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The Classification of Multi-Level Marketing Participants under Norwegian Labour Law - An analysis of participant classification within Norwegian Labour Law

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Sammendrag The classification of workers as either employees or independent contractors, is crucial for establishing the extent of the workers' protection under national and international law. The differences between the activities of an independent contractor, with minimal protection, and an employee, with extensive legislative protection, may be small, but are nonetheless consequential. In recent years, this issue has gained prominence with the rise of platform workers and other non-traditional work forms, where some workers may have a need for the same protection as employees, but under traditional assessments would be considered as independent contractors.

This Article examines the classification of participants in Multi-Level Marketing (MLM), who have historically been classified as independent contractors. However, recent legal and factual developments suggest that they may deserve a reclassification. Thus, the focus of this Article is on how MLM participants should be classified in light of the legal definition of the term «employee», in Section 1-8 (1) of the Norwegian Working Environment Act (WEA).

Whether or not an MLM participant should be classified as an employee has to be determined based on a case-by-case assessment. However, utilizing participation agreements from four prominent MLM companies operating in Norway, this Article provides a general evaluation of the classification of MLM participants.

The analysis is primarily grounded in Norwegian legal sources. However, Norwegian law must be interpreted in accordance with Norway's international obligations, a point which is particularly pertinent in the realm of Norwegian Labour Law, since this field is considerably influenced by Norway's international obligations, and especially those of EU/EEA law. Nonetheless, Norwegian law is presumed to comply with relevant international obligations. Thus, the assessments in this Article are primarily based on Norwegian law, supplemented by international sources where applicable.

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1. Abstract[1]

The classification of workers as either employees or independent contractors, is crucial for establishing the extent of the workers' protection under national and international law. The differences between the activities of an independent contractor, with minimal protection, and an employee, with extensive legislative protection, may be small, but are nonetheless consequential. In recent years, this issue has gained prominence with the rise of platform workers and other non-traditional work forms, where some workers may have a need for the same protection as employees, but under traditional assessments would be considered as independent contractors.

This Article examines the classification of participants in Multi-Level Marketing (MLM), who have historically been classified as independent contractors. However, recent legal and factual developments suggest that they may deserve a reclassification. Thus, the focus of this Article is on how MLM participants should be classified in light of the legal definition of the term «employee», in Section 1-8 (1) of the Norwegian Working Environment Act (WEA).[2]

Whether or not an MLM participant should be classified as an employee has to be determined based on a case-by-case assessment. However, utilizing participation agreements from four prominent MLM companies operating in Norway, this Article provides a general evaluation of the classification of MLM participants.

The analysis is primarily grounded in Norwegian legal sources. However, Norwegian law must be interpreted in accordance with Norway's international obligations, a point which is particularly pertinent in the realm of Norwegian Labour Law, since this field is considerably influenced by Norway's international obligations, and especially those of EU/EEA law.[3] Nonetheless, Norwegian law is presumed to comply with relevant international obligations.[4] Thus, the assessments in this Article are primarily based on Norwegian law, supplemented by international sources where applicable.

2. Introduction

2.1 Topic and Problem Statement

The topic of this Article is the term «employee» in the Working Environment Act (WEA), Section 1-8 (1), and whether the term should be applied to participants in «Multi-Level Marketing» (MLM). The Working Environment Act serves as a safeguarding legislation that places the employee at the core of rights and protections. Therefore, the determination of whether individuals are employees under Section 1-8 (1) of the WEA is crucial in defining the extent of their legal protections within the realm of labour law.

The content and scope of the term «employee» is dynamic in nature and is subject to evolution in line with societal changes, case law, and legislative amendments. The most recent legislative revision to the term, within the Working Environment Act, was enacted in 2023 and came into force on January 1, 2024.[5] The amendment allowed for the reclassification of certain workers who were previously not considered to be employees.[6]

One specific group of workers that has historically fallen outside the scope of the Working Environment Act, is participants in MLM. MLM is a direct sales model characterized by hierarchical levels, where individuals – or «participants» – engage in direct selling and marketing to consumers, while also recruiting others to perform similar tasks. Participants earn financial gain through a combination of sales, recruitment, and commissions on sales made by their recruited participants.[7]

Traditionally, MLM participants have been classified as «independent contractors», thereby excluding them from the protections provided by the Working Environment Act. This Article aims to examine the classification of MLM participants in light of the legal definition outlined in Section 1-8 (1) of the Working Environment Act . The central issue addressed in this Article is how participants in MLM should be classified under Norwegian Labour Law, following the legislative changes which came into force in January 2024.

2.2 Topicality

The distinction between employees and independent contractors has frequently been addressed in case law, in legislative preparatory works, and by legal scholars. Despite this, there were 25 court cases related to the term «employee» within the Norwegian Working Environment Act, during the period of 2010-2020, with three of these cases reaching the Supreme Court.[8] The frequency of lawsuits highlights the uncertainty surrounding the interpretation of the term «employee» and underscores the continued relevance of the topic. Additionally, the introduction of changes to the legal definition of the term «employee», makes an analysis of the legal classification of some occupational groups even more relevant. Among these occupational groups, MLM participants hold particular interest for several reasons.

Firstly, there has been a notable absence of discussion regarding the classification of MLM participants within the context of labour law. While there is one Supreme Court ruling from 1984 that concerns the topic,[9] this judgment pertained to a claim of employee status within the contractual relationship of two participants, rather than the contractual relationship between a participant and the MLM business itself. The latter is the focus of this Article.[10] The judgment has been interpreted by many to imply that all MLM participants should be

classified as contractors.[11] Beyond this ruling, only limited attention has been given to the employment status of MLM participants.

Secondly, the concept of worker protection has undergone dynamic development since the Tupperware ruling in 1984. The understanding of the term «employee» and the perception of who should benefit from labour law protection have both evolved over the past 39 years. Additionally, societal and technological advancements have brought about changes in the overall working life, including within the MLM industry. The work of MLM participants is now conducted differently compared to 39 years ago;[12] a change which, alongside legal developments, may have influenced the perception of the participants' need for protection under labor law.

Furthermore, MLM participants find themselves in a particularly vulnerable position within the labour market. The MLM industry has often faced criticism for exploiting participants, employing unethical recruitment tactics, providing misleading information about income opportunities, and engaging in pyramid scheme-like practices. Classifying MLM participants as employees under the Working Environment Act can offer them some protection against these issues.[13] The criticism is not entirely unfounded and is supported by research findings, particularly regarding income opportunities for participants. The research is often based on American MLM participants and usually indicates a low probability of achieving net profit. For instance, Dr. Jon M. Taylor estimates that 99.6% of participants in recruitment-driven MLM businesses do not achieve net profit, while organizations like AARP estimate that around 75% of MLM participants do not achieve net profit.[14] These estimates are not necessarily directly transferable to Norwegian or European conditions; however, they still provide an indication of MLM participants' income opportunities, in particular given that many MLM companies operate with uniform compensation models across national borders.

Given these circumstances, conducting a more detailed analysis of how MLM participants should be classified under labour law is highly relevant.

2.3 Clarification of Terms and Concepts

2.3.1 «Multi-Level Marketing» and «Multi-Level Marketing» companies

The first key concept for this Article is «Multi-Level Marketing» (MLM). MLM, also referred to as «network marketing,» is a form of direct selling organized into hierarchical levels. Participants in MLM businesses are responsible for marketing and distributing the company's products and services, as well as recruiting new participants to undertake similar responsibilities.[15] [16] Financial profit is achieved through product and service sales, as well as the recruitment of new participants.[17] By engaging in a combination of these activities, participants can be promoted to higher levels within the organization, where both income opportunities and responsibilities will typically increase. The recruitment aspect gives meaning to the name «Multi-Level Marketing», as it creates a pyramid-like matrix of distributors at various levels within the business.

Unlike traditional businesses that sell products and services, MLM businesses utilize individuals to sell products and market them directly to consumers. This approach reduces the company's expenses arising from traditional mass media advertising campaigns, as well as the costs associated with maintaining physical offices and storefronts. Participants are often offered financial incentives to recruit their own competition – meaning new participants – through percentage commissions on the sales and personal purchases of those they recruit.[18] This is a distinctive feature of the MLM model and can lead to a saturation of the market, especially as the primary marketing takes place in personal networks where participants often have connections in common with potential recruits.

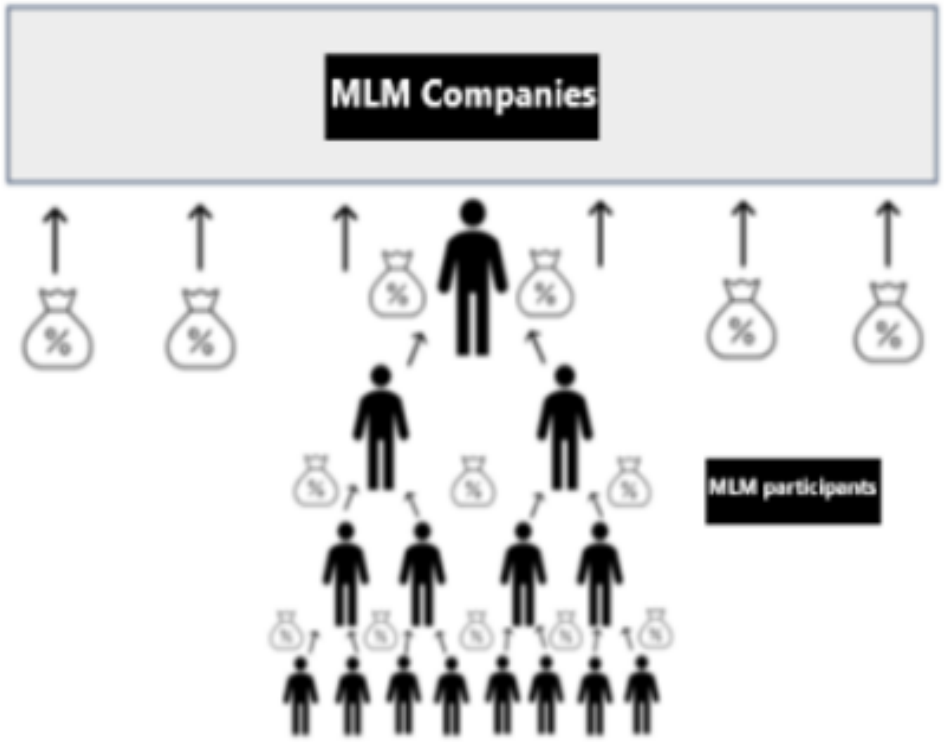

Figure 1: The distribution of financial gain in MLM.

Here, two distinctions must be made.

Firstly, MLM is not the same as illegal pyramid schemes. While MLM businesses utilize a distribution model with a pyramid structure similar to that of illegal pyramid schemes, they differ in that MLM businesses engage in sales of goods and services.[19] The main rule is that MLM is legal, provided the majority of the company's earnings stem from the sale of actual goods or services.[20] It is important to note that the MLM model has been utilized to camouflage illegal pyramid schemes,[21] for which many MLM companies have faced criticism. However, a more detailed discussion of this issue falls outside the scope of this Article.[22]

Secondly, MLM is not synonymous with direct sales. Although MLM companies use the direct sales method, not all companies that engage in direct sales are MLM companies. Direct selling refers to companies using salespeople who make direct contact with buyers, usually without a store as an intermediary. In other words, the intermediary is replaced by an independent contractor.[23] As stated above, it is nonetheless the recruitment aspect that is the strongest characteristic of MLM, and this aspect is not found in pure direct sales. Although there are similarities between pure direct sales and MLM, the presentation that follows, shows that the relationship between the participant and the MLM business is involves distinctive differences.

2.3.2 Participant

In this Article, the term «participant» or «MLM participant» refers to an individual who has been recruited to participate in MLM. For the purpose of this Article, it is assumed that the participant operates under an agreement with the MLM company, which classifies him/her as an independent contractor, not an employee.[24] [25] [26] [27] The wording of the agreement when differentiating the participant's role from that of an employee is of secondary importance; the important thing is that the agreement states that the participant is not an employee. To avoid unnecessary confusion, the individuals recruited by a participant into the MLM business will be referred to as the latter's «downline», and conversely, the participant who has recruited another participant will be referred to as the latter's «upline».

There are participants who are inactive in their roles. If such inactivity stems from the participant choosing not to perform work, he or she will not be covered by the term «participant» in this Article. However, lack of profit despite actually performing work, or inactivity imposed by external factors, will not be regarded as inactivity in this context.

Here, it is necessary to further clarify the term «participant», as used in connection with Tupperware's participants. Tupperware has a somewhat special participant structure, where new participants enter into contractual relationships with participants at a higher level in the matrix. Furthermore, it is the participants at the higher levels who enter into agreements directly with the company. Thus, the new participants do not always have a direct contractual relationship with Tupperware. The extent to which this is true is debatable, as all participant agreements are standard agreements produced by the company, and participants at all levels must adhere to a comprehensive system of guidelines designed by Tupperware. However, a detailed examination of whether these participants actually have an agreement with Tupperware, is beyond the scope and subject matter of this Article. Consequently, the focus of the classification of Tupperware participants will be on the participants who have entered into a contractual relationship with Tupperware as a company.

2.3.3 Participant Agreement

In this Article, a «participation agreement» means the contract that establishes the central obligations in the contractual relationship between the MLM business and the participant. Participant agreements are often detailed and regulate several matters, including compensation, rules of conduct, and rules on the termination of the contractual relationship. It is these agreements that will be used to map the nature of the participants' work and their relationship with the MLM business.

2.4 Delimitation

For the purposes of this Article, the scope of the topic must be delineated in three ways.

Firstly, the focus of this Article is the term «employee», as stated in WEA Section 1- 8 (1). The term holds significance within several legal fields and is defined in several laws. In some legal fields and laws, the meaning of the term coincides with the Working Environment Act's use of «employee»; this applies, for example, to the term «employee» in the Holidays Act [28] Section 2 (1), and also the Labour Disputes Act [29] Section 1 letter a.[30] For other legal areas and laws, however, the terms do not coincide. However, the scope of this Article does not allow for an analysis of the content of the term «employee» within all legal fields and laws, and thus, the Article is limited to the substance of the term «employee» in the WEA.

Secondly, there will be no independent assessment of whether an employment contract exists between MLM companies and their participants. The term «employee» is typically reserved for relationships based on employment contracts.[31] [32] Consequently, work performed on a different basis than an agreement, does not usually qualify for utilization of the term «employee». Furthermore, the assessment of the existence of an employment contract is closely linked to the assessment of whether an individual should be regarded as an employee.[33] The working relationships between the MLM participants and the MLM companies are undoubtedly based on contracts, and given that the evaluation of whether participation agreements constitute employment agreements largely overlaps with the employee classification assessment, the issue of employment agreements will not be addressed separately.

Thirdly, this Article will not discuss whether the MLM businesses should be defined as employers, under WEA Section 1-8 (2). The participants' possible classification as employees owes little to no reality if no employment relationship has been entered into with an employer. The employer is the primary obligor of the Working Environment Act,[34] and WEA Section 2-1 stipulates that the employer is responsible for compliance with the Act’s provisions. Furthermore, an employer is defined as «anyone who has employed an employee as mentioned in the first paragraph», cf. WEA Section 1-8 (2). According to the same Section, the provisions of the Act relating to employers apply correspondingly to «anyone who manages the business in the employer's place». In other words, the term «employer» is primarily defined by the employment relationship. Therefore, it is natural to determine the identity of the employer based on who entered into the employment relationship with the employee and who is considered the »strong party» of the contractual relationship.[35] The revision of WEA

Section 1-8 in January of 2024, intended to clarify this connection between the employee and employer definitions.[36] Thus, if the MLM participants are classified as employees, the MLM companies will automatically be regarded as employers under this Article.

Additionally, it is this relationship between the participants and the businesses that is the basis for the assessment of the participants' employee status. The participants' employee status in relation to other participants – which was the subject of the assessment in the *Tupperware* case – will not be addressed.

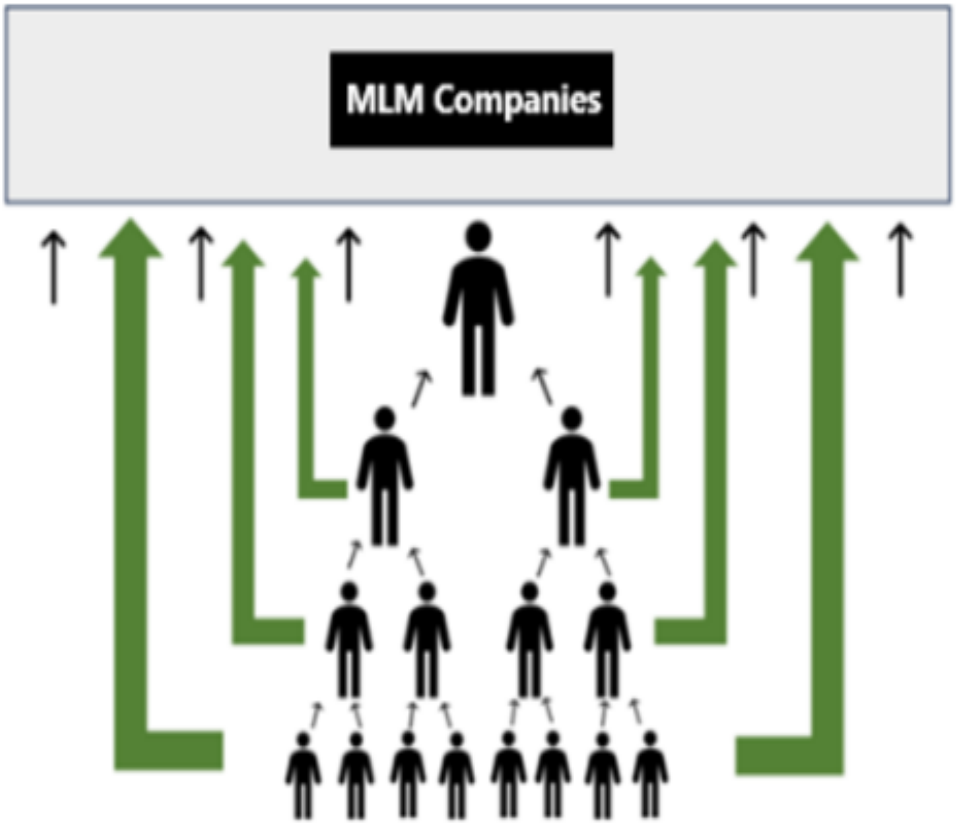

Figure 2: The contractual relationship considered in this Article

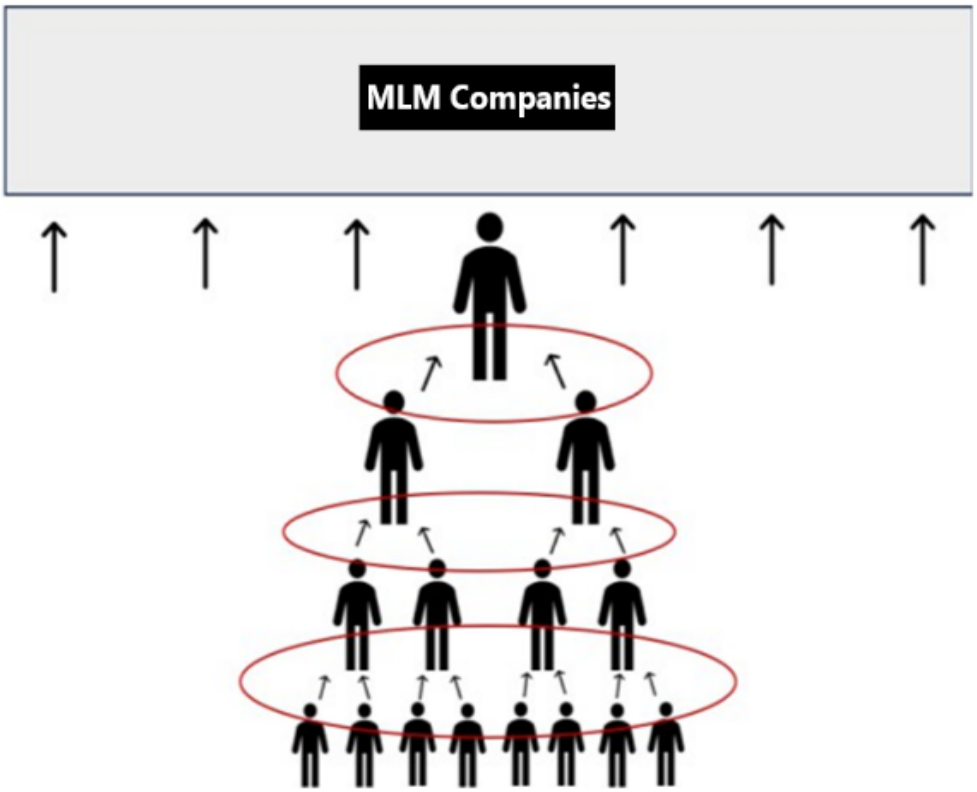

Figure 3: The contractual relationship considered in the Tupperware case

2.5 Methodological Starting Points

The primary legal source for this Article is WEA Section 1-8 (1).

Furthermore, the preparatory works associated with the amendment of WEA Section 1-8 are of particular importance when interpreting Section 1- 8 (1) and its new wording. These preparatory works hold importance because there are limited other legal sources that specifically address WEA Section 1-8 (1) in its amended form.

However, this does not imply that previous preparatory works, legal theory, and case law in this field, are disregarded. The preparatory works for the amendment specify that previous case law, assessment factors, and preparatory works, all remain relevant when interpreting the amended Section 1-8 (1). This is because the amendment essentially confirms existing law through statutory means.[37] Thus, legal sources pertaining to the provision as it appeared before the amendment will be used frequently. The same applies to legal sources relating to the employee term from the time before the current Working Environment Act of 2005 entered into force.[38] Nevertheless, these legal sources will be utilized in light of the considerations that the amendment intends to safeguard, since the Ministry has stated that the amendment may result in more individuals gaining employee status.[39]

Furthermore, the scope of the term «employee» is not an unknown topic within labour law. The delimitation of the term has long been a topic of discussion, and thus, there exists a lot of legal theory, case law, and preparatory works regarding the general scope of the term.

Nevertheless, the specific topic of this Article – namely the classification of MLM participants – has received little attention in legal sources. This can partly be attributed to the fact that the issue was raised in the *Tupperware* case, where the Supreme Court concluded that an MLM participant was not an employee. The judgment still holds relevance and is constantly cited and utilized in case law from the Supreme Court and lower courts. However, and as mentioned, the ruling concerned the contractual relationship between a participant and its upline, not the relationship between the participant and the business itself. In addition, the

scope of the term «employee», and MLM work, has evolved since the judgment was handed down, meaning that the *Tupperware* judgment is not necessarily fully applicable to today's MLM participants. Consequently, the judgment will be used to shed light on the aspects that are still relevant for participants today.[40]

Beyond this, there are few Norwegian legal sources that examine the classification of MLM participants. The regulations are «designed with traditional businesses in mind»,[41] and most legal sources therefore cover more traditional work forms. MLM work is not traditional work, which makes the classification challenging. Thus, the Article will use Norwegian and international legal sources that deal with similar and more untraditional occupational groups, and occasionally refer to legal developments in the area. In particular, parallels will be drawn to platform workers.

Finally, it should be noted that Norwegian law must be interpreted in accordance with Norway's international obligations.[42] This is particularly relevant for the rules of Norwegian labour law, as these are considerably influenced by Norway's international obligations, especially by EU/EEA law.[43] Nonetheless, Norwegian law is presumed to comply with relevant international law obligations.[44] Assessments related to the term «employee» will therefore be made primarily on the basis of Norwegian legal sources, supplemented with international sources where relevant.

2.6 Factual Starting Points

Today, there are various MLM companies that offer several different services and products, and the specific assessment of a participant's employee status may turn out differently, depending on the specific MLM company and other nuances.[45] For the purposes of this Article, it is not realistic to examine all MLM companies or individual participants. Therefore, this Article draws upon some of the most prominent MLM businesses in Norway, in order to map similarities that apply across the MLM industry. Differences across the industry and internally among participants will also be highlighted where relevant. The MLM companies that will be used as reference points in this Article are: Nu Skin, Forever Living, Herbalife and Tupperware.

As part of the work on the Article, I have used the participation agreements of the four MLM companies mentioned above. The Norwegian participation agreements for Nu Skin and Forever Living are publicly available on the internet. Furthermore, I was sent Herbalife's Norwegian participation agreement by an active participant, as well as consent to use it. I contacted Tupperware and requested access to their participation agreement, without response. However, Tupperware's U.S. participation agreement is publicly available on the internet. The content of the U.S. participation agreement may differ somewhat from the Norwegian one; however, a review of other participation agreements reveals significant similarities across national borders. Tupperware's American participation agreement will therefore be utilized, in the same way as the other three participation agreements, to shed light on the topic of this Article. I have not obtained approval from the companies to register as a pro forma participant in order to access unpublished participation agreements. Registering without approval may raise ethical concerns; therefore, I have refrained from doing so.

Another characteristic of MLM is that some of the participants' perceived obligations are not clearly stated in the participation agreements, but rather communicated through closed forums.[46] However, obtaining and utilizing such information in accordance with research ethics guidelines and proper source referencing practices is challenging, and therefore, this information is not included in this Article.

2.7 Continued Presentation

In the following sections, I will outline the content of the Working Environment Act's definition of an employee in Section 3. Subsequently, in Section 4, I will apply the principles established in Section 3 to analyze the classification of MLM participants under labour law. Lastly, I will emphasize the implications of potentially reclassifying MLM participants and address some of the challenges and potential solutions pertaining to current regulatory frameworks.

3. The Term «Employee»

3.1 Introduction

The Working Environment Act is a protection law that fundamentally seeks to protect employees against the characteristic unequal power relations in the employment relationship.[47] The employee is the central legal subject of the Act, and as a general rule the Act is invariably in favour of the employee in order to safeguard the protective objectives, cf. WEA Section 1-9 .[48] The assessment of who falls within the Act's definition of employee is therefore decisive for determining the rights and protection to which workers are entitled.[49]

Here, the distinction between employees and independent contractors is crucial. The assessments made when mapping the content of the term «employee», are often also the starting point for differentiating between employees and independent contractors. Independent contractors are described in the preparatory works as being «individuals who, without having their own employees, perform work on behalf of an enterprise, while not being an employee in relation to Section 1-8 first paragraph of the Working Environment Act «.[50] The fundamental base for the distinction between these groups is the degree of dependence and subordination between the contracting parties,[51] i.e. the level of unequal power dynamics. Contractors and employees may have several similarities, and thus, some contractors may possess many of the characteristics traditionally attributed to employees, but still be considered contractors, without most of the protection of the Working Environment Act.[52] Consequently, the working differences between workers with different labour law classifications may be small, but result in major legal and factual consequences.[53] This aspect of the consequences of the classification is emphasized in the preparatory work for the amendment.[54]

In the following, the scope of the Working Environment Act's term «employee», with associated assessment elements, will be presented at a general level. Some more detailed comments will also be made on the relevance of the *Tupperware* case.

3.2 The Basis for the Assessment

WEA Section 1-8 (1), in its first sentence, defines an employee as «anyone who performs work for and under subordination of another». The second sentence of the provision outlines specific assessment elements, which shall be considered «among other things». These elements are whether the individual «continuously makes his or her personal labour available for disposal, and whether he or she is subordinated through management, leadership and control». Finally, the first paragraph establishes a presumption that an employment relationship is the default solution, unless the contracting entity makes it «highly probable that an independent contractual relationship exists».

The wording clarifies that key factors in the assessment of the applicability of the term «employee» are whether the worker makes his labour available for disposal, whether this labour is personal and whether the worker is subject to direction, management, and control. The preparatory works also emphasize that the intention of the enumeration is that the most central elements should be expressly stated in the legal text.[55] In addition, the phrase «among other things» indicates that the list of elements – however important – is not exhaustive.[56]

The preparatory works specifies that the inclusion of the assessment factors is a «statutory confirmation of current law» and that these must therefore be interpreted in light of existing legal sources.[57] The factors that are expressly mentioned in the legal text were already considered to be some of the most important factors in the assessment before they were included in the wording of the law in January 2024.[58] The judgment HR-2016-1366-A (Avlaster II) exemplifies this. The case concerned a woman who acted as a reliever and support person for a boy with special care needs. The lead judge for the majority stated that «the question of the employer's management and control» will «be particularly central» in the overall assessment,[59] and that if the woman «could have engaged assistants to perform the work she has agreed to, an assessment of the agreement as an employment relationship would have been excluded».[60] Although the latter aspect is formulated as a prerequisite for employee status, the wording cannot be interpreted literally, as the first judge also emphasized that the assessment must be made specifically and be discretionary.[61] In other words, the factors listed have been of importance for the assessment even before the amendment of Section 1-8 , but nevertheless only as part of a complex assessment.

In principle, the legal assessment of who should be classified as an employee, is not affected by the presumption included in section 1-8 (1) last sentence.[62] The presumption is intended to entail a «stricter standard of proof for the employee classification», with the burden of proof to be placed on the contracting entity.[63] Nevertheless, a requirement of high preponderance of evidence may affect the content of the substantive term «employee», since the threshold for determining the existence of a legitimate independent contractor relationship is higher. To this point, the Ministry has stated that the legal assessment and the assessment of evidence are not always easy to separate.[64] Furthermore, the Ministry has emphasized that the purpose of the presumption is to establish the employee relationship as the default solution. It is also in connection with this presumption that the Ministry has allowed for a reclassification of individuals who did not have employee status before the amendment of Section 1-8 .[65] Thus, the presumption is important for the conclusion of what type of contractual relationship is considered proven between the parties, and can be decisive in grey area cases. Nevertheless, the rule means that the benefit of the doubt must be given to the individual if it has not been made «highly probable» that there is an independent contractual relationship.

The provision's preparatory works emphasize that the assessment of whether the term «employee» should be applied is based on a purpose-oriented overall assessment, and that a broad understanding of the concept must be applied.[66] This is also how the employee assessment has traditionally been carried out.[67] The purposes that govern the overall assessment may vary depending on both the protection legislation and provisions in question. Thus, the content of the term is relative. It is the term «employee» in the WEA that is significant for this assessment, and WEA Section 1-8 (1) contains the Act's legal definition of the term. Consequently, the term should generally be interpreted uniformly across the provisions of the WEA.[68]

The assessment's decisive factors are whether the overall relationship between the parties is characterized by dependency, subordination, and an imbalance of power;[69] in other words, whether the relationship between the parties indicates the need for protective legislation.[70] It is the actual relationship between the parties that is relevant. While the parties have the freedom to classify the employment relationship, this classification only serves as a starting point if the reality suggests a different classification.[71] This is because the stronger contracting parties have a greater ability to adjust the contract design and control the actual practice.[72]

3.3 The Elements of the Assessment

In addition to the factors explicitly referred to in the wording of the provision, case law has identified several other factors of relevance when assessing an individual's employee status. Recent case law often relies on the factors outlined in Ot.prp. nr. 49 (2004–2005) on p. 73 when assessing the term «employee».[73] However, in the preparatory works of the amendment made in January 2024, the Ministry refers to NOU 2021: 9 , which provides a summary and updated outline of key elements.[74] The «new» list is relatively similar to that in Ot.prp. nr. 49 (2004–2005) , p. 73 , with some clarifications and revisions. In NOU 2021: 9 , the Committee highlights the following elements:[75]

- Whether the person makes their labour available for disposal
- Whether there is an obligation to perform work personally
- Whether the person is subordinated to the counterparty's direction, management and control
- Whether the employment relationship is stable, and/or whether the employee works mainly for one employer
- Which party provides workspace and equipment
- Remuneration structure and termination terms
- The nature of the work – whether the work is performed in close association with the employer's regular business and organization
- Whether the person has the ability to negotiate their own terms.

The Committee emphasizes that elements five and six are most relevant as supporting factors, when other elements point in the same direction.[76]

The list of factors is indicative and is not intended to be exhaustive or to be used mechanically.[77] The elements referenced in the list have largely been developed through case law, and therefore, the list should be used in

conjunction with existing case law and other legal sources. Additionally, the list should be supplemented by elements that are relevant to the specific case at hand.

An example that illustrates how the court has dealt with the previous list of factors, can be found in the case of Rt-2013-354 (Avlaster I). This case concerned whether a woman working as a respite worker for a family with a multifunctionally disabled son should be considered an employee under the provisions of the Norwegian Holidays Act.[78] The first voting judge for the majority stated that in cases of doubt, a discretionary overall assessment must be conducted on the basis of the listed elements, and that the intention of the legislator is to provide protection under the WEA, the Holidays Act and similar legislation, to those who require it.[79] Thus, the list primarily functions as a starting point for the assessment.

There is no case law yet that utilizes the amended legal text in WEA Section 1-8 and the updated list of elements for the classification of workers. However, the preparatory works suggest a similar use of the new list of elements,[80] and it is reasonable to assume that the courts will adhere to the legislator's intent and utilize the updated list in a similar manner to the previous one.

Furthermore, the weighting of the factors may vary depending on the specific circumstances of each case. This is a logical consequence of the specific and purpose-oriented overall assessment that must be conducted. An example highlighting the variation in factor weighting can be seen in the comparison between Rt-2013-342 (Beredskapshjem) and *Avlaster I* . In the former case, the Supreme Court placed particular emphasis on the «character» of the work when determining whether the worker was an employee,[81] while in the latter case, this factor was not emphasized. Thus, the relevance and emphasis of specific factors will depend on the unique circumstances of each case.

3.4 The Case Rt-1984-1044 (Tupperware)

3.4.1 About the Case

The *Tupperware* case is the only case in which the Supreme Court has addressed the classification of an MLM participant under Norwegian Labour Law.

The case concerned a distributor associated with the MLM business Tupperware. The distributor filed a claim against her upline – the importer of the Tupperware products – seeking payment of holiday allowance and salary during the notice period following a dispute. The distributor held the position of group leader and her duties consisted of conducting direct sales, marketing, and recruitment of new participants. The case was decided in accordance with the former Holiday Act of 1947 and its employee term,[82] and the coinciding term in the previous Working Environment Act of 1977 .[83]

3.4.2 Verdict and Justification

The Supreme Court unanimously concluded that the MLM participant was not an employee. The first-voting judge stated that the form of recruitment and the loose affiliation between the parties strongly indicated that the distributor was not an employee.[84] Emphasis was placed on the fact that the distributors joined and left the system in a relatively informal manner, and that enrollment took place without prior contact and without an assessment of the distributor's suitability.[85]

Furthermore, the court emphasized that the distributors did not have a traditional «duty to work», due to the lack of instructions and prerequisites relating to sales volume and working hours.[86] In support of this, the Court emphasized that the varying level of activity among the participants – such as there being fewer active participants than inactive ones – indicated that the influencing of sales through training and guidance did not function as instructions, and was not perceived by the distributors as instructions.[87]

The Court also noted that the participants' remuneration depended on their own and their downline's sales activities, and that they had to cover their own expenses related to their work.[88]

As a counterargument, the Supreme Court pointed out the existence of price lists, which the distributors perceived as binding. However, the Court did not place much importance on this factor.[89] The first-voting judge also noted that the long duration of the contractual relationship and the extensive activities of the participant could potentially warrant a more «special solution».[90] The contractual relationship had existed for six years, and this was the distributor's full-time job and only source of income. However, this aspect was not given decisive weight, due to the general nature of the participant's relationship with the business and the potential practical difficulties that such a solution could pose. [91]

3.4.3 Assessment and Relevance of the Supreme Court’s Decision

There is little to criticize about the Supreme Court's result and use of legal sources in this case. The Court's decision is generally well-founded and based on relevant legal sources. The court conducted a comprehensive assessment of the specific circumstances and relied on available legal sources to reach its decision.

Furthermore, the Supreme Court's analysis of the actual situation is sound. The view of who should be protected by the legislation, the legislation itself, and the MLM industry, has evolved in recent years. The starting points and arguments that were decisive for the result were therefore probably appropriate for the situation in 1984.

Consequently, there is no doubt as to whether the decision still holds value as a legal source. The judgment is unanimous, and some of the judgment's statements and principles are still frequently cited in legal theory and case law, particularly statements regarding the broad interpretation of the term «employee», and statements highlighting the alignment of the scope of the term in the Holidays Act and Working Environment Act.[92]

However, the decision's direct applicability to the topic of this article is somewhat limited. Firstly, the judgment is 39 years old. The ruling was based on a different legislation and stems from a different time. The view of who should be protected has evolved since the time of the judgment, with increased focus on individuals with non-traditional working conditions, who may still require protection similar to employees in more traditional roles.[93]

Secondly, the topic of assessment in the judgment differs from the topic in this article. The judgment dealt with claims from a participant against their upline, rather than with the participant's employee status in relation to the company itself. This article questions the participant's employee status in the latter instance.[94] This distinction may impact the assessment, since the need for protection and power dynamics can vary depending on whether the employer is a large company or a small business.

Thirdly, the MLM industry has undergone significant changes since the ruling. Participants have moved from exclusively conducting home visits, or «home parties», to utilizing social media to market and contact customers and recruits. In addition, the participants' internal interaction has been digitized, and most of the work tasks and control of the work, is now managed through digital systems.

Consequently, the decision does not have direct relevance for the topic of the Article. However, the judgment and its arguments will not be disregarded, but factual and legal differences between the decision and the current situation will be highlighted where relevant.

4. The Classification of MLM-participants

4.1 Introduction

The list of elements provided in the preparatory works should not be applied mechanically when classifying employment relationships. However, the list serves as a valuable starting point for the assessment.[95] In the following, an analysis will therefore be conducted to determine how MLM participants should generally be classified, based on the list of elements outlined in Section 3.3. Subsequently, an overall assessment and conclusion will be made in Section 4.10.

4.2 Making one’s Labor Available for Disposal

The Act explicitly states that it is relevant to assess whether the worker continuously makes their labour available for disposal by the employer, when determining whether they should be classified as an employee. In NOU 2021: 9 , the majority of the Committee describes that this factor entails the employer being free to utilize the employee's labour within the framework of legislation, agreements/contracts, and management rights.[96]

An employee can typically be utilized by the employer to perform ongoing and, to some extent, unspecified tasks, provided it complies with the law, agreements/contracts, and the employer's management rights.[97] Generally, a contractor is not subject to similar control by the contracting entity and is primarily responsible for performing the specific tasks outlined in the contract.[98] In other words, an independent contractor often has a result-based obligation, while an employee usually has an efforts-based obligation.[99] In close connection with this, independent contractors often bear the risk of the work results, unlike employees.[100]

In previous preparatory works, bearing the risk for the work results was highlighted as a factor of importance for the employee classification assessment.[101] Whether the worker made their labour available for disposal by the other party was also significant,[102] but the latter is the focus of the new formulation in the Act and its preparatory works.

This element is central to the employee classification assessment but is not necessarily decisive. There are employees with predetermined and more specific work tasks, as well as contractors who make their expertise and labour available for disposal by the contracting entity. Thus, this factor must always be considered in the context of the specific case at hand and the other elements in the overall assessment.[103]

Most participant agreements include clauses that explicitly or implicitly regulate the risk associated with the outcome of the work.[104] For instance, Nu Skin includes the following statement in its participant agreement: «You agree that you, as an independent contractor [...] are subject to the risks of a business owner and responsible for all losses incurred as a Brand Affiliate».[105] Additionally, participants bear the risk for all their income-generating activities. Thus, participants are contractually responsible for the risks associated with their work,[106] which, taken in isolation, indicates that they are independent contractors.

Nevertheless, the companies assume some risk, such as the risk for product liability claims and damage compensation claims. Nu Skin has a policy whereby the company – subject to certain limitations – will compensate and defend the participant against third-party claims arising from defective products or from the use of their products.[107] Thus, participants do not bear the risk for work outcomes in all instances. However, this provides limited guidance for the assessment of the participants’ employment classification, since the liability assumed by the companies is not significantly different from the liability they already assume as the manufacturer of the products sold by the participants.[108] The fact that the MLM companies emphasize that they are assuming a risk they would already have, cannot be given significant weight. Consequently, the risk associated with the work lies primarily with the participants.

As indicated by the wording of WEA Section 1-8 and its preparatory works, the central issue is not solely that of who bears the risk for the work outcome, but whether participants are obliged to make their labour available for the company's disposal. The participant agreements emphasize that participants can choose how and when to perform the work.[109] This suggests that the companies do not have free access to the participants' labour, and therefore, the labour is not made available for the companies' disposal. However, this is only a starting point.

MLM companies often reserve the right to impose work requirements on participants to varying degrees. For example, Herbalife includes provisions in its participant agreements allowing the company to require participants to take certain actions if the company, in its sole discretion, determines that the participant is acting in a manner that damages its reputation.[110] MLM companies often include similar «hidden» rights to impose specific actions on participants, which results in a limited obligation for participants to make their labour available for the companies' disposal. However, this obligation is generally far more limited than the obligations of traditional employees.

A distinctive feature of the participant agreements that may nevertheless indicate a more extensive obligation for participants to make their labour available is that MLM companies reserve the right to unilaterally modify the participant agreement.[111] These changes can pertain to the procedures for performing work, the addition of tasks, or other modifications that, in practice, require participants to make their labour available to the companies. Such unilateral rights to amend agreements and control labour are not typical in contractual

relationships between professional parties. On the contrary, this is a characteristic feature of employment relationships, where the employer, within the scope of their managerial rights, can make unilateral changes.[112] This suggests that participants are subject to an employee-like obligation to make their labour available for disposal by the MLM companies.

The extent to which this modification-right is exercised by the companies is difficult to determine. However, the wording of the law and its preparatory works seem to imply that the central issue is whether the worker continuously makes their labour available for disposal, not how freely the employer actually disposes of the labour. In the case of *Avlaster II* , the Norwegian Supreme Court addressed whether an employer needed to exercise management and control over a worker to establish a subordinate relationship between the parties, or if it was sufficient that there existed a right for the employer to exercise such control. The Supreme Court concluded that the central issue was the existence of a right to exercise management and control, not whether the employer actually utilized this right.[113] The Supreme Court emphasized that the wording of this element did not call for utilization of the right and that it would cause problems if identical job descriptions had to be assessed differently, based on the individual's need for management.[114] While these statements are not directly transferable to the question of making labour available for disposal, the focus in the wording of the law and its preparatory works does not require the employer to freely utilize the employee's labour. Additionally, it would lead to a «less robust» «employee» term, if identical positions were judged differently depending on how freely the employer utilizes the individual's labour.[115] Thus, the most appropriate solution is that the central issue for the question of making labour available for disposal, is whether the company has the right to dispose of the labour, and not the actual disposal.

It is noteworthy that companies must make changes for an extended right of disposal to take effect. However, the key point in relation to this is that participants who wish to maintain their contractual relationship must accept the companies' changes. For Herbalife participants, changes come into effect without consent,[116] while participants who do not accept changes in Nu Skin, Forever Living, and Tupperware, must either accept termination of their agreement or cease ordering the companies' products.[117] Thus, the changes must be accepted by the participants for the existing contractual relationship to continue, and a requirement for acceptance appears to be of negligible significance, as the companies have a legal ability to dispose of the labour of all participants with existing contractual relationships. In *Avlaster II* , the Supreme Court emphasized that the central issue was precisely whether there existed a «legal right» to exercise control and management.[118] The same considerations seem to apply to the question of disposal.

Although participants formally have an obligation to perform specific tasks on their own initiative and at their own risk, the reality seems to be that the MLM companies may impose the work they desire on participants through unilateral contract changes. Consequently, the participants are obliged to make their labour available for disposal by the companies, indicating an employment relationship.

This is not a traditional right of disposal, as it is conditional upon contract changes, but the possibilities for changes nonetheless highlight an uneven power dynamic, with a «hidden» right of disposal reserved for the companies. The unfairness of such change clauses was emphasized in the preparatory works for the former Lottery Act, referring to pyramid schemes disguised as MLM businesses. The Ministry stated that the standard contracts of such MLM businesses often contain unfair contract terms, such as general clauses granting the company's owners the right to unilaterally change all contract terms.[119] Thus, the untraditional nature of the right of disposal does not appear to affect the participants' need for protection, nor the weight of this element in the overall assessment.

4.3 Personal Work Obligation

The new wording of Section 1-8 (1) of the WEA , specifies that consideration must be given to whether the worker makes their «personal labour» available, meaning whether they have a personal work obligation. This aspect has long been central to the classification of employment relationships and involves assessing whether the worker is obligated to perform the work personally, or whether they can use others for the execution at their own expense.[120] The former obligation indicates an employment relationship, while the latter freedom indicates an independent contractor relationship.

However, this starting point requires some nuance. It is undisputed that there are contractor relationships where the nature of the assignment necessitates personal execution,[121] and conversely, there are employees with the authority to engage assistants.[122] Furthermore, it is established in the legislative preparatory works that the crucial factor is not solely whether there is an explicit restriction on the ability to engage assistants, but also whether there are «practical, legal, or economic limitations» that make the use of assistants difficult.[123] Thus, the existence of a genuine personal work obligation is decisive.

For MLM participants, the opportunity to utilize assistants is not always explicitly addressed in the participant agreements. The agreements often allow tasks to be carried out as participants see fit, with limitations imposed by the agreement and other binding guidelines. These imitations are highly relevant when assessing the participants' personal work obligation.

The scope and articulation of these limitations vary across the industry. A common restriction in many companies is a limitation on participants' access to sharing information with others. This limitation typically includes access codes to the portals that participants use to perform their work[124] and other information necessary for carrying out their tasks.[125]

Some companies formally allow the use of assistants but simultaneously impose extensive limitations on this. For example, Herbalife permits the use of other individuals for administrative tasks and product fulfillment. However, participants are still required to fulfill customer service requirements personally, as well as all other aspects of the work execution.[126] Additionally, the company prohibits participants from hiring individuals in their own downline.[127] Similarly, Forever Living specifies that participants are not «prevented from using assistants»,[128] but includes a confidentiality agreement covering «know-how, sales strategies, organizational structure, trade secrets, other business affairs, or any such information not generally available and related to Forever's business operations».[129] Much of the content on participants' private portals is not generally accessible and pertains to Forever Living's business operations. Consequently, this limitation restricts the tasks that can be delegated to assistants.

The limitations can, for some companies, be partially circumvented if assistants who are also participants are utilized, since these individuals already have access to significant portions of the company's confidential information. Nevertheless, this still constrains participants to a greater extent than is customary for independent contractors. Additionally, this solution is impractical, since participants recruited into the company have independent tasks to complete and therefore have less time and inclination to act as assistants for other participants-who, after all, are their competitors. Furthermore, such engagement presupposes that the participant's personal information associated with their profile within the company is shared with others-a practice typically not permitted.[130]

The Norwegian Sharing Economy Committee stated in NOU 2017: 4 that the requirement for logging in when using a work platform is an indication of a personal work obligation.[131] While this statement was made in the context of the sharing economy and may not directly apply to MLM, MLM participants often rely heavily on the company's websites, with associated personal logins, in order to order sales products, record sales, manage their own downline, and complete other tasks. Thus, this dependence on the work platform appears to be relatively similar within both the sharing economy and MLM.

Regardless, MLM companies consistently impose practical restrictions on the sharing of information and access to portals necessary for involving others in the MLM work. Consequently, participants seemingly have a personal work obligation, indicating an employment relationship.

4.4 Subordination through Direction, Management, and Control

4.4.1 Introduction

This is the final aspect emphasized in the legal text of WEA Section 1-8 . As mentioned in Section 3.1, the subordinate relationship of the employee in relation to the employer, is a fundamental aspect in distinguishing between independent contractors and employees. The legislative preparatory works describe this element as

follows: «This illustrates both subordination and organizational dependence and therefore stands as a highly significant and weighty factor in the assessment of the employee classification».[132]

However, this aspect alone is not determinative. There exist employee positions with a high degree of autonomy. This was already emphasized in the case of Rt-1958-1229 (Sceneinstruktør), which concerned whether two stage directors were to be considered employees and thus entitled to holiday pay. The directors both had the discretion to disregard instructions and demands from theatre management if they did not deem it «artistically justifiable,» without the Supreme Court placing decisive weight on that aspect.[133] Thus, the significance of this element is relative.[134]

An employer has the «authority to determine what work is to be done, as well as how, where, and when the work is to be carried out».[135] The Ministry emphasizes that such authority for «direction, management and control» strongly indicates the existence of an employment relationship.[136] It is the ability to exercise this authority that is relevant, not whether the authority is actually utilized.[137] It is also important to highlight that authority – like the assessment of employee status overall – should be assessed in a technology-neutral manner.[138] This means that direction, management, and control can be conducted through technical means and algorithms.[139]

As previously mentioned, it is common for participant agreements to emphasize that participants have a freedom akin to that of independent contractors, subject to the limitations outlined in the agreement. Similarly to the assessments above, it is the limitations in the participant agreements that are of interest in evaluating the companies' authority for direction, management, and control.

MLM companies often have extensive standardized agreements that bind participants to comply with a comprehensive set of regulations. Tupperware, for instance, boasts one of the shortest participant agreements, yet it still requires participants to adhere to «established Company program guidelines and procedures including, but not limited to, the online ordering system, host programs, compensation programs, promotional and incentive programs»,[140] alongside the general terms of use for the company's website.[141] Some of the guidelines recount national and international regulations, while others dictate specific marketing disciplines, recruitment methods, access to social media, and sales prerequisites for commission payouts. These regulations are detailed and far-reaching, and due to the scope of the article I will not delve into every aspect of the agreements. Nevertheless, I will highlight some key tendencies of central importance to the classification.

4.4.2 Guidelines for Sales and Marketing

The preparatory work stipulates that direction, management, and control can occur through overarching organization and management, as well as through more «concrete leadership and follow-up of individual workers».[142] This means that both the company's general and specific regulations regarding work are relevant.

Traditional independent contractors enjoy relatively broad discretion in executing their tasks; it is the result rather than the process that matters.[143] A consistent feature of participant agreements, however, is that participants are subject to extensive regulations concerning their sales and marketing practices. For instance, Herbalife's participant agreement contains around 100 provisions detailing how participants should conduct their business through sales and marketing.[144] Many of these guidelines affect participants' ability to carry out work in a «traditional» manner. Some recurring guidelines include prohibitions on promoting through mass media and paid advertising,[145] and bans or strict regulations on sales through websites not owned by the company.[146] If participants perform similar sales work for other companies, they generally cannot use their own websites to sell the MLM products, nor can they advertise their business in mass media if the advertisement includes MLM products. The guidelines thus presuppose a distinct type of sales and marketing methodology.

Nevertheless, it is not uncommon for companies to desire a uniform marketing and sales approach that reflects the company as a brand. For instance, an influencer engaged in a promotional campaign may be subject to strict guidelines regarding the content of the advertisement, without necessarily being classified as an employee of the company they are endorsing. The imposition of requirements by companies on how their products should be marketed does not necessarily determine the employment classification. This also applies in cases where companies employ unique sales and marketing techniques. In the *Tupperware* case , the Supreme Court ruled that regulations mandating demonstrations and sales being conducted exclusively at «home parties», along with the distribution of weekly newspapers containing sales guidance, did not constitute instructions.[147] Hence, the

Court did not give significant weight to the fact that this represented an unconventional sales approach limiting the distributor's autonomy in choosing their sales and marketing strategies. Consequently, general regulations stipulating unconventional sales and marketing methods must also be permissible within contractual agreements with independent contractors.

However, there are also more specific guidelines for participants' work. For example, Nu Skin prohibits the use of personal support material in marketing to businesses,[148] and requires pre-approval for the use of before-and-after images.[149] Moreover, Forever Living may require the implementation of marketing measures,[150] and has rules regarding participants' creation of their marketing materials.[151] Nevertheless, the companies' regulation of these specific matters varies, and is rarely so extensive that participants are completely subordinated to the company's direction, management and control.

In the *Tupperware* case , the company's price suggestions were cited as an argument for employee status, since participants perceived these suggestions as binding.[152] The Supreme Court placed limited importance on this aspect in 1984,[153] but it may be of greater significance for today's participants. Tupperware seems to have the same practice as in 1984.[154] The same applies to Herbalife and Nu Skin, where the participants also appear to receive suggested prices from the companies.[155] Forever Living, on the other hand, does not allow for price coordination among participants,[156] yet the company regularly informs them of its «pricing policies», and commissions are calculated based on the company's recommended sales prices.[157] The latter also applies to most MLM businesses. However, the significance of these pricing recommendations remains uncertain, since it is unclear whether participants perceive these recommendations as binding. While participants do probably aim to sell at the recommended retail price in order to maximize their commissions, this does not necessarily imply that they feel obligated to adhere to the suggested pricing. Thus, the companies' recommended retail prices do not provide a definitive indication of extensive direction, management, and control.

The overall trend is that MLM participants are subject to certain general and specific regulations relating to sales and marketing. However, the regulations vary and are often limited in scope. The participants are therefore not necessarily subordinated through the kind of direction, management, and control that require employee status.

It should be noted that a primary aspect of participants' tasks involves marketing the participation opportunity and recruiting new participants. MLM companies typically have extensive regulations governing these activities, seemingly to avoid violations of pyramid scheme legislation. MLM companies often operate in legal grey areas concerning pyramid scheme regulations, primarily due to their recruitment and compensation structures. Thus, many of these guidelines appear designed to help participants and companies comply with the law, without necessarily exerting greater direction, management, or control over participants than the legislation itself.

4.4.3 Workload, Working Hours, and Control through Sanctioning

A key part of the assessment of whether a worker is subject to the direction, management, and control of their contracting party is whether they have the freedom to manage their own work schedule. This includes how much they want to work and what hours they prefer to work.[158] The common denominator for MLM work is that the participants are formally free to decide their workload and working hours.[159]

Participants generally have the autonomy to decide when they want to work during the day and when they wish to take time off. This freedom is somewhat constrained by the companies' campaigns and events, which offer significant income-generating opportunities within specific time periods. The ability to take time off may also be limited for higher-level participants, to the extent that they have downlines to manage. Nonetheless, these aspects of the work do not constitute mandatory instructions requiring participants to work within set hours. On the contrary, participants' ability to determine the time and place of their work is comparable to that of traditional independent contractors.

The preparatory works for WEA Section 1-8 also highlight the relevance of a worker’s ability to decline assignments when assessing the worker’s employment classification.[160] Most of the participation agreements do not grant companies the authority to impose specific tasks on the participants. Participants are consistently afforded formal freedom to choose whom they sell to, which tasks they undertake within the company, how

much they work, and when. Thus, participants do not have a traditional obligation to work, an argument also emphasized in the *Tupperware* case, against classifying the participant in question as an employee.[161]

However, this is not conclusive. In the Supreme Court's Appeal Committee Decision Rt-1990-903 , the Supreme Court's Appeals Committee found that the Appellate Court did not err in failing to assign decisive weight to the absence of a work obligation.[162] The case concerned telephone consultants who were free to choose their own working hours and workload. The same principle has been applied by the European Court of Justice, which stated that it is not decisive whether a worker is obliged to perform offered tasks.[163] Thus, the presence of a formal work obligation is only part of the overall assessment. The crucial factor is whether the worker is subject to actual direction, management, and control, which is particularly relevant when assessing non-traditional forms of work.

In this respect, the participants' formal freedom to determine their workload is restricted by the various activity criteria and compensation regulations in the participant agreements. Participants and their downlines must meet sales quotas to receive commissions and avoid losing rank, which would result in a loss of income. The commission rules of Forever Living serve as an illustrative example. Their participant agreement states that participants at the lowest level in the company («Assistant Supervisors») must be «4CC active» to be considered active distributors and thus eligible for «personal commission» and «preferred customer commission»; in other words, to receive most of their commissions.[164] The 4CC quota equates to approximately NOK 12,000 per month.[165] The specific sales requirements and consequences of non-compliance vary between companies, but all have periodic quotas that participants must meet, in order to avoid negative consequences.[166] Such prerequisites have a normative effect on workload and, to a large extent, on working hours. They also suggest that MLM participants' work today differs from the work considered in the *Tupperware* case, where the lack of «specific conditions on how much [participants] should sell or at what times» was highlighted as an argument against the participant being classified as an employee.[167]

The aforementioned Sharing Economy Committee has noted that the use of sanctions to regulate workload for platform workers, may indicate a work obligation.[168] Although platform work and MLM are different types of work, a similar viewpoint seems applicable to MLM. Sanctioning and negative consequences, similarly to platform workers, imposes pressure on participants to work a certain amount.

The MLM companies' direction, management, and control also extend beyond regulating sales volume. A contracting entity can naturally implement control measures on an independent contractor to ensure compliance with guidelines and satisfactory work quality.[169] Nevertheless, the authority to control work extensively and utilize sanctioning goes beyond merely ensuring compliance with guidelines and work quality.

MLM companies consistently reserve the right to control participants' work and to sanction at their discretion.[170] Herbalife serves as an example, as many of their rules are based on what the company «solely and entirely at its discretion» considers proper work performance or conduct.[171] Sanctioning for breaches of these discretionary rules is also done at Herbalife's discretion, including loss of income and rank.[172] Such broad control and sanctioning powers grant companies significant authority over participants and their work performance, sinces companies can remove or significantly impact participants' work opportunities at their discretion. This extends beyond ensuring compliance with guidelines and work quality, indicating extensive direction, management, and control.

In summary, MLM participants appear to be subordinated to the companies' direction, management, and control regarding workload, working hours, and control through sanctioning.

4.4.4 Unilateral Authority to Modify the Agreement

The preparatory works highlight that an indication of whether a worker is subject to the direction, management, and control of their contracting party is whether the counterparty has the right to unilaterally make changes to the agreement at any time.[173] Typically, contracting entities do not possess such authority in relation to independent contractors.

As illustrated in Section 4.2, MLM companies reserve the right to unilaterally make any modifications to participant agreements, and participants wishing to continue their contractual relationships must accept such changes.[174] Some companies go a step further by reserving the right to «waive breaches or make exceptions to

any provision of the contract» at their sole discretion and without formal amendments.[175] Regardless, MLM companies have the authority to unilaterally make changes to the agreement at any time, to which participants with ongoing agreements with the companies must comply. This gives companies the power to introduce new obligations for participants or remove their own commitments to participants at will. This ability to change agreements unilaterally allows for a significant degree of direction, management, and control. Whether this authority to change the agreements is utilized is irrelevant.[176]

This right to unilateral modification is reminiscent of the criticized clauses that some companies include in their standard contracts with consumers.[177] Consumer contracts are characterized by an imbalance of power between the parties.[178] The resemblance of MLM companies' contractual terms to standardized consumer agreements suggests that a similar imbalance may exist in the relationship between MLM participants and the MLM companies.

In any case, a unilateral authority to modify agreements is characteristic of employment relationships.[179] Furthermore, the companies' reservation of absolute modification rights concerning all aspects of the contractual relationship, extends beyond the conventional authority that employers possess to make changes to the employment contract, since this authority is limited by the employment contract and the scope of the employer's managerial authority.[180] Consequently, MLM companies have extensive control over what participants are required to do, as well as how, where, and when the work should be carried out.

The right to unilateral modification, combined with existing control through sales requirements and discretionary sanctions, grants companies significant authority to direct, manage, and control participants. Therefore, although the isolated regulation of sales and marketing is not a significant indicator of employment status, the cumulative effect strongly suggests that participants are subordinated to the companies' direction, management, and control, thus necessitating employment protection.

4.5 Stability and Number of Employers

4.5.1 Stability

Independent contractors and employees may both experience varying degrees of stability in their contractual relationships, irrespective of their legal classification.[181] Nevertheless, the preparatory works emphasize that it «may indicate economic dependence», and thus a power imbalance in the contractual relationship, if a person works «primarily for one contracting entity, particularly if the work is stable, fairly regular over time, full-time, and without the possibility of taking on other work».[182] Such a contractual relationship suggests that the worker is dependent on the company, which is typical for employees.

The determination of what constitutes a «stable» attachment and the weight it should carry seems to vary depending on the specific case. In the *Beredskapshjem* case, the relationship between the parties was considered «fairly stable» when the contract had a term of five years from 2010, and the contractual relationship had lasted since 2006.[183] However, this was not decisive for the outcome. The Supreme Court also held in the Tupperware case that a contractual relationship of approximately six years was «of longer duration»,[184] but here too, stability was not given decisive weight. A relationship of only 18 months was also considered stable in the *Avlaster I* case, without the weight of this element being mentioned explicitly.[185]

The duration of the contractual relationship between participants and the companies, and the weight this should carry in the overall assessment, must therefore be evaluated specifically for each participant. There are MLM relationships, as seen in *Tupperware* , that last for several years and serve as the participant's full-time occupation. However, it is also common for participants to work for their MLM company part-time and for shorter periods. Thus, the assessment must be nuanced depending on the stability of each individual relationship and cannot be generalized for specific companies or for the MLM industry as a whole. However, some common traits may be identified.

All MLM companies seem to design their contracts to run indefinitely, with rules regarding termination and potential loss of participant status, due to extensive inactivity or contract breaches.[186] Thus, it is not intended for

participants to have «sporadic, random, and/or short-term engagements». Consequently, the contractual relationship can have a similar duration to that of a regular employment relationship.

Nevertheless, participants' connections to MLM companies are generally looser and more incidental than traditional employment relationships. Firstly, there are rarely extensive qualification requirements for individuals who wish to become participants, making the enrollment process quick and uncomplicated. In the *Tupperware* case, such an informal enrollment process was considered to indicate a «loose and incidental» contractual relationship, suggesting that the participant was an independent contractor.[187] This enrollment process appears to remain the same across the MLM industry today. Secondly, the often discretionary and immediate termination rights of MLM companies, create a more unstable relationship than traditional employment relationships.[188] The companies' right to terminate participants on a discretionary basis and immediately is uncommon in employment relationships. Participants can thus more easily lose their contractual relationship with the company or be subjected to sanctions that reduce income, making MLM riskier and more unstable than ordinary full-time occupations.

While the latter point initially argues against an employment relationship, it paradoxically also shows that participants may have a need for protection. For MLM participants, the lack of stability mostly results in negative consequences, since their income and position within the company are unpredictable and dependent on the companies' discretion. The Supreme Court has noted that such unpredictability regarding contract termination may indicate that the worker «is in a vulnerable position.[189] Thus, the participants' lack of stability may create a need for protection for which the traditional assessment of stability does not take account. In such cases, it is particularly important to avoid the mechanical application of the list of elements, against which both preparatory works and case law advise.[190] A central purpose of the Working Environment Act is to protect those in need of protection.[191] Based on a purpose-oriented approach, and according to the Supreme Court's statement, the need for protection is likely to prevail with regard to participants' lack of predictability.

The simple enrollment process of participants thus points towards less stability and looser and more incidental contractual relationships, while the participants' vulnerable position concerning the companies' discretionary termination rights points towards a need for protection. Therefore, the stability element alone provides limited guidance for the classification of the participants. The duration and solidity of the individual participant's connection to their specific company are likely of greater importance when considering their classification.

4.5.2 Number of Employers

As previously mentioned, the preparatory works highlight that exclusivity with a single client can indicate an employment relationship.[192] They further assert that an independent contractor typically has the ability to develop and build their own client portfolio,[193] and it is relevant to consider whether «the individual truly has the opportunity to offer their services to others».[194] The Supreme Court also stated in the *Beredskapshjem* case that a standard clause prohibiting the undertaking of other work without consent suggested «on its own» the existence of an employment relationship.[195]

The exclusivity of participants towards their company varies depending on their specific preferences and needs. Thus, making a general assessment is challenging, but some observations may be made regarding the participants' general ability to take on other work.

MLM companies generally do not prevent participants from taking on other work alongside their MLM work. However, this principle is commonly limited in two ways. First, MLM companies rarely allow participants to work for other MLM companies, or else they significantly restrict this possibility.[196] Second, participant agreements often limit participants' ability to sell other products on the same websites or at gatherings where they present the company's products.[197]

The first restriction is typical in employment relationships as a result of competitive concerns and the employee's duty of loyalty.[198] For independent contractors, however, this is not as common a restriction, since contractors can usually build a client portfolio[199] – even within a given industry. The companies' restrictions also typically do not account for whether the other direct sales or MLM companies produce similar products or services; all direct sales and MLM companies are included. Nevertheless, the restriction does not prevent participants from entering more traditional employment relationships or contracts outside the direct sales and MLM industries. Although unusual, the restriction does not lead to comprehensive exclusivity, since

participants who wish to take on other work can enter into contracts or employment agreements with more traditional companies.

The second restriction, like the first, is common in employment relationships, due to competitive concerns and the duty of loyalty. For independent contractors engaged in sales and marketing, however, it may be necessary to offer services and products to several clients for their business to be viable. This is why contractors typically have the freedom to develop and build their own client portfolio.[200] Thus, restricting participants' ability to sell products from different companies on a single platform or within the same sales pitch may hinder the execution of other sales contracts.

Nevertheless, even in contractual relationships with independent contractors, it must be permissible to impose certain restrictions on taking on other work due to competitive concerns.[201] In the *Tupperware* case, the Supreme Court concluded that the company's ban on selling «competing products» at gatherings in private homes was likely of «less practical significance».[202] These statements suggest that the restrictions companies impose on participants regarding work for other MLM companies and the sale of other products alongside MLM company products must also be accepted within the framework of contractual relationships with independent contractors. This is because these restrictions do not significantly impact the participants' ability to take on other work.

However, attention must be paid to an important nuance. As mentioned above, the prohibitions or restrictions are not limited to competing products or gatherings specifically intended for promoting the MLM company's products and services, as in the *Tupperware* case. The restrictions often cover both physical gatherings and websites, as well as competing and non-competing products. Thus, the ability to sell other products and take on other work within the sales industry appears to be more restricted in today’s MLM industry today at the time of the *Tupperware* ruling.

Consequently, there are limitations on participants' ability to take on other sales contracts, but not on taking on contracts unrelated to sales or entering into more traditional employment relationships. While participants' ability to enter into other contractual and employment relationships is somewhat limited, these restrictions do not result in exclusivity towards MLM companies. Thus, this element may suggest that the participants are independent contractors. However, it should be noted that these restrictions may be more significant when viewed in conjunction with the participants' unpredictable relationship with the MLM companies, since this may increase the need for work from other contracting entities.

4.6 Workspace and Equipment

Assessing which of the parties provides workspace and equipment was emphasized as being a relevant consideration under the previous list of elements for the assessment of employee classification.[203] Jakhelln associates the importance of this factor with the employee's obligation to make their labour available for disposal by the employer, which consequently imposes a responsibility on the employer to organize and manage the work to be performed.[204]

The significance of this element has varied when assessing whether an employment relationship exists. In the *Beredskapshjem* case, it was considered to strongly indicate an independent contractor relationship that the foster home's task was to «provide a home with its daily life, where the alternative often would have been placement in an institution» and that the service could not «be provided using Bufetat's or the municipality's premises».[205] Similarly, in the *Avlaster I* case, the fact that the respite care took place in the home of family receiving the respite care – and not in the caregiver's home – was viewed as suggesting the existence of an employment relationship.[206] Conversely, in the *Avlaster II* case, where the respite care occurred in the caregiver's home, this factor was not given significant weight. The Supreme Court emphasized that unlike the *Beredskapshjem* case, the stay in the caregiver's home did not constitute the «core» of the respite care.[207] These examples illustrate that the importance of this factor is dependent on the nature of the work, and that slight nuances may influence its weight.

This element is repeated in the new list of relevant elements, but the Committee notes that it is «less indicative of whether there is an imbalance or dependency» and is «also suitable for adjustment in contractual terms».[208] The Committee points out that «technological developments and digitization increasingly facilitate work, both regularly and sporadically, being performed digitally from locations other than the workplace», leading to

uncertain cases related to this factor.[209] Hotvedt also made similar observations prior to the adoption of the new wording in WEA Section 1-8 .[210] Therefore, the factor's significance has been reduced in the overall assessment and will be used as «a supporting element when other factors point in the same direction».[211]

MLM participants normally have to provide their own workspace and the equipment to perform their tasks. Participants are not supplied with work phones or computers, which are probably the most crucial tools for their work. The work does not take place within the company's premises and mostly involves remote work using internet platforms and social media. The only equipment the companies seem to provide for the participants are the technological platforms they use to perform their work, execution guidelines, and some advertising and training materials.

Participants may eventually have the opportunity to have certain operating costs covered if they achieve specific sales targets. This includes, for example, costs related to travelling for company events[212] and car expenses.[213] However, these opportunities resemble a form of bonus system and are far more modest than the opportunities that regular employees typically have for coverage of operating costs in employment relationships.

This characteristic of MLM participants' work was also highlighted in the *Tupperware* case. The Supreme Court found that an indicator of independent contractor status was that participants «had to cover all expenses associated with their sales activities, such as travel expenses and costs for promotional items, postage, printed materials, and packaging», as well as the demonstration kit, and any fuel expenses if they had a car provided under certain conditions.[214] These principles remain partially applicable today, since MLM participants still primarily cover their own operating costs.

However, MLM participants today engage in more modernized work that was not – and could not have been – considered in the *Tupperware* case. As previously mentioned, participants' work today largely involves utilizing technological tools. This also applies to Tupperware participants, who, in addition to some use of «home parties», conduct much of their work online. In today's digitalized society, this does not significantly differ from the work done by employees with fully remote work, such as certain salespeople and digital customer service representatives. Consequently, the fact that the participants' work is performed outside the company's premises and at their own expense does not hold the same weight today as it did in 1984. This is also a development for which the preparatory works have attempted to account.[215]

It should be noted, however, that employees with fully remote work often still have parts of their work equipment covered, such as computers, phones, and office chairs. Thus, the participants' responsibility to cover operating costs still differs somewhat from most remote workers with employee status. Nevertheless, the extent to which this should be given importance remains uncertain, since the participants' self-provision of equipment and workspace might indicate that the difference between participants and other remote workers with employee status, lies primarily in the former having less protection under their contract than the latter.[216]

Therefore, this element offers limited guidance in the overall assessment, since the participants' self-provision of equipment, when considered in isolation, suggests them being independent contractors but may also indicate a need for protection. In any case, and as already mentioned, this element is primarily relevant as a supporting argument in cases where other factors point in the same direction.

4.7 Remuneration Structure and Termination Terms.

Remuneration structures and termination conditions have traditionally been key factors when assessing whether an employment relationship exists.[217]

Periodic remuneration typically indicates an employment relationship, since WEA Section 14-15 (1) stipulates that, generally, «salary shall be paid at least twice a month» unless otherwise agreed. Such remuneration implies an efforts-based, rather than a results-based, obligation.[218] Similarly, a notice period may suggest an employment relationship, since employments are usually terminated based on the provisions in WEA Section 15-3 (1), whereby the mutual notice period is generally one month.[219] Furthermore, a continuous contract with notice periods may indicate that the work effort is the central obligation of the contract, while an automatic termination upon completion of work may suggest a results-based obligation.[220]

However, there has been scepticism regarding the application of these factors. For remuneration, scepticism arises because employees may be compensated in various ways, sometimes dependent on their results, and conversely some independent contractors might be paid based on criteria other than results.[221] Jakhelln notes that here, the «significant caveat» is that employees paid based on results typically have a minimum wage regardless of their performance, such as sales workers.[222] Concerning termination terms, scepticism mainly stems from the fact that an absence of notice periods may indicate that the worker is in a vulnerable position and thus requires protection.[223] Despite this scepticism, both factors have been used in case law, including in the *Tupperware* case.[224]

The scepticism seems to be reflected in the preparatory work for the recent amendment to WEA Section 1-8 , which states that these elements should not «play a decisive role in the classification».[225] This is partly because remuneration and termination conditions can be adjusted in the contractual provisions, without necessarily reflecting the worker's need for protection.[226] Therefore, like the elements relating to workspace and equipment, remuneration and termination terms primarily serve as supporting factors when «other elements point in the same direction».[227]

The remuneration structure in the MLM industry is unique. Participants do not receive a fixed salary and are not compensated on an hourly basis. They are paid on a piecework basis, based on the number of sales they generate, the number of people they recruit, and the sales generated within their respective downlines. The commission rate also varies, depending on the participant's «level» within the company, and there is no guaranteed minimum wage, which Jakhelln refers to.[228] These factors suggest that participants resemble independent contractors more than employees, since their financial gain is entirely dependent on their results, as also noted in the *Tupperware* case.[229]

Paradoxically, however, this remuneration structure, combined with the companies' sales requirements for commission payments,[230] creates significant economic uncertainty, indicating that participants may have a need for protection. The low statistical likelihood of MLM participants achieving financial gain,[231] further suggests that the remuneration structure has negative consequences, warranting protection for the participants. Thus, although the remuneration structure in isolation argues against employee classification, the participants' need for protection suggests that significant weight should not be placed on this element.

Regarding termination terms, the participant agreements have indefinite duration.[232] This may, as mentioned, indicate that the participants' effort is the crucial element of the contractual relationship. The termination of participant agreements is also more formalized today than assumed in the *Tupperware* case,[233] since termination now usually requires some form of notice. Nevertheless, the specific content of the termination provisions varies.

Forever Living and Tupperware have mutual termination rights without requiring a reason or justification for the termination.[234] By contrast, Herbalife and Nu Skin cannot terminate participants entirely without cause, but can terminate agreements if the company finds a breach of contract.[235] The former opportunity for mutual and reasonless termination is more common for contractual relationships with independent contractors with equal parties, while the latter approach bears more resemblance to employment relationships and the protection that employees have against unfair dismissal under WEA Section 15-7 . However, the threshold for termination is still lower for the latter approach than in traditional employment relationships, and especially for Herbalife, where termination decisions may be based on highly discretionary assessments.[236]

However, a common feature among participant agreements is that terminations – regardless of the basis for termination – take effect relatively immediately.[237] This practice does not parallel traditional employment or independent contractor relationships. Participant agreements do not operate with a fixed notice period of one or more months, nor do they require participants to commit gross misconduct or other significant breach of contract for immediate termination, as required under WEA Sections 15-3 and 15-14 (1). Nor does this practice align with the requirement for «substantial breach of contract» typically needed for immediate termination under traditional Norwegian Contract Law, including in contractual relationships with independent contractors.[238] This may indicate that MLM participants are in a vulnerable position in the labour market, as they have less predictability in their work than both traditional employees and independent contractors. This heightened uncertainty is especially pronounced for MLM participants who may face termination without cause.[239]

On the one hand, the participants' ongoing contractual relationship, with rules on termination, indicates an effort-based obligation, suggesting the existence of an employment relationship. On the other hand, the immediate notice periods and termination grounds vary between the companies. Thus, this element provides limited guidance, particularly since the participants' unpredictability due to immediate notice periods indicates a need for protection.

4.8 The Nature of the Work – Whether the Work is Performed in Close Association with the Employer's Regular Business and Organization

The previous list of elements did not include «the nature of the work» as a distinct element of relevance for the classification of workers.[240] However, the majority of the Committee in NOU 2021: 9 found it necessary to add this element, along with the element addressed in Section 4.9 of this Article, «in light of societal developments».[241] This element, according to the Committee, will primarily hold significance in «ambiguous and grey-area cases», although they emphasize that its relevance and weight «will vary depending on the specific circumstances of each case».[242]

Historically, the nature of work has been utilized sparingly in case law to assess the classification of workers. In the *Sceneinstruktør* case, for instance, the Supreme Court noted that it was «obviously» not feasible to draw any distinction based on the nature of the work.[243] Conversely, in *Beredskapshjem* , the nature and distinctiveness of the work performed in emergency foster care homes were cited as arguments against the existence of an employment relationship.[244] However, the emphasis placed in the latter judgment on the nature of work to delimit the employee term has been criticized in legal theory, as it may conflict with EU law.[245]

The preparatory works highlight that the assessment involves examining «whether the work performed falls within the core business activities of the undertaking and thus concerns the permanent and regular workforce needs of the undertaking, including whether similar work is performed, or should be performed, by other employees in the undertaking».[246] The assessment described in the preparatory works resembles the assessment made when evaluating the permissibility of temporary employment under the WEA. Such employment should only be utilized if the nature of the work warrants it and if the work differs from the enterprise's regular operations.[247] The purpose of the latter restriction is to prevent circumvention of the protective provisions of the WEA,[248] which is also sought through the amendment of the employee definition in WEA Section 1-8 (1).[249] Thus, it seems that «the nature of the work» may have been added as a relevant element to the overall assessment, to further prevent circumvention of the protection of the WEA. Consequently, the basis for the assessment of this element is not whether the nature of the work differs from traditional employment relationships, as assessed in *Beredskapshjem* , but rather whether the work, by its nature, is part of the undertaking’s permanent and regular workforce needs.

It is indisputable that MLM participants engage in work within the core business activities of MLM companies. The tasks performed by participants involve sales, recruitment, and marketing, all of which are central to the workforce needs of any business selling products or services. Sales and marketing activities are often assigned to permanent employees such as sales representatives and marketing executives. The only task that may typically be outsourced by companies is recruitment. However, the leadership responsibilities that participants have for their downline after recruitment are traditionally assigned to employees in managerial positions, not to external contractors.

Nevertheless, the significance of this element is uncertain. The outsourcing of sales and marketing is a characteristic not only of the MLM industry, but of the entire direct sales industry. It may not be entirely expedient to apply an employee term that excludes, or considerably complicates, direct sales and other forms of business that outsource work to a greater extent than traditional businesses. The factor therefore speaks in favour of employee status, but the weight will depend on the overall assessment.

4.9 Ability to Negotiate Own Terms

The consideration of the parties' bargaining power was also absent from the previous list of elements and was, as mentioned, added to the new list by the Committee «in light of societal developments».[250]

The Committee emphasizes that the ability to negotiate one's own terms «can shed light on the balance of power and the need for protection», and may be relevant to the assessment of whether an employment relationship exists.[251] Furthermore, the Committee highlights that some employees may be in a position to negotiate salary and income, and conversely, some independent contractors must accept market price without engaging in «actual negotiations».[252] Nevertheless, the lack of «opportunity to negotiate one's own terms and conditions» because the terms and conditions are «unilaterally determined by the contracting entity», indicates economic dependency in the contractual relationship.[253] As an example of this, the preparatory works refer to platform work, and the views adopted by the British Supreme Court in the case of *Uber BV v. Aslam*.[254] In this case, Uber drivers were classified as «workers» under British law,[255] partly because the drivers had «little or no ability to improve their economic position through professional or entrepreneurial skill».[256]

It is possible to draw certain parallels between platform work and MLM. MLM participants have very limited bargaining power. Participant agreements are characterized by formalistic standard contracts, where participants must accept the terms of the enterprises, both when entering into the agreement and upon the implementation of changes to the contract.[257] In this respect, the participants' bargaining position is relatively similar to that of platform workers, and this was highlighted by the UK Supreme Court in *Uber BV v. Aslam* as an argument against relying on Uber's classification of drivers as independent contractors.[258]

The participants' bargaining power is further hindered by the fact that agreements are generally entered into with the enterprises, while communication, information, and recruitment occur through their upline.[259] The participants' contact with the companies typically happens after contract formation, and subsequent communication is conducted indirectly through their upline, the companies' websites, and the systems used in their work. As a result, participants find themselves obligated to a legal entity with which clear communication is difficult, thereby affecting their bargaining power. This situation suggests that participants have limited opportunities for negotiation and co-determination in their contractual relationships with the companies, leading to an uneven power balance.

It is not uncommon for one party to have stronger bargaining power than the other in negotiations, even in contractual relationships with independent contractors. Furthermore, it is not unusual for one party to provide a pre-drafted contract typically used for the specific type of assignment, requiring the independent contractor to accept the contracting entity's internal policies for the agreement to be established. Consequently, the presence of disparities in bargaining power alone is not sufficient to determine the existence of an employment relationship.

It can be argued that MLM work differs from platform work to which the preparatory work specifically refers, since MLM participants may have greater potential to improve their financial gain through pricing and promotions.[260] Nonetheless, the income opportunities for MLM participants are statistically so limited that a formal ability to enhance their financial position becomes meaningless.[261] Thus, MLM participants may not necessarily have greater real opportunities to improve their financial gain than the platform workers cited in the preparatory works.

In any case, the crux of the matter is that MLM participants seemingly lack bargaining power. There is no partially uneven power balance where one party holds a slightly better negotiating position, nor is there a typical situation where contractors must accept market rates. The participants' bargaining positions essentially resemble that of consumers seeking to utilize a service, thus having to accept the companies' unilaterally determined standard terms and accompanying changes.[262] Consequently, the participants' bargaining power is weaker than that which traditionally exists for both independent contractors and employees, indicating a significant power imbalance and a need for protection.

4.10 Overall Assessment and Conclusion

The updated list of elements presented in Section 3.3 has been presented and assessed in relation to the MLM participants' work. Now, the classification must be based on «whether the relationship between the parties overall is characterized by dependency, subordination, and an imbalance of power on one side, or independence and autonomy on the other».[263] The key question is whether there is such a degree of dependency and subordination, with a corresponding imbalance of power, that the protective legislation should apply.[264] In the following, an overall assessment will be conducted, based on the participants' shared characteristics highlighted

above. The presented elements will be evaluated against each other, and other relevant factors will be considered where applicable. The term «employee» should be interpreted broadly,[265] and any doubt should be to the benefit of the participants, unless it is «highly probable» that an independent contractor relationship exists, as per WEA Section 1-8 (1) last sentence. The participation agreements' classification of participants as non-employees is irrelevant; what matters is the actual character of the contractual relationship.[266]

The following assessment is conducted on a general basis, considering the MLM industry as a whole. However, the legal classification of individual participants may vary depending on their specific relationship with their respective companies, and individual cases must therefore always be assessed specifically and separately.

Regarding the weighting of the various elements, the wording of WEA Section 1-8 (1) seems to place particular importance on the first three factors presented above (i.e. whether labour is made available for disposal, obligation for personal performance and evidence of subordination). This is supported by the preparatory works, which states that the wording was intended to emphasize the three most important elements.[267] These elements have also traditionally been considered particularly significant in both case law and legal theory.[268] Furthermore, the preparatory works suggests that the fifth and sixth elements (i.e. nature of the work, ability to negotiate terms) should carry less weight and primarily serve as supporting factors when «other elements point in the same direction».[269] As for other enumerated and non-enumerated factors, their weight may vary, depending on the specific situation.

As seen above, the first three elements are more likely to indicate the existence of an employment relationship between the MLM participants and the MLM companies. Regarding the participants' obligation to make their labour available for disposal, and whether they are subject to the companies' direction, management and control, the companies' extensive contractual right to unilaterally change the agreements is particularly significant. This right to make changes results in a high degree of dependency, subordination, and power imbalance between the parties, suggesting an employment relationship. Concerning the participants' personal work obligation, the confidentiality clauses and rules prohibiting the sharing of personal user accounts in the primary work systems, limit the participants' ability to delegate work. This too indicates a contractual relationship characterized by subordination and dependency, warranting the application of protective legislation.

Here, a key counterargument is that the participants' personal work obligation only applies to the extent that participants choose to work, since they do not have a general work obligation. Notably, this was highlighted in the *Tupperware* case.[270] Participants can largely choose whom to sell to, which tasks to undertake within the company, how much to work, and when. The companies' right to direct, manage, and control is therefore limited to the working hours and workload that the participants themselves choose.

However, this argument loses much of its weight due to the companies' periodic sales requirements and unilateral rights to make changes to the agreements. The sales requirements ensure that the companies already have a certain degree of control over the participants' work scope. Furthermore, the companies' unilateral rights to make changes to the agreements effectively allow them to impose specific workloads and work hours on the participants. The absence of a traditional work obligation is therefore not decisive.

Nonetheless, other counterarguments may be made. One counterargument, which was central to the outcome in the *Tupperware* case and still applies to today's MLM participants, is that the enrollment process is informal and does not require special qualifications. This may indicate that the connection between the parties is too «loose and incidental» to be considered an employment relationship.[271] Additionally, participants provide their own workspaces and equipment, have some freedom to take on other work, and their compensation structure differs from traditional employment relationships, all of which argue against the application of protective legislation.

However, the arguments in favour of the application of the protection legislation seem to outweigh the counterarguments. Firstly, the argument of the participants having a «loose and incidental» connection to the companies is less applicable today than it was at the time of the *Tupperware* decision. In the *Tupperware* case, this argument was linked to both the contract formation, termination, and the absence of sales requirements. Today, participation agreements typically terminate through some form of notice, and participants are subject to sales requirements to receive payments. The relationship between the parties is therefore more formalized today, making the informal nature of the enrollment process less decisive. Secondly, the factors related to workspace, equipment, and compensation structure are primarily supporting elements when «other elements

point in the same direction».[272] In other words, these elements are not heavily weighted and provide limited guidance, since the participants' differing remuneration structure and self-provision of work equipment, while traditionally indicating an independent contractor relationship, may also indicate a need for protection.[273] Thirdly, the elements related to the nature of the work and the participants' bargaining power – as with the first three elements – suggest that protective legislation should apply. Consequently, there are several and more significant elements supporting the application of the protective legislation.

An additional factor which may indicate that the participants are independent contractors, is the participants' responsibility for paying taxes and fees. The significance of this relates to the typical risk that independent contractors bear for their own work. However, this factor has been given limited weight in case law. In the *Tupperware* case, the Supreme Court stated that this element bore «no weight» in their assessment,[274] and it was stated in Rt-1994-1064 and Rt-2007-1458 (Dykkerulykke), that tax and fee arrangements could not be given decisive weight.[275] Additionally, these factors may be adjusted in the contractual terms without necessarily reflecting the worker's need for protection. Thus, this factor has limited significance.

Overall, the factors supporting the application of protective legislation seem to carry the most weight. MLM participants hold roles characterized by uncertainty and limited co-determination, and the assessments conducted above indicate a consistent need for protection. Statistics show that the majority of MLM participants do not achieve economic gain,[276] and the companies' compensation plans are unpredictable and complex. Additionally, participants who achieve economic gain risk losing work opportunities and income, based on the companies' discretionary decisions. The companies also have the ability to manage, control, and supervise the participants, in accordance with contractual terms that the participants have limited ability to negotiate. In other words, it appears that the companies reserve virtually all the rights an employer has in relation to its employees, without assuming the corresponding employer obligations. Such potential attempts to circumvent employer obligations by using «false» independent contractor titles are among the issues that the revised employee definition in WEA Section 1-8 seeks to prevent.[277] The protective legislation may reduce many of these uncertainties associated with MLM work. The Working Environment Act requires employers to use remuneration methods, including performance pay, that do not cause «adverse physical or psychological strain» for employees, cf. WEA Section 4-1 (2). The MLM compensation models that often result in participants working without profit probably do not comply with this provision, and thus, would need to be changed if participants were granted employee status. Additionally, the deeming of the participants to be employees would, for example, prevent the companies from terminating the contractual relationship at their sole discretion,[278] and ensure the participants' co-determination through safety representatives, information, and discussions.[279] Thus, the MLM participants' need for protection may be remedied by the application of the protective legislation.

Consequently, the answer to the question posed in this Article is that it is most appropriate to conclude that the participants are employees, since there is a relationship of dependency and subordination with such an imbalance of power between the parties, that warrants the application of protective legislation. This classification has the strongest arguments in its favour, since the above assessments indicate that it is not «highly probable» that the participants are independent contractors, and such doubt should benefit the participants, cf. the legal presumption in WEA Section 1-8 (1) last sentence. As mentioned, the conclusion may nevertheless vary, depending on the individual MLM participant's relationship to their respective MLM company. Each case must therefore be based on a specific and purpose-oriented overall assessment.

5. Concluding Reflections

5.1 The Significance of a Reclassification

The consequence of MLM participants gaining employee status under the WEA is, generally, that they enjoy the law’s protection. However, the long-term implications of this reclassification in relation to Norwegian labour law remain uncertain.

On one hand, reclassifying MLM participants could reduce the similarities between MLM and pyramid schemes, thus making it easier to differentiate between them. As noted, the MLM industry has been criticized

for camouflaging illegal pyramid schemes.[280] In the preparatory work for the former Norwegian Lottery Act, it is highlighted that MLM companies functioning as fronts for pyramid schemes have numerous negative aspects, including operations that are «in violation of the rules on currency trading, securities trading, fraud and cheating, lotteries and gambling, as well as consumer protection regulations, such as rules on marketing and product liability».[281]

Many of these concerns may be alleviated if participants gain employee status. Firstly, this status would necessitate the use of a compensation system that ensures the participants' mental health.[282] Consequently, the complex compensation models used by MLM companies would probably no longer be permissible. This would eliminate one of the major similarities between MLM companies and illegal pyramid schemes, which has also facilitated many of the economic illegalities mentioned above.[283] Secondly, this classification ensures a more centralized marketing and product responsibility within the companies. While this responsibility does also lie with the companies today, it is more indirect, since they use independent contractors for marketing and product sales, often disclaiming responsibility for the information provided by them. Classifying participants as employees can prevent such disclaimers, thereby minimizing the chances of the unlawful marketing that characterizes some MLM companies and illegal pyramid schemes.[284]

On the other hand, classifying participants as employees may prompt MLM enterprises to adjust their contractual terms to avoid the aforementioned changes and other employer-related responsibilities. It may be more cost-effective for enterprises to waive certain rights to maintain the participants' status as independent contractors than to align the business with the rules and expenses applicable to employers. Specifically, the companies may choose to waive the unilateral and discretionary amendment rights to somewhat balance the power dynamics between the parties. If this is the result of the reclassification, it may not necessarily make it easier to differentiate between MLM and illegal pyramid schemes.

How the companies adapt to the classification will also impact the participants' work. If the companies choose to align with the participants' employee status, this may result in more control and thus less freedom for the participants, leading to them gaining a more «traditional» employment. Conversely, the companies' attempts to maintain the participants' status as independent contractors could result in more freedom and independence for the participants. However, the downside with the latter is that part of the companies' control might shift to closed forums, which is already a characteristic of MLM.[285] In any case, a reclassification of the participants will affect their work and necessitate shifts in the MLM industry.

Additionally, the reclassification may have ripple effects on the understanding of the term «employee» in other laws than just the WEA. For the Holidays Act and the Labour Disputes Act, this is unproblematic, since the definitions in these respective laws will be updated to align with WEA Section 1-8 (1) first sentence.[286] Thus, the Working Environment Act, the Holidays Act and the Labour Disputes Act are still expected to operate with a consistent definition of «employee». For other laws, the consequences are more uncertain. The Ministry emphasized that there may «be a need to review the terminology in [...] other laws,» but that this fell outside of their mandate.[287] It is not inconceivable that the changes in to the Working Environment Act, the Holidays Act, and the Labour Disputes Act will have repercussions for other laws, but the term must still be interpreted «in light of the purpose of the individual law».[288]

5.2 De Lege Ferenda

While it may be most appropriate to conclude that MLM participants qualify as employees under WEA Section 1-8 (1), this status may not be the most suitable solution for all MLM participants and other workers in classificational «grey-areas». Thus, the following section examines whether it would be advisable to introduce an intermediate legal category of workers, de lege ferenda.

Several scholars have proposed the creation of a third legal category to capture individuals in the grey area between employees and independent contractors. This intermediate category would offer more extensive legal protection than that afforded to independent contractors, though not as comprehensive as the protections granted to employees. Professors Seth D. Harris and Alan B. Krueger, for instance, have suggested such an intermediate category in American law, focusing primarily on platform workers, but also encompassing other grey-area workers.[289] The OECD has similarly recommended that national legislators consider strengthening the rights of grey-area workers, by ensuring «fair pay» and some form of job security.[290]

The United Kingdom already employs an intermediate category known as «workers». Individuals classified as «workers» enjoy partial protections, including minimum wage, protection against wage deductions, holiday pay, time off, and protection against retaliation.[291] The Uber drivers, in the case of *Uber BV v. Aslam*, were considered to belong to this category.[292]

Swedish labour law also grants certain extended rights to worker-like individuals. According to the Swedish Act on Co-Determination in the Workplace, the law applies both to employees and also to those who perform work for another without being employed, but who hold a position essentially similar to that of an employee.[293] These worker-like individuals, or «dependent contractors», enjoy rights such as freedom of association, the right to negotiate, and the right to information.[294] However, Swedish labour law consists of multiple statutes and acts regulating different aspects of employment, and this intermediate category is not used in all of them.[295]

On the one hand, a similar intermediate category could be sensible in Norway. Although MLM participants appear most akin to employees, their work differs from the traditional employment relationships primarily considered in the WEA. Consequently, it may not be appropriate to apply all the mandatory provisions of the Act to MLM participants and other grey-area workers. The Committee highlights that most self-employed individuals prefer to remain self-employed.[296] While it is unclear how this statistic relates specifically to MLM participants, it is plausible that these participants do not desire all the rights and duties that come with employee status. Increased rights typically entail reduced freedom, and participants might wish to retain certain freedoms they currently have, such as the ability to engage in other work and greater flexibility in their working hours. This could lead participants to refrain from claiming employee status. Therefore, an intermediate category tailored to the work situations of grey-area workers might be more appropriate. Such a category could provide a more flexible and applicable framework for those who do not fit neatly into existing categories and thus do not benefit fully from the corresponding legal protections.

On the other hand, the Sharing Economy Committee considered and ultimately rejected the introduction of an intermediate category for platform workers, deeming it unnecessary in response to the potential emergence of a new category of contractors in the sharing economy. [297] The majority of the Committee argued that an intermediate category would create complicated delimitation issues and facilitate easier circumvention of the regulations, while representing a «radical innovation» without precedent or history in Norwegian law.[298] The OECD has also cautioned against establishing new intermediate categories, as such categories may result in individuals who previously held employee status losing certain rights by being placed in a new category, instead of providing enhanced protections for the workers in need.[299]

A more effective approach might be to extend the rights of independent contractors generally, rather than introducing an intermediate category. For instance, the Committee in NOU 2021: 9 proposed clarifying WEA Section 2-2 (1), which pertains to the employer's responsibility for individuals without employee status. The proposal suggested specifying that the employer's responsibility applies «regardless of where the work takes place».[300] Although this proposal was not adopted by the Ministry due to the ongoing processes related to the EU Platform Workers Directive, such changes could nonetheless extend protections to both MLM participants and platform workers.[301] Additionally, further expansion of protections for independent contractors, such as through job security regulations, as suggested by the OECD, could be considered.[302]

However, this approach would extend protections to all contractors, not just grey-area workers. A general extension of protections might limit the flexibility of businesses and make it challenging to tailor rights to safeguard the needs of both traditional independent contractors and grey-area workers. Furthermore, applying WEA Section 2-2 to independent contractors working outside the employer's physical workplace would only equalize their status with independent contractors working on-site, without addressing the specific labour law challenges faced by MLM participants and other grey-area workers.

A final point is that some of the flexibility sought through an intermediate category could be partially achieved by recognizing grey-area workers deemed to be employees as having a «particularly independent post», cf. WEA Section 10-12 (2). However, this would primarily exempt them from the Act's working time regulations, and it is uncertain whether all MLM participants and other grey-area workers would qualify as having a particularly independent post.

Consequently, the introduction of a new intermediate legal category may not be the most prudent solution in Norwegian law. Nevertheless, the potential for enhancing the rights of workers situated in the grey area

between employees and independent contractors should continue to be explored, in order to ensure an adequate allocation of responsibilities in a continuously evolving labour market.

Notes

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2 Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven).

3 Ot.prp. nr. 49 (2004–2005) p. 38.

4 See for example the judgment Rt-2000-1811 (Finanger I), on p. 1826 .

5 Kongelig resolusjon 17. mars 2023 nr. 341 . Ikraftsetting av lov 17. mars 2023 nr. 3 om endringer i arbeidsmiljøloven mv. (arbeidstakerbegrepet og arbeidsgiveransvar i konsern).

6 Prop. 14 L (2022–2023) p. 31.

7 See Section 2.3 of this Article for more information about these terms.

8 NOU 2021: 9 p. 244, with reference to Advokatfirmaet Haavind's mapping of court cases concerning the term «employee».

9 Rt-1984-1044 (Tupperware).

10 See Section 2.4 of this Article.

11 This is evident when reading the MLM companies' participation agreements, where it is assumed that the participants do not have employee status. See Section 2.3.2 of this Article.

12 See Section 3.4.3 of this Article.

13 See Sections 4.10 and 5.1 of this Article.

14 Bäckman, Claes and Tobin Hanspal. «Participation and losses in multi-level marketing: Evidence from a Federal Trade Commission settlement» in Financial Planning Review vol 5, iss. 1 (2022) pp. 1-19, on pp. 3-4.

15 Vikøren, Birger M., Roger Pihl «multilevel-marketing» (2019) [retrieved 4 October 2023].

16 Vikøren, Birger M., Roger Pihl «nettverkssalg» (2020) [retrieved 4 October 2023].

17 Ot.prp. nr. 97 (2004–2005) . *Om lov om endringer i lov 24. februar 1995 nr. 11 om lotterier m.v.* on p. 10 .

18 Vikerøen (2019).

19 Prop. 220 L (2020–2021) p. 38.

20 Ot.prp. nr. 97 (2004–2005) p. 24.

21 Ibid. p. 5 . See also the description of the «5% community» in Vikerøen (2019).

22 Another issue is that the participants' possible classification as employees may make it challenging for MLM companies to camouflage illegal pyramid schemes, see Section 5.1 of this Article.

23 Pihl, Roger. «Direktesalg» (2019) [retrieved 4 October 2023].

24 Herbalife, *Atferdsregler for Norge* (2023a), [retrieved 4 October 2023], on page 19, Section 3.1.2.

25 Nu Skin, *Retningslinjer og prosedyrer Europa, Midtøsten og Afrika (EMEA)* (2019a) [retrieved 4 October 2023], on page 16, Chapter 2, Section 3.1.

26 Forever Living, *Allmenne vilkår og regler 10:16* (n.d.a) [retrieved 5 October 2023], on page 7, Section 3.3.1.1.

27 Tupperware. Consultant Agreement – USA (2021a) [retrieved 5 October 2023], on page 4.

28 Lov 29. april 1988 nr. 21 om ferie (ferieloven).

29 Lov 27. januar 2012 nr. 9 om arbeidstvister (arbeidstvistloven).

30 Hotvedt, Marianne Jenum. «Arbeidsgiveransvar i formidlingsøkonomien? Tilfellet med Uber» in *Lov og Rett* vol. 55, iss. 8 (2016) pp. 484-503, on page 29. And Rt-1984-1044 (Tupperware) on p. 1048 .

31 Hotvedt, Marianne Jenum. «Arbeidstaker – quo vadis? Den nyere utviklingen av arbeidstakerbegrepet» in *Tidsskrift for Rettsvitenskap* vol 131, iss. 1 (2018) pp. 42-103, on page 64.

32 See also the judgment HR-2016-589-A , regarding whether a mayor was an employee under the Norwegian National Insurance Act. The Supreme Court stated that «a contract between employee and employer concerning the rights and obligations of the employment relationship» is «a central basis and characteristic of an employment relationship» (paragraph 50 of the judgment).

33 Hotvedt (2016) p. 494 .

34 Hotvedt, Marianne Jenum. «Karnov lovkommentar til arbeidsmiljøloven.» in *Lovdata Pro* [retrieved 4 October 2023]. In note 5 to Section 1-8 (2).

35 Fougner, Jan, Lars Holo, Tron Løkken Sundet and Tarjei Thorkildsen. *Arbeidsmiljøloven – Lovkommentar*, 3. edition, Oslo: Universitetsforlaget (2018), on page 87. And Skjønberg, Alexander Næss, Eirik Hognestad and Marianne Jenum Hotvedt. *Individuell*

arbeidsrett, 2. edition., Oslo: Gyldendal Norsk Forlag (2021), on page 59.

36 Prop. 14 L (2022–2023) p. 35.

37 Ibid. p. 28 .

38 Ot.prp. nr. 49 (2004–2005) pp. 17 and 74 .

39 Prop. 14 L (2022–2023) p. 31.

40 See more about this in Section 3.4 of this Article.

41 Hotvedt (2016) p. 487 .

42 Ot.prp. nr. 49 (2004–2005) p. 38.

43 l.c.

44 See for example the judgment Rt-2000-1811 (Finanger I), on p. 1826 .

45 See Sections 3.2 and 3.3 of this Article.

46 Ot.prp. nr. 97 (2004–2005) p. 13.

47 Fougner (2018) p. 67.

48 Skjønberg (2021) p. 47.

49 Hotvedt (2022) Section 1-8 (1) note 2 .

50 Prop. 14 L (2022–2023) p. 32.

51 Fougner (2018) pp. 70-71 and Ot.prp. nr. 49 (2004–2005) p. 304.

52 An independent contractor's contractual relationship with an entity is usually governed by traditional contract law.

53 Prop. 14 L (2022–2023) p. 27 and NOU 2021: 9 p. 238.

54 Prop. 14 L (2022–2023) p. 27.

55 Prop. 14 L (2022–2023) pp. 27 - 28 .

56 l.c.

57 l.c.

58 Skjønberg (2021) p. 51.

59 Avlaster II paragraph 63 .

60 Ibid. paragraph 70 .

61 Ibid. paragraphs 58 , 77 , 82 and 85 .

62 Prop. 14 L (2022–2023) p. 30.

63 l.c.

64 l.c.

65 Ibid. p. 31 .

66 Ibid. p. 28 .

67 See for example the judgment Rt-2015-475 (Partner) paragraph 65 , which concerned the interpretation of the employee» in connection with employer liability in Section 2-1 of the Norwegian Damages and Compensations Act , and HR-2017-344-A (Fellesoppgjør) paragraphs 33 and 37 on the interpretation of the term «employees» in Section 9-5 no. 8 of the Tax Assessment Act . See also p. 1048 of the *Tupperware* case .

68 Fougner (2018) p. 63 and Hotvedt (2018) p. 62.

69 NOU 2021: 9 s. 249. See also the emphasis on the same in Prop. 14 L (2022–2023) p. 27.

70 Skjønberg (2021) p. 50, and Hotvedt, Marianne Jenum, « Avklaringer om arbeidstakerbegrepet – Rt-2013-342 og Rt-2013-354 », in *Nytt i privatretten* no. 2 (2013a) pp. 4-5, on p. 5 .

71 This follows implicitly from WEA Section 1-9 but is also applied in case law. See for example Rt-2013-354 (Avlaster I) paragraph 37 , Rt-2013-342 (Beredskapshjem) paragraph 44 and *Avlaster II* paragraph 56.

72 Hotvedt (2016) p. 495 .

73 See, for example, *Avlaster I* paragraph 38 under the reference to the same statement in *Beredskapshjem* paragraph 46 .

74 Prop. 14 L (2022–2023) p. 28.

75 NOU 2021: 9 pp. 246 - 248 .

76 Ibid p. 248 .

77 NOU 2021: 9 p. 248 - 249 .

78 Skjønberg (2021) p. 52.

79 *Avlaster I* paragraph 39.

80 NOU 2021: 9 pp. 248 - 249 .

81 *Beredskapshjem* paragraph 62.

82 Lov 14. november 1947 nr. 3 om ferie (ferieloven) [since revoked], Section 1 .

83 Lov 4. februar 1977 nr. 4 om arbeidervern og arbeidsmiljø. (arbeidsmiljøloven) [since revoked], Section 3 first paragraph.

84 *Tupperware* p. 1048.

85 l.c.

86 Ibid p. 1049 .

87 Ibid pp. 1048 - 1049 .

88 Ibid p. 1049 .

89 l.c.

90 Ibid p. 1050 .

91 l.c.

92 See for example *Avlaster I* paragraph 39, repeated in *Avlaster II* paragraph 60.

93 This is particularly true for digital platform workers. See for example Prop. 14 L (2022–2023) and Hotvedt (2016) .

94 See figures 2 and 3 in section 2.4.

95 See Section 3.3.

96 NOU 2021: 9 p. 246.

97 l.c. and Prop. 14 L (2022–2023) p. 28.

98 Prop. 14 L (2022–2023) p. 28.

99 NOU 2021: 9 p. 246.

100 l.c.

101 Ot.prp. nr. 49 (2004–2005) p. 73.

102 Jakhelln, Henning. «Arbeidstakerbegrepet – oppdragstaker eller arbeidstaker» in *Jussens Venner* vol 48, iss. 5 (2013) pp. 329-365, on p. 333.

103 See Sections 3.2 and 3.3.

104 Tupperware (2021a) p. 4, Forever Living (n.d.a) p. 9 section 3.5.2.1 and Herbalife (2023a) p. 19 section 3.1.2.

105 Nu Skin (2019a) p. 16, chapter 2, section 3.1.

106 See section 4.7 of this Article.

107 Nu Skin (2019a) p. 29, chapter 2, section 8.

108 Lov 23. desember 1988 nr. 104 om produktansvar (prodansvl.), section 2-1 (1) cf. sections 1-3 (1) letter a cf. section 1-2 (1).

109 Nu Skin (2019a) p. 16, chapter 2, section 3.1, Tupperware (2021a) p. 4, Forever Living (n.d.a) p. 7 section 3.3.1.1 and Herbalife (2023a) p. 19 section 3.1.2.

110 See, for example, Herbalife (2023a), p. 44, Section 7.5.5 and Section 4.4.4 of this Article.

111 Nu Skin (2019a) p. 66, Chapter 8, Sections 1.1 and 1.2, Tupperware (2021a) p. 5, Forever Living (n.d.a) p. 6 Section 2.2, and Herbalife (2023a) p. 1 footnote 1.

112 Evju, Stein. «Arbeidsrett og styringsrett – et perspektiv» in *Arbeidsrett og arbeidsliv* vol. 1 (2003) pp. 3-32, on p. 7.

113 *Avlaster II* paragraph 65.

114 l.c.

115 l.c.

116 Herbalife (2023a) footnote 1 page 1.

117 Tupperware. *Terms of Use* (2019) [retrieved 9 October 2023] Sections 1 and 16. See also Nu Skin (2019a) Chapter 8, Section 1.1, Tupperware (2021a) p. 5 and Forever Living (n.d.a) p. 6 Section 2.2.

118 Paragraph 65.

119 Ot.prp. nr. 97 (2004–2005) p. 13.

120 Prop. 14 L (2022–2023) p. 28.

121 See, for example, *Beredskapshjem* , paragraph 49 .

122 Referring to, for example, the case of Rt. 1968 p. 725 , where a home worker was considered an employee, even though she could engage assistants, as stated on p. 728 (the district court's judgment).

123 Prop. 14 L (2022–2023) p. 28.

124 See, for example, Nu Skin. *Terms of Use* (2022) [retrieved 9 October 2023], Section 2.2. Additionally, see Nu Skin (2019a) p. 53, Section 2.3 and Tupperware (2019) Section 6 no.6.

125 See, for example, Forever Living (n.d.a) p. 30, Section 8.2.1.1 and Herbalife (2023a) pp. 35-36 Sections 6.2.1 and 6.2.4 and p. 62 Chapter 12.

126 Herbalife (2023a) p. 19 Section 3.1.5.

127 Ibid. p. 31, Section 5.1.2.

128 Forever Living (n.d.a) Section 3.4.2.4.

129 Ibid. p. 30 Section 8.2.1.1.

130 See, for example, Nu Skin (2022) Section 2.2. and Tupperware (2019) Section 6 no. 6. This is probably also in violation with the regulations in Forever Living (n.d.a) p. 30 Section 8.2.1.1.

131 NOU 2017: 4 p. 53.

132 Prop. 14 L (2022–2023) p. 28.

133 *Sceneinstruktør* p. 1231.

134 Skjønberg (2021) p. 51.

135 Prop. 14 L (2022–2023) p. 29.

136 l.c.

137 See Section 3.2 of this Article with reference to *Avlaster II* .

138 NOU 2021: 9 p. 246.

139 Prop. 14 L (2022–2023) p. 29.

140 Tupperware (2021a) p. 4.

141 Tupperware (2019) Section 2.

142 Prop. 14 L (2022–2023) p. 2.

143 This is a consequence of contractors frequently having performance-based obligations, as discussed in Section 4.2.

144 Herbalife (2023a).

145 Nu Skin (2019a) p. 36, Chapter 3, Section 5.1, and Forever Living (n.d.a) p. 25, Section 7.2.2.7.

146 Nu Skin (2019a) pp. 40-42, Chapter 3, Sections 7.4 and 7.5, Herbalife (2023a) pp. 41-42, Section 7.3, Tupperware (2021a) p. 1 and Forever Living (n.d.a) p. 25 Section 7.2.2.5 and p. 56 (Appendix 1).

147 *Tupperware* p. 1049

148 Nu Skin (2019a) p. 31, Chapter 3, Section 1.1.

149 Ibid. p. 32, Chapter 3, Section 2.4.

150 Ibid. p. 32, Chapter 3, Section 2.4.

151 Ibid. p. 24, Section 7.2.1.7.

152 *Tupperware* p. 1049

153 l.c.

154 Tupperware. *Code of Conduct* (2021b) [Retreived 9 October 2023]. On p. 12.

155 Nu Skin. *Price List* (2002) [Retreived 9 October 2023]. Additionally, see Herbalife (2023a) p. 38, Section 6.4.

156 Forever Living (n.d.a) p. 28, Section 7.4.3.

157 Ibid. p. 9 Section 3.5.1.3 and p. 17 Section 4.15.1.

158 Prop. 14 L (2022–2023) p. 29.

159 See Section 4.2 of this Article.

160 Prop. 14 L (2022–2023) p. 29.

161 *Tupperware* p. 1049.

162 See for example Rt-1990-903 on p. 904 .

163 Case C-256/01*Allonby* paragraph 72 with reference to C-357/89*Raulin* paragraphs 9 and 10.

164 Forever Living (n.d.a) p. 16 Section 4.6.1, p. 38 Section 10.2.2 and p. 39 Section 10.3.

165 See Forever Living. *Ofte stilte spørsmål - Hva er en Case Credit eller CC* (n.d.b) [retrieved 9 October 2023].

166 Nu Skin. *Velocity Salgspresentasjonsplan* (2019b) [retrieved 9 October 2023] on p. 11 Section 3.1 E, p. 7 Section 2.2 D and p. 9 Section 2.3 D. Additionally, see Herbalife. *Sales and MarketingPlan* (2023b) [retrieved 2 June 2024], on p. 16. Also, see Tupperware (2021a) p. 1 and the inactivity rules in Nu Skin (2019a) p. 59, Chapter 6, Section 3.9 (a).

167 Tupperware p. 1048 .

168 NOU 2017: 4 p. 53. See also Hotvedt (2016) p. 496 .

169 Jakhelln (2013) p. 344.

170 Tupperware (2021a) p. 5, Tupperware (2019) Sections 10 and 16, Forever Living (n.d.a) pp.12-14 Sections 3.11.2, 3.11.3, 3.12.1.1, 3.12.2.1 and 3.12.2.2, and Nu Skin (2019a) pp. 57-58 Chapter 6, Section 3.6 (Nu Skin requires that the discretion must «have an objective basis and not be discriminatory» if the contract is to be terminated. There are no similar requirements for other sanctions), and Chapter 6, Section 3.7.

171 See, for example, Herbalife (2023a) p. 19 Section 3.1.4, p. 39 Section 7.1.1 and p. 44 Section 7.5.5.

172 Ibid. p. 59 Section 10.1.2.

173 Prop. 14 L (2022–2023) p. 29 and NOU 2021: 9 s. 247.

174 See Section 4.2 of this Article.

175 Nu Skin (2019a) p. 66, Chapter 8 Section 1.2. See also the similar regulation in Herbalife (2023a) footnote 1 page 1.

176 See Section 4.2 with reference to *Avlaster II* .

177 See, for example, Apple. *Velkommen til iCloud* (2023) [retreived 10 October 2023]. Section I, letter E.

178 Prop. 64 L (2013–2014) p. 91 and NOU 1993: 27 p. 16.

179 See Section 4.2.

180 Fougner, Jan. «Arbeidsgivers styringsrett – skillet mellom virksomhets- og arbeidsledelse» in *Arbeid og rett: Festskrift til Henning Jakhellns 70-årsdag*. Helga Aune, Ole Kristian Fauchald, Kåre Lilleholt, Dag Michalsen red., 1. edition, Oslo: Cappelen Damm Akademisk (2009) pp. 235-256. On p. 246.

181 *Beredskapshjem* paragraph 59.

182 NOU 2021: 9 p. 247.

183 *Beredskapshjem* , paragraph 59 .

184 *Tupperware* p. 1050.

185 *Avlaster I* paragraph 55.

186 Forever Living (n.d.a) p. 7 Section 3.2, Tupperware (2021a) p. 5, Nu Skin (2019a) pp. 57-59, Chapter 6 Section 3.6 and 3.9, Herbalife (2023) p. 18 Section 2.5.1 and p. 60 Section 10.1.4. See also Section 4.7 of this Article.

187 *Tupperware* p. 1048

188 See Sections 4.4.3 and 4.7 of this Article.

189 *Avlaster I* paragraph 55.

190 Hotvedt (2018) p. 71.

191 *Avlaster I* paragraph 39.

192 Section 4.5.1 of this Article.

193 NOU 2021: 9 p. 247.

194 Prop. 14 L (2022–2023) p. 29.

195 *Beredskapshjem* , paragraph 60 .

196 Forever Living (n.d.a) p. 7 Section 3.3.1.4, Tupperware (2021b) p. 10, Herbalife (2023) p. 20 Section 3.1.8 and Nu Skin (2019a) pp. 51-52, Chapter 5 Sections 2.1 b and 2.2 a.

197 Forever Living (n.d.a) p. 25 Section. 7.2.1.14, Herbalife (2023) p. 40 Section 7.2.4 and Nu Skin (2019a) p. 51, Chapter 5 Section 2.1 a. Note that Tupperware prohibits participation in activities that could potentially affect sales for the business, which sales of other products in the same forum as Tupperware products may undoubtedly do, see Tupperware (2021b) p. 10.

198 Note that there is often reason to impose a stricter duty of loyalty in employment relationships than in ordinary contractual relationships, cf. Hotvedt, Marianne Jenum, Terese Smith Ulseth. «Arbeidsavtalen og styringsrett: harmoni i en domsoktett» in *Arbeidsrett* vol 19, iss. 1 (2013b) pp. 112-138, on p. 120 .

199 NOU 2021: 9 p. 247.

200 l.c.

201 Jakhelln (2013) p. 348.

202 *Tupperware* p. 1049.

203 Ot.prp. nr. 49 (2004–2005) p. 73.

204 Jakhelln (2013) p. 342.

205 *Beredskapshjem* paragraph 62.

206 *Avlaster I* paragraph 52.

207 *Avlaster II* paragraphs 75 and 76 .

208 NOU 2021: 9 p. 248.

209 l.c.

210 Hotvedt (2018) p. 71.

211 NOU 2021: 9 p. 248.

212 See, for example, Forever Living (n.d.a) p. 53 Section 13.8. Additionally, see Nu Skin. *Qualification Rules for SuccessTrip 2024* (n.d.) [retrieved 10 October.2023], Section 1.

213 *Tupperware* p. 1049.

214 *Tupperware* p. 1049.

215 NOU 2021: 9 p. 248.

216 l.c.

217 Ot.prp. nr. 49 (2004–2005) p. 73.

218 Fougner (2018) p. 77.

219 However, the law allows for alternative methods of termination, such as for temporary employees, cf. WEA Section 14-9 .

220 Fougner (2018) p. 81.

221 Ibid. p. 77.

222 Jakhelln (2013) p. 335.

223 See for example *Avlaster I* paragraph 55.

224 *Tupperware* p. 1049.

225 NOU 2021: 9 p. 248.

226 l.c.

227 l.c.

228 Jakhelln (2013) p. 335.

229 *Tupperware* p. 1049.

230 See Section 4.4.3 of this Article.

231 Ibid Section 2.2.

232 Forever Living (n.d.a) p. 7 Section 3.2, Tupperware (2021a) p. 5, Nu Skin (2019a) p. 59, Chapter 6 Section 3.9, and Herbalife (2023) p. 18 Section 2.5.1.

233 *Tupperware* p. 1048.

234 Forever Living (n.d.a) p. 13 Section 3.12.1. and Tupperware (2021a) p. 5.

235 Nu Skin (2019a) p. 57, Chapter 6 Section 3.6, and Herbalife (2023) p. 60 Section 10.1.4.

236 See Section 4.4.3 of this Article.

237 Forever Living (n.d.a) p. 13 Section 3.12.1, Tupperware (2021a) p. 5, Nu Skin (2019a) p. 58, Chapter 6 Section 3.9 b, and 3.6, Herbalife (2023) p. 18 Section 2.5.1.

238 See for example the case Rt. 1998 p. 1510 (Hussopp) on p. 1518 .

239 See the reference to *Avlaster I* in Section 4.5.1 of this Article.

240 Ot.prp. nr. 49 (2004–2005) p. 73.

241 NOU 2021: 9 p. 248.

242 l.c.

243 *Sceneinstruktør* p. 1230.

244 *Beredskapshjem* paragraphs 64 and 65 .

245 Hotvedt (2018) p. 95.

246 NOU 2021: 9 p. 248.

247 WEA Section 14-9 (2) letter a, and Prop. 39 L (2014–2015) p. 119.

248 Skjønberg (2021) p. 125.

249 NOU 2021: 9 p. 250.

250 Ibid. p. 248 .

251 l.c.

252 l.c.

253 l.c.

254 *Uber BV v. Aslam* (2021) [UKSC]

255 «Workers» is a British employment classification in between the categories of employee and independent contractor, which, among other things, entitles them to minimum wage, cf. NOU 2021: 9 pp. 242 - 243 footnote 132 and *Uber BV v. Aslam* (2021) paragraph 1.

256 NOU 2021: 9 p. 248 and *Uber BV v. Aslam* (2021) paragraph 101.

257 See Sections 4.4.4 and 4.7 of this Article.

258 *Uber BV v. Aslam* (2021) paragraph 77.

259 The system utilized by Tupperware is an exception to this. See Section 2.3.2 of this Article.

260 NOU 2021: 9 p. 248.

261 See Section 2.2 of this Article.

262 Ibid Section 4.4.4.

263 NOU 2021: 9 p. 249.

264 Hotvedt (2013a) p. 5 and Skjønberg (2021) p. 50.

265 *Tupperware* p. 1048.

266 See Section 3.2 of this Article.

267 Prop. 14 L (2022–2023) pp. 27 - 28 .

268 See, for example, Hotvedt (2016) p. 495 and *Avlaster II* paragraph 63 relating to direction, management, and control.

269 NOU 2021: 9 p. 248.

270 *Tupperware* p. 1049.

271 Ibid. p. 1048 .

272 NOU 2021: 9 p. 248.

273 See Sections 4.6 and 4.7 of this Article.

274 *Tupperware* p. 1049.

275 Rt. 1994 p. 1064 on p. 1069 and *Dykkerulykke* paragraph 36.

276 See Section 2.2 of this Article.

277 NOU 2021: 9 p. 250.

278 WEA Sections 14-7 and 15-14 .

279 WEA Sections 6-1 , 6-2 and 8-1 .

280 See Sections 2.3.1 and 2.4 of this Article.

281 Ot.prp. nr. 97 (2004–2005) p. 13.

282 See Section 3.10 of this Article.

283 Ot.prp. nr. 97 (2004–2005) p. 13.

284 l.c.

285 l.c. and Section 2.6 of this Article.

286 Prop. 14 L (2022–2023) p. 29.

287 Ibid. p. 26 .

288 l.c

289 Harris, Seth D., and Alan B. Krueger. «A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The «Independent Worker»» in *The Hamilton Project* (2015) on p. 27.

290 OECD. *The Future of Work: OECD Employment Outlook 2019*. OECD Publishing, Paris. (2019), on pp. 146, 150 and 159.

291 UK Government «Employment status: Worker» (n.d.) [retrieved 17 October 2023].

292 *Uber BV v. Aslam* (2021) paragraph 130.

293 Läg om medbestämmande i arbetslivet (1976:580) Section 1.

294 Prop. 14 L (2022–2023) p. 20.

295 See, for example, Arbeidsmiljölag (1977:1160) Section 3.

296 NOU 2021: 9 p. 240.

297 NOU 2017: 4 p. 75.

298 l.c.

299 OECD (2019) p. 145.

300 NOU 2021: 9 s. 322.

301 Prop. 14 L (2022–2023) p. 57.

302 OECD (2019) pp. 50-51.