

How to amend the Sri Lankan labour law to include flexible working arrangements?

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EXECUTIVE SUMMARY

The global trend in the new world of work indicates that there is a clear downward trend in working hours and it is increasingly embracing flexible work arrangements. In the Sri Lankan situation, the surveys conducted have also indicated that both employers as well as employees are in favour of moving towards flexible work arrangements.

This policy paper seeks to put forward three recommendations in order to make the labour law framework conducive to employment generation by facilitating flexible work arrangements. Namely to constitute a tripartite working group to come up with a mutually consensual proposal for legal amendments after duly assessing the impact of such amendments on the interests of the tripartite stakeholders, amending the provisions of the above-mentioned legislative enactments in a manner that facilitates flexible work arrangements in compliance with the safeguards the tripartite constituents recommended and to enable the Commissioner General to grant administrative relaxations to prorata the existing provisions to suit the proposed work arrangement as an interim measure.

ACKNOWLEDGEMENTS

The author would like to thank Naren Prasad for helping her in writing this brief as a result of the ILO RESEARCH department's "International Training Evidence-Based Policy Making for Decent Work". She would also like to thank Najati Ghosheh for his comments and suggestions on the draft. The views and opinions in this paper are solely those of the author and the responsibility for the information set out lies entirely with her.

KEYWORDS

Flexible work, labour law, amendment, Sri Lanka

Introduction

The aim of this policy brief is to identify the required changes in the Labour Law framework in Sri Lanka in order to make it conducive to flexible work arrangements.

The emerging trends in the world of work indicate that there is a clear downward trend in working hours. (Messenger: 2018). The data depicted in the diagram below further establishes the reduction of annual working hours in several countries around the world whilst Sri Lanka remaining static.

Flexible working hours have been part of the growing issues that were discussed by the World Commission on the Future of Work. Consequently, the Centenary Declaration for the Future of Work specifically (Art A.7).

Whilst the advancements in technology have enabled this phenomenon, the increased demand for work-life balance by the workforce has propelled the world of work into diverse work arrangements that break away from the traditional work cultures (Regus: 2017). It is noteworthy that recent research has revealed 77% of the Millennials and Generation Z demand more freedom of location and report that flexible work would make them more productive. Recent studies specifically focusing on the effects of work-sharing schemes on job preservation have concluded that these programmes reduce layoffs by increasing per capita reductions in working hours (ILO: 2011).

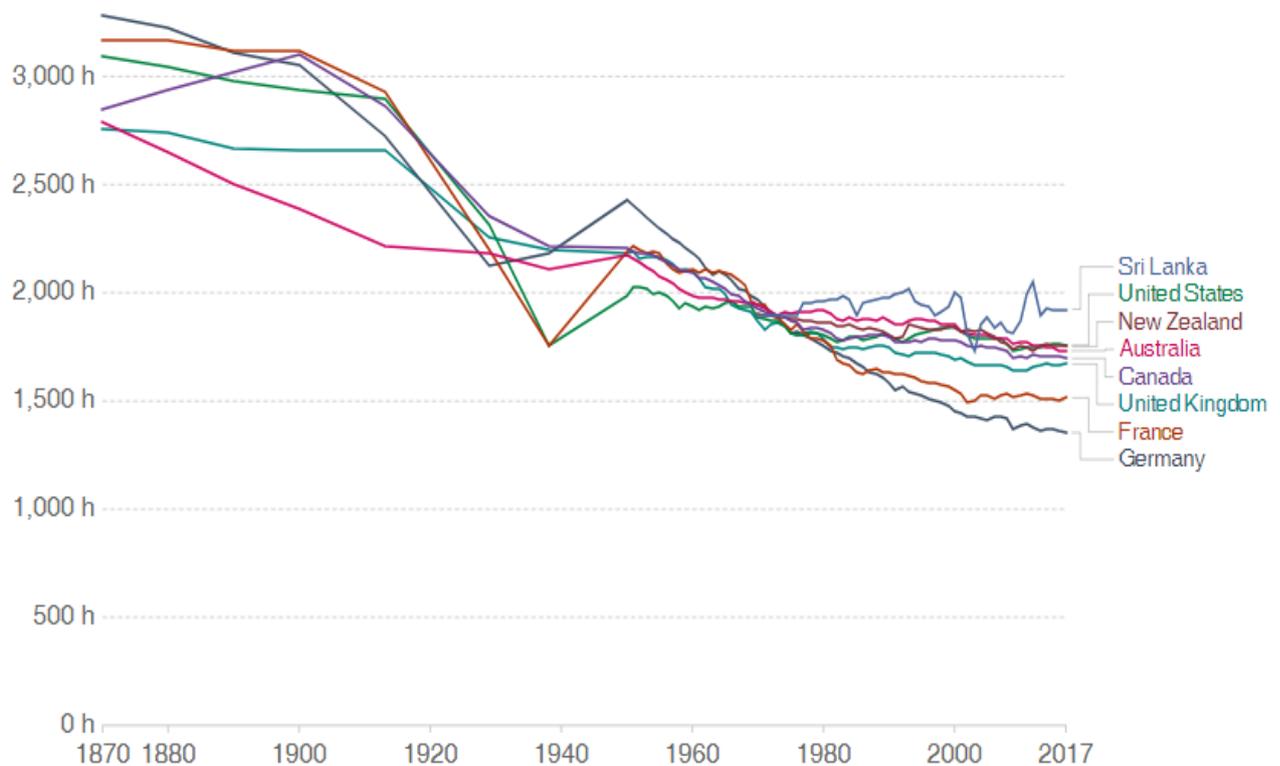
Similarly, the workforce that opt to be employed post-retirement has also joined the quest for mobility in the modern workplace. (Regus: *ibid*).

Furthermore, the rapid expansion of the 'gig economy' albeit from a very low baseline, has decreased the number of full-time work opportunities and motivated employees to engage in part-time work as an additional mode of income (Messenger: 2018). Accordingly, Hall and Krueger (2017) found that only 20% of the Uber drivers in the United States

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The policy brief has been prepared as a result of ILO's training on Evidence-Based Policy Making for Decent Work, which was organized by the Research Department from 1 Oct – 30 November 2020.

derived their income from the online platform and only a 3 to 11% of the respondents in Europe derive their income entirely from crowd work.



Source: Average annual working hours per worker: Huberman & Minns (2007) and PWT 9.1 (2019)

In view of the above, Sri Lanka cannot be an exception when it comes to the global trend towards flexible working hours.

At a survey conducted by the Employers' Federation of Ceylon (EFC) to ascertain the employers' perception of the Impact of Labour Laws on employment Generation in Sri Lanka, 63% of the respondents have clearly indicated that Sri Lankan Labour Laws provide little or no room for flexible work arrangements such as flexible hours, part-time work and five-day work weeks. Consequently 69% of the respondents recommended that the Labour Laws be amended to incorporate flexi-working arrangements and part-time/virtual-working arrangements (EFC: 2012).

Interestingly, a study conducted targeting employees of the private sector in Sri Lanka too had further validated these findings. (Wickramasinghe: 2007). The majority of the respondents considered flexi-time work to grant them comparatively higher levels of autonomy to harmonize work and non-work demands and anticipated flexi-time work as a feature at their workplaces.

Needless to state such flexible work arrangements will also provide a mode of income for the young adults to pursue their higher studies without being dependent upon parental support.

Sri Lanka has to date failed to streamline the existing legal framework to facilitate the flexible work arrangements despite same being regarded as an important requirement by both employers as well as employees.

Ironically, however, with the outbreak of the COVID-19 pandemic the state itself had to declare compulsory period of 'work-from-home/virtual-working' as a measure to combat the spread of the virus. Most of the companies in the public sector lacked the basic infrastructure and/or a process to be amendable to this sudden change and was compelled to face many hardships. On the

contrary, the private sector navigated through the changes with much ease, predominantly due to the flexible work arrangements already in place as a Human Resources benefit package² with little support from the applicable Labour Laws.

Against this backdrop, this policy paper will focus on identifying the gaps in the current laws in facilitating flexible work arrangements that will grant Working Time Flexibility and the Locational Flexibility within the private sector in Sri Lanka and arrangements that are within the realms of formal employment. Accordingly, the legal provisions applicable for flexible work arrangements such as part-time work, compressed work weeks, virtual-working and working from home arrangements will be considered in detail.

Background

As mentioned above the Sri Lankan law had been promulgated to cater only to orthodox work arrangements that prevailed during colonial days. The amendments brought into the Sri Lankan Labour Laws time to time had failed to address the unique characteristics and requirements of flexible work arrangements vis-à-vis locational and work time flexibility. The sporadic attempts to adopt flexible work arrangements at company level are merely offered as a better employment term and/or strategic Human Resource management initiative to retain talent. In these attempts, the employers have no choice but to grant full benefits mandated by Law, in line with the rights and privileges extended to a full-time employment.

Considering the financial constraints faced by the employers due to the COVID 19 pandemic, it would not be feasible to offer flexible-work arrangements, bearing the cost of terms and benefits applicable to full-time workers.³ Consequently, the employers will not be encouraged to adopt such flexible work methods unless the Law is relaxed to address the pro-rating of benefits for part-time work or a complete overhauling of Laws made to govern such flexible work arrangements.

In general, none of the Labour Laws in Sri Lanka expressly recognizes flexible working arrangements considered in this policy paper. The Shop and Office Employees Act⁴ and the Wages Boards Ordinance⁵ being the two main pieces of legislation governing the terms and conditions of employment in Sri Lanka have specified a daily limit as well as a weekly limit of normal hours of work. Accordingly, both Laws recognize 8 hours a day as the normal working hours per day and 45-48 hours⁶ as the weekly limit on normal working hours. Both the daily limit as well as the weekly limit must be complied with and an employee required to work more than 8 hours per day will have to be paid overtime even if the weekly limit had not been exceeded.

However, the Law fails to address the issue of making payments for a lesser number of hours worked or provides for prorated payment for such lesser numbers.

² In the absence of Labour Laws that are conducive to granting flexible working arrangements, private sector companies have initiated flexible work practices within their organizations as part of their Human Resource Management initiatives to ensure work-life-balance of employees.

³ Depending on how working time arrangements are used. In some instances, flexible working time arrangements could also contribute helping companies when conditions are problematic. The concept of “work-sharing” in that case could also be considered as an alternative short-term solution in times of crises, eventually.

⁴ Act No. 19 OF 1954.

⁵ Ordinance No. 27 of 1941.

⁶ 45 hours as per the Shop and Office Employees Act and 48 hours as per the Wages Boards Ordinance with the particular wages board specifying the weekly limit for the relevant trade.

Policy process

On a comparison of the other terms and conditions applicable to employees in general, the below mentioned areas can be identified as areas that do not specifically provide for flexible work arrangements, thereby creating a mismatch between terms enjoyed when compared to the contribution by individual workers.

- **Leave**

Both Laws referred to above mandate the same quota of leave for employees regardless of them being under part time, virtual or work from home arrangements as set out below.

- **Annual leave**

Especially the Shop and Office Employees Acts mentioned above provide for a quota of 14 days of paid annual leave upon completing a calendar year of employment, regardless of the number of days worked during that year. Consequently, the part-time employees will also be entitled to the same quota of paid annual leave as full-time employees at the expense of the employers.

- **Casual leave**

The Shop and Office Employees Act mandates 7 days of paid casual leave from the 2nd calendar year of employment, irrespective of the days worked during that year. This will again entitle the part-time employees also for the same quota of casual leave as full-time employees, again at the expense of the employers.

It is noteworthy, however, that in terms of the Wages Boards Ordinance, an employee is required to work a specified number of days during a working year to be eligible for annual leave.

- **Maternity leave**

Whilst the Shop and Office Employees Act itself set out the maternity leave entitlement in relation to employees coming under its purview, the Maternity Benefits Ordinance sets out the maternity leave and benefits for the employees that do not come under the purview of the Shop and Office Employees Act.

It is noteworthy that the full onus of maternity leave, as well as maternity benefits have to be borne by the sole employer and the state does not contribute in any manner whatsoever.

The only exception for granting maternity leave is for an employee on casual work arrangements and as such the employers are compelled to ensure paid maternity leave and benefits to employees under all flexible work arrangements similar to the full-time employees.

In addition to the above, certain Laws including a few brought-in during the recent past seems to be totally oblivious to the dynamics of flexible work arrangements.

- **National Minimum Wage of Workers Act. No. 3 of 2016**

Section 3 (1) of the Act stipulates that the national minimum monthly wage for all workers in any industry or service shall be Rs.10,000/- and that the national minimum daily wage of a worker shall be Rs.400/-.

The Act provides a very broad definition of the term “Worker” and consequently the only exemptions granted by the Act are in the case of the domestic workers and trainees under the National Apprenticeship and Industrial Training Scheme.

As such it appears that all employees regardless of them being on full-time or part-time employment are being brought under the purview of the act but has no express provisions to prorate this daily rate to make payments on an hourly rate, thereby failing to provide for work done on a part-time basis.

- **Budgetary Relief Allowance of Workers Act No. 4 of 2016**

The Act mandates the payment of a budgetary relief allowance of Rs. 2500/- for employees drawing a basic monthly salary of Rs. 40,000/- or below and Rs. 100/- for employees drawing a daily wage of Rs 1600/-, the allowance payable shall be a sum of Rs. 60/- per day.

The definition of the employee is similar to the definition under the National Minimum Wage Act and has failed to provide for pro-rating in the case of the employees who work a lesser number of hours per day when compared to the statutory maximum on the daily limit on working hours, such as in part-time work arrangements.

- **Payment of Gratuity Act No. 12 of 1983**

This piece of legislation provides a social security measure for employees who have served an employer for an uninterrupted period of 5 years or more. However, the Act does not set out a minimum number of days in a year that has to be worked in order to be qualified for gratuity payment, thereby also entitling part-time workers for the same amount of gratuity payment as a full-time worker.

- **Workmen’s Compensation Ordinance No. 19 of 1934**

The Act seeks to grant compensation for injuries and diseases sustained “arising out of and in the course of employment”. However, the Act is silent on the injuries/diseases employees are prone to flexible work arrangements such as work from home and virtual-working. As there will be no physical place of work in virtual-work and the employer has no control over the risks associated in Work from home arrangements, application of the Workmen’s Compensation Ordinance in its current form will result in bizarre situations.

- **Five-Day work week**

At present, approval to spread over the working hours over five days of the week is granted for export manufacturing sector on a case-by-case basis and only upon applications to the Commissioner General of Labour. In relation to all other sectors, the daily limit of eight hours has to be complied with. Therefore, any work done beyond the daily limit will be subject to overtime payments.

This has resulted in operational and administrative issues to all employers who would want to move for a five-day work week and especially when considering the IT sector, there is a dire need for relaxation of these rigid rules.

Legalizing a compressed workweek would enable workers to have an extra day of weekly holiday, whereas the Company will benefit from a more efficient operation for five days instead of 5-1/2 days coupled with reduction of overhead costs. On a cautious approach to safeguard the interest of the employees, the Law may regulate the maximum limit of normal hours as well as overtime hours per day.

Recommendations proposed

In view of the above, the following recommendations calling for legal amendments to the current legal framework are suggested:

1. Constitute a tripartite working group to come up with a mutually consensual proposal for legal amendments, after duly assessing the impact of such amendments on the interests of the tripartite stakeholders.

In Singapore this method was successfully implemented, and the Economic Review Committee required to set up a tripartite work group comprising of Ministry of Manpower, NTUC and SNEF to deliberate on recommendations that assess the various applications of flexible work schedules and to grant exemptions to companies from statutory provisions in the case of flexible work arrangements. The recommendations submitted were accepted by the government. (Tripartite Guidelines: 2004)

2. Amending the provisions of the above-mentioned legislative enactments in a manner that facilitates flexible work arrangements under consideration, in compliance with the safeguards the tripartite constituents recommend.

This can be done through one of the two alternative approaches. One approach is to completely overhaul the existing Labour Laws and introducing specific labour laws to recognize flexible work arrangements as already done in a country like Vietnam. The other approach is to follow the Indian model which allows pro-rating of terms to suit the specific work arrangements proportionate to the actual contribution of the individual worker. (Landau:2015)

3. As an interim measure, enable the Commissioner General to grant administrative relaxations to prorata the existing provisions to suit the proposed working arrangement.

Experts project that the effects of the pandemic would last at least for 2-2 ½ years. Therefore, it is imperative that there is a system to protect the employers that are compelled to adopt options for working-from-home (WFH), remote working, telecommuting, and flexible working hours, on a larger scale in response to social distancing measures, lockdowns, and mobility restrictions, until the labour Law reforms take effect. In this regard, the authorities may seek technical assistance and guidance from the ILO experts, who have already published instructions on addressing Flexible work arrangements such as telework. (ILO: 2020)

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