INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK

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10 January 2020

On behalf of the International Lawyers Assisting Workers (ILAW) Network, which is comprised of over 350 labour lawyers and scholars in over 50 countries, we write to express our serious concerns regarding the Government of Ukraine's decision to introduce highly regressive amendments to the Trade Union Law and Labour Law on 27 December 2019. Drafted without prior consultations with trade unions, these unnecessary amendments violate several fundamental and technical ILO conventions which Ukraine has ratified, and in some cases violate the Constitution of Ukraine.[1] There appears to be no possible motivation for these amendments other than to weaken the trade union movement and to eliminate the basic contractual rights of all workers. We therefore urge that these amendments be withdrawn.

Below are just some of our concerns with the proposed amendments:

I. Trade Union Law Amendments

[1] These amendments also violate several articles of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, both of which Ukraine ratified.

1. The bill limits the number of trade unions in an enterprise to no more than two. Currently, the law imposes no limit on the number of unions in an enterprise. ILO Convention 87 provides that all workers have a right to form or join a trade union of their choosing[2] and the ILO Committee on Freedom of Association has repeatedly noted that, while trade union unity may be desirable, legislated limits on the number of trade unions violate the right to freedom of association.[3] Today, numerous large companies have more than 2 unions; it is unclear what would happen in these circumstances should the amendment be enacted.

2. The bill mandates the establishment of "control commissions" in all trade unions. The procedure for establishing a control commission and exercising its powers will be determined by the statute of the trade union. Third parties who are not members of trade unions may be included in the control commission. The motivation for the proposal is unclear, as there appears no need to impose greater internal checks on trade unions than what they already have established in their own statutes. The requirement to establish a control commission would in our view violate the right of trade unions to organize their activities freely, to adopt their own statutes and to establish their own structures.[4] The inclusion of non-union members on such commissions, if not freely chosen (such as government appointed members), could also affect the trade union's independence.

3. The bill would remove the current obligation of employers to deduct dues from union members' pay and transfer the dues to the appropriate union.[5] Union members should be able to have their employer deduct their membership dues through their paycheck. While it may still be possible to include dues deduction in collective agreements, this would remain to be negotiated and may be refused by the employer in order to frustrate the funding of the union.

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[2]Convention 87, Article 2

[3]See, Committee on Freedom of Association, Compilation of Decisions ¶¶ 475-95 (on trade union pluralism).

[4]See, Committee on Freedom of Association, Compilation of Decisions ¶ 676 ("The Committee recalls that in accordance with Article 3 of Convention No. 87 the Government is required to refrain from any interference which would restrict the right of workers and employers organisations to elect their representatives in full freedom, to organise their activities and to formulate their programmes.")

[5] See, e.g., Compilation of Decisions ¶ 695 ("Workers should have the possibility of opting for deductions from their wages under the check-off system to be paid to trade union organizations of their choice, even if they are not the most representative.")

4. The bill would prohibit collective bargaining with trade unions that include "managerial" staff among their members. However, the amendment includes no definition of this term and could be interpreted broadly to refuse to bargain with unions whose members include, for example, those who perform occasional supervisory work but are not responsible for the management decisions of the enterprise.[6]

5. The bill would eliminate the right of trade unions to request information from the employer necessary to determine whether the law or the collective agreement has been violated or otherwise for the purposes of collective bargaining. However, employers must provide the facilities and relevant information to conduct the work of trade unions.[7]

6. The bill would deprive trade unions the opportunity to submit proposals to draft laws before their submission and consideration by the executive authorities and deny them the right to participate in the consideration of their proposals by the executive authorities. According to the current legislation, draft legislation on issues related to the development and implementation of state social and economic policy, regulation of labour, social and economic relations are required to be submitted to the trade union organizations by the committees of the Verkhovna Rada of Ukraine for their input. This amendment is an afront to tripartism, which is a bedrock principle of the ILO.

7. The bill requires the forced transfer to the state of all trade union property which was in their possession as of 24 August 1991 (when Ukraine declared its independence). The government has argued that that all such property belonged to the USSR and as such is state property which belongs to the successor entity – the GOU. However, much trade union property was acquired by member dues and were not state property at the time of the independence of Ukraine. Further, the property has been in the consistent possession of trade unions for nearly 30 years since independence. The confiscation of union property by the state, and in particular without due process, is a significant violation of the right to freedom of association.[8]

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[6]See, e.g., Compilation of Decisions ¶382 ("As regards provisions which prohibit supervisory employees from joining workers' organizations, the Committee has taken the view that the expression "supervisors" should be limited to cover only those persons who genuinely represent the interests of employers.").

[7] See, ILO Recommendation 143, Art 16 ("The management should make available to workers' representatives, under the conditions and to the extent which may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation, such material facilities and information as may be necessary for the exercise of their functions.")

[8] See, Compilation of Decisions ¶ 275 ("the right to adequate protection of trade union property is one of those civil liberties which are essential for the normal exercise of trade union rights); ¶ 288 ("The confiscation of trade union property by the authorities, without a

8. The bill sets a minimum membership of a trade union at least 10 persons, up from 3 currently. There appears no reasoned basis for the government to make this change. While legislation may require an appropriate minimum membership, we note that in the case of Ukraine, this would exclude many workers from the ability to form or join a union – namely those who are employed in micro and small enterprises.[9] While technically possible to associate through a sectoral union, e.g. workers of small commercial enterprises, Ukrainian law vests most rights with enterprise unions and few with sectoral unions (e.g. access to worksites to represent members).

II. Labour Law Amendments

1. The bill would eliminate many of the protections currently available under the labour law and instead allow employers to unilaterally terminate an employment contract - introducing to Ukraine the concept of at-will employment. This would violate Convention 158 which provides at Article 4 that "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." While workers cannot be fired on a discriminatory basis, it would be much harder to prove in under at-will employment regime. In light of the experiences of other countries, we are deeply concerned that the ability of an employer to terminate the employment at-will will facilitate the dismissal of trade unionists and whistle-blowers and make it more difficult for such workers to obtain a remedy for such reprisals.

A separate provision of the bill would allow either party to offer the other changes to the essential terms of the contract. If the employer insists on changing the essential terms of the employment contract and the employee does not agree, however, the employment contract will be terminated. This means that the contract of employment is only truly binding on the worker, as the employer can terminate the employee if they do not agree to another one. This is employment at-will in another form.

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court order, constitutes an infringement of the right of trade unions to own property and undue interference in trade union activities.")

[9] See, e.g., Compilation of Decisions ¶ 441 ("While a minimum membership requirement is not in itself incompatible with Convention No. 87, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed.")

2. The bill would allow an employer to hire up to 10% of the workforce on "zero-hours contracts". The law specifically provides that the employer can offer a contract with an unfixed work schedule and that the employee would have work only when it is offered, and that such offer of work provides no guarantee of future work. The bill only provides a guarantee of 8 hours work per month (or if not, at least 8 hours pay). While the bill does not prohibit work for a third party, the unpredictable nature of the work may make obtaining other work difficult.

3. In addition to zero-hours contracts, the bill would also greatly expand the use of fixed-term contracts. A fixed-term contract could be concluded for the duration of certain project or a term of not more than 5 years. In addition, the bill includes a long list of when a fixed-term employment contract is encouraged, including the replacement of a temporarily absent employee, with the head of a legal entity, employees of theatres, circuses, athletes, etc. While fixed-term contracts may be appropriate for work of truly limited duration, all too often these contracts are abused, and workers are hired on consecutive short, fixed-duration contracts for work that is of a permanent nature.[10] Of course, workers on such contracts have much greater difficulty exercising their right to freedom of association, as their contracts may simply not be renewed. It also strongly discourages whistleblowing against corruption.

4. The bill would require that the employee disclose to the employer any and all circumstances that may affect the conclusion, performance, termination of the employment contract. This could force an employee to disclose pregnancy or health conditions which could form the basis of the employment contract being refused. It is also unclear what would be the penalty should an employee not disclose that (private) information at the time. The bill clearly creates new opportunities for employment discrimination based on pregnancy or disabilities.

5. While the bill includes requires a contract of employment contract with domestic workers, it provides that work of less than 80 hours per month is not considered domestic work. This would exclude a significant number of domestic workers from the scope of the law – essentially all but those who live

[10]ILO, Non-standard forms of employment Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Feb 2015) ¶ 57 (citing the use of fixed-term contracts, finding "the most common challenge that workers in NSFE face regarding freedom of association and collective bargaining rights is the inability to exercise these rights in practice.")

in the household in which they are employed. Moreover, such a rule would violate Art 10 of Convention 189.[11]

6. Finally, the law reduced the overtime pay premium from 100% of the regular pay to only 20%, which violates ILO Convention 1. Article 6 of that convention requires a minimum premium of 25%.[12] Moreover, the drastic reduction in overtime pay would create economic hardship in a country with already high levels of working poor.

For all of these reasons, we urge the GOU to withdraw these proposed amendments. Should the Labour Law or Trade Union Law need amendment, it should be done in consultation with representative trade unions and consistent with ILO conventions and recommendations.

Sincerely

The ILAW Network

[11] Article 10.1 ("Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work.")

[12] Article 6.2. "These regulations shall be made only after consultation with the organisations of employers and workers concerned, if any such organisations exist. These regulations shall fix the maximum of additional hours in each instance, and the rate of pay for overtime shall not be less than one and one-quarter times the regular rate."