasizes the importance of job security and protection of workers' rights. Likewise, Wagenaar et al. (2012) consider it important to establish adequate regulations and legal guarantees to protect labor rights and avoid possible abuses.

However, according to the study carried out by Salgado (2023), from a positive perspective, labour flexibility can be seen as an opportunity to provide new employment options by implementing policies such as teleworking, digital platforms and hourly work. These measures allow employees to feel motivated when performing their work, which in turn leads to higher performance and reduced associated expenses.

In support of the above, Mendieta's study (2023) determined that hourly hiring previously especially helped university students find employment that fit their study schedules and allowed them to financially support themselves for their subsistence.

Conclusions

- Hourly employment contracts can cause legal, social and economic problems for both employers and workers. When fundamental rights and principles of an employment relationship are violated, such as legally established wages and access to all social benefits, job stability and the payment of fair wages are affected. This results in increased labour exploitation and economic and social inequality for workers who do not have a permanent employment contract.
- It is important to note that the proposed amendment seeks to establish a legal framework for fixed-term and hourly employment contracts, with the aim of providing labour flexibility and adapting to the current needs of the labour market. However, it is crucial to ensure that this reform does not undermine the acquired rights of workers, as well as the fundamental principles of labour law, such as the protection of labour rights, equal treatment and the non-precarisation of employment.
- In addition, there are gaps in the response to question “E”, such as the topic of the contribution to the IESS in this modality, the minimum and maximum limits of working hours, payments of profits and bonuses, as well as vacations and payments for night shifts, holidays and weekends. There is also the lack of control mechanisms to prevent precariousness in the labor sector and the difficulty in having a general and specific vision in relation to the amendment, such as costs per hour and differentiated work by sector.
- It is advisable to carry out comparative studies between the Ecuadorian context and other Latin American countries in relation to hourly contracts. This will allow obtaining a broader and comparative view of the legal, social and economic implications of this type of contract in different contexts. In addition, it is important to consider aspects such as social security, minimum and maximum working hours, profit and tenth payments, as well as vacations and payments for night hours, holidays and weekends.

Conflict of interest

The authors declare that there is no conflict of interest in relation to the submitted article.

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