

INTERNATIONAL LABOUR OFFICE GENEVA

REPORT FORM

FOR THE

PROTECTION OF WORKERS' CLAIMS (EMPLOYER'S INSOLVENCY) CONVENTION, 1992 (No. 173)

The present report form is for the use of countries which have ratified the Convention. It has been approved by the Governing Body of the International Labour Office, in accordance with article 22 of the ILO Constitution, which reads as follows: "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

Governments may find it useful to consult the Protection of Workers' Claims (Employer's Insolvency) Recommendation, 1992 (No. 180), a copy of which is appended. This Recommendation supplements the Convention and may contribute to a better understanding of its requirements and facilitate its application.

Governments are under no obligation to supply in their reports on the application of the Convention information on the action they have taken to give effect to the Recommendation as such, but should they decide for practical reasons to supply such information in their reports, then this may make it possible to obtain a more detailed understanding of the extent to which the Convention has been applied and of the problems to which such application may give rise.

PRACTICAL GUIDANCE FOR PREPARING REPORTS

First reports

If this is your Government's first report following the entry into force of the Convention in your country, full information should be given on each of the provisions of the Convention and on each of the questions set out in the report form.

Subsequent reports

In subsequent reports, information need normally be given only:

- (a) on any new legislative or other measures affecting the application of the Convention;

- (b) in reply to the questions in the report form on the practical application of the Convention (for example, statistics, results of inspections, judicial or administrative decisions) and on the communication of copies of the report to the representative organizations of employers and workers and any observations received from these organizations;

- (c) **in reply to comments by the supervisory bodies:** the report must contain a reply to any comments regarding the application of the Convention in your country addressed to your Government by the Committee of Experts or the Conference Committee on the Application of Standards.

Article 22 of the Constitution of the ILO

Report for the period to
made by the Government of

on the

PROTECTION OF WORKERS' CLAIMS (EMPLOYER'S INSOLVENCY) CONVENTION, 1992 (No. 173)

(ratification registered on)

- I. Please give a list of the laws and regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of these laws, regulations, etc., to the International Labour Office with this report.

Please give any available information concerning the extent to which the above-mentioned texts have been enacted or modified to permit, or as a result of, ratification.

- II. Please indicate in detail, under each of the following Articles of the Convention, the respective measures which give effect to it. In addition, please provide any indications specifically requested below under each Article.

If in your country ratification of the Convention gives the force of national law to its terms, please indicate by virtue of what constitutional provisions the ratification has had this effect. Please also specify what action has been taken to make effective those provisions of the Convention which require a national authority to take certain steps for its implementation.

If the Committee of Experts or the Conference Committee on the Application of Standards has requested additional information or made comments on the measures adopted to apply the Convention, please supply the information asked for or indicate the action taken by your Government to settle the points in question.

PART I. GENERAL PROVISIONS

Article 1

1. For the purpose of this Convention, the term "insolvency" refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors.

2. For the purposes of this Convention, a Member may extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, for example where the amount of the employer's assets is recognized as being insufficient to justify the opening of insolvency proceedings.

3. The extent to which an employer's assets are subject to the proceedings referred to in paragraph 1 above shall be determined by national laws, regulations or practice.

Paragraph 1. Please indicate the proceedings covered by this paragraph (for example, bankruptcy or winding-up, arrangement, administration or "bankruptcy protection", receivership, ...).

Paragraph 2. Please indicate the situations to which the term "insolvency" has been applied.

Paragraph 3. Please indicate in what way the extent of the employer's responsibility in the insolvency proceedings is determined by legislation or practice (for example, employer's personal goods not affected by the insolvency proceedings concerning the actions of his or her enterprise by virtue of company law, declaration that certain of the employer's personal goods are not attachable, etc.).

Article 2

The provisions of this Convention shall be applied by means of laws or regulations or by any other means consistent with national practice.

Please indicate the means used to apply the provisions of the Convention.

Article 3

1. A Member which ratifies this Convention shall accept either the obligations of Part II, providing for the protection of workers' claims by means of a privilege, or the obligations of Part III, providing for the protection of workers' claims by a guarantee institution, or the obligations of both Parts. This choice shall be indicated in a declaration accompanying its ratification.

2. A Member which has initially accepted only Part II or only Part III of this Convention may thereafter, by a declaration communicated to the Director-General of the International Labour Office, extend its acceptance to the other Part.

3. A Member which accepts the obligations of both Parts of this Convention may, after consulting the most representative organizations of employers and workers, limit the application of Part III to certain categories of workers and to certain branches of economic activity. Such limitations shall be specified in the declaration of acceptance.

4. A Member which has limited its acceptance of the obligations of Part III in accordance with paragraph 3 above shall, in its first report under article 22 of the Constitution of the International Labour Organization, give the reasons for limiting its acceptance. In subsequent reports it shall provide information on any extension of the protection under Part III of this Convention to other categories of workers or other branches of economic activity.

5. A Member which has accepted the obligations of Parts II and III of this Convention may, after consulting the most representative organizations of employers and workers, exclude from the application of Part II those claims which are protected pursuant to Part III.

6. Acceptance by a Member of the obligations of Part II of this Convention shall *ipso jure* involve the termination of its obligations under Article 11 of the Protection of Wages Convention, 1949.

7. A Member which has accepted only the obligations of Part III of this Convention may, by a declaration communicated to the Director-General of the International Labour Office, terminate its obligations under Article 11 of the Protection of Wages Convention, 1949, in respect of those claims which are protected pursuant to Part III.

Paragraph 4. If applicable, please give the information requested in this paragraph.

Paragraph 5. Please state the claims which, following the acceptance of Part III of the Convention, have been excluded from the application of Part II.

Please indicate the employers' and workers' organizations consulted and the manner in which such consultations were held concerning such exclusions, including the opinions expressed during the consultations.

Article 4

1. Subject to the exceptions provided for in paragraph 2 below, and to any limitations specified in accordance with Article 3, paragraph 3, this Convention shall apply to all employees and to all branches of economic activity.

2. The competent authority, after consulting the most representative organizations of employers and workers, may exclude from Part II, Part III or both Parts of this Convention specific categories of workers, in particular public employees, by reason of the particular nature of their employment relationship, or if there are other types of guarantee affording them protection equivalent to that provided by the Convention.

3. A Member availing itself of the exceptions provided for in paragraph 2 above shall, in its reports under article 22 of the Constitution of the International Labour Organization, provide information on such exceptions, giving the reasons therefor.

Paragraphs 2 and 3. Please indicate, if the provisions of paragraph 2 have been applied:

- (a) *the categories of workers excluded by reason of the particular nature of their employment relationship. Please indicate whether such categories of workers are excluded from Part II or Part III, or both, and provide information on the exceptions and the reasons for them;*
- (b) *the categories of workers excluded by reason of the existence of other types of guarantee affording them protection equivalent to that provided by the Convention. Please indicate the nature of the protection afforded these categories of workers. Please indicate whether such workers are excluded from Part II or Part III, or both.*

Please indicate the employers' and workers' organizations consulted and the manner in which such consultations were held including the opinions expressed during the consultations.

PART II. PROTECTION OF WORKERS' CLAIMS BY MEANS OF A PRIVILEGE

PROTECTED CLAIMS

Article 5

In the event of an employer's insolvency, workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share.

Please indicate the provisions defining the privilege described in this Article.

Article 6

The privilege shall cover at least:

- (a) the workers' claims for wages relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment;
- (b) the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;
- (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment; and
- (d) severance pay due to workers upon termination of their employment.

Please indicate the workers' claims protected by the privilege described in the previous Article.

LIMITATIONS

Article 7

1. National laws or regulations may limit the protection by privilege of workers' claims to a prescribed amount, which shall not be below a socially acceptable level.

2. Where the privilege afforded to workers' claims is so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.

Paragraph 1. Please indicate, if applicable, the manner in which the "socially acceptable level" referred to in this paragraph is determined and its amount.

Paragraph 2. Please indicate how effect is given to this provision of the Convention.

RANK OF PRIVILEGE

Article 8

1. National laws or regulations shall give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system.

2. However, where workers' claims are protected by a guarantee institution in accordance with Part III of this Convention, the claims so protected may be given a lower rank of privilege than those of the State and the social security system.

Paragraph 1. Please indicate the rank of privilege of workers' claims compared with other privileged claims, in particular those of the State and the social security system.

Paragraph 2. Please indicate whether workers' claims protected by a guarantee institution enjoy a higher or lower rank of privilege than the State or the social security system.

PART III. PROTECTION OF WORKERS' CLAIMS BY A GUARANTEE INSTITUTION

GENERAL PRINCIPLES

Article 9

The payment of workers' claims against their employer arising out of their employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency.

Please indicate the measures taken regarding the purposes and operations (organization, financing, management) of the guarantee institutions referred to in this Article.

Article 10

In giving effect to this Part of the Convention, a Member may, after consulting the most representative organizations of employers and workers, adopt appropriate measures for the purpose of preventing possible abuse.

Please indicate any measures taken to prevent abuse, the employers' and workers' organizations consulted, and the manner in which such consultations took place.

Article 11

1. The organization, management, operation and financing of wage guarantee institutions shall be determined pursuant to Article 2.

2. The preceding paragraph shall not prevent a Member, in accordance with its particular characteristics and needs, from allowing insurance companies to provide the protection referred to in Article 9, as long as they offer sufficient guarantees.

Paragraph 2. Where insurance companies provide the protection referred to in Article 9, please indicate the criteria used to determine whether such companies offer sufficient guarantees for the purposes of this paragraph.

CLAIMS PROTECTED BY A GUARANTEE INSTITUTION

Article 12

The workers' claims protected pursuant to this Part of the Convention shall include at least:

- (a) the workers' claims for wages relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of the employment;
- (b) the workers' claims for holiday pay due as a result of work performed during a prescribed period, which shall not be less than six months, prior to the insolvency or prior to the termination of the employment;
- (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of employment; and
- (d) severance pay due to workers upon termination of their employment.

Please indicate the workers' claims whose payment is guaranteed within the meaning of Article 9.

Article 13

1. Claims protected pursuant to this Part of the Convention may be limited to a prescribed amount, which shall not be below a socially acceptable level.

2. Where the claims protected are so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.

Paragraph 1. Please indicate the manner in which the "socially acceptable level" mentioned in this paragraph is determined and its amount.

Paragraph 2. Please indicate how effect is given to this provision of the Convention.

- III. Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the texts of these decisions.
- IV. Please provide general indications as to the manner in which the Convention is applied in your country, including — if information has not already been provided on other points in this form — information concerning the number of workers covered by measures giving effect to the Convention.
- V. Please indicate the representative organizations of employers and workers to which copies of the present report have been communicated in accordance with article 23, paragraph 2, of the Constitution of the International Labour Organization.¹ If copies of the report have not been communicated to representative organizations of employers and/or workers, or if they have been communicated to bodies other than such organizations, please supply information on any particular circumstances existing in your country which explains the procedure followed.

Please indicate whether you have received from the employers' and workers' organizations concerned any observations, either of a general kind or in connection with the present or the previous report, regarding the practical application of the provisions of the Convention or the application of the legislation or other measures implementing the Convention. If so, please communicate the texts of these observations, together with any comments that you consider useful.

¹ Article 23, paragraph 2, of the Constitution reads as follows: "Each Member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22."

APPENDIX

RECOMMENDATION CONCERNING THE PROTECTION OF WORKERS' CLAIMS IN THE EVENT OF THE INSOLVENCY OF THEIR EMPLOYER

I. DEFINITIONS AND METHODS OF APPLICATION

1. (1) For the purposes of this Recommendation, the term "insolvency" refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors.

(2) For the purposes of this Recommendation, Members may extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, and in particular to the following:

- (a) where the enterprise has closed down or ceased its activities or is voluntarily wound up;
- (b) where the amount of the employer's assets is insufficient to justify the opening of insolvency proceedings;
- (c) where, in the course of proceedings to recover a worker's claim arising out of employment, it is found that the employer has no assets or that these are insufficient to pay the debt in question;
- (d) where the employer has died and his or her assets have been placed in the hands of an administrator and the amounts due cannot be paid out of the estate.

(3) The extent to which an employer's assets are subject to the proceedings referred to in subparagraph (1) should be determined by national laws, regulations or practice.

2. The provisions of this Recommendation may be applied by means of laws or regulations or by any other means consistent with national practice.

II. PROTECTION OF WORKERS' CLAIMS BY MEANS OF A PRIVILEGE

PROTECTED CLAIMS

3. (1) The protection afforded by a privilege should cover the following claims:

- (a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during a prescribed period prior to the insolvency or prior to termination of the employment. This period should be fixed by national laws or regulations and should not be less than 12 months;
- (b) holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;
- (c) amounts due in respect of other types of paid absence, end-of-year and other bonuses provided for by national laws or regulations, collective agreements or individual contracts of employment, relating to a prescribed period, which should not be less than 12 months, prior to the insolvency or prior to the termination of the employment;
- (d) payments due in lieu of notice of termination of employment;
- (e) severance pay, compensation for unfair dismissal and other payments due to workers upon termination of their employment;

(f) compensation payable directly by the employer in respect of occupational accidents and diseases.

(2) The protection afforded by a privilege might cover the following claims:

- (a) contributions due in respect of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;
- (b) contributions due in respect of private, occupational, inter-occupational or enterprise social protection schemes independent of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;
- (c) benefits to which the workers were entitled prior to the insolvency by virtue of their participation in enterprise social protection schemes and which are payable by the employer.

(3) Claims enumerated in subparagraphs (1) and (2) that have been awarded to a worker through an adjudication or arbitration within 12 months prior to the insolvency should be covered by the privilege regardless of the time-limits specified in those subparagraphs.

LIMITATIONS

4. Where the amount of the claim protected by a privilege is limited by national laws or regulations, in order that this amount should not fall below a socially acceptable level it should take into account variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

CLAIMS WHICH FALL DUE AFTER THE INSOLVENCY PROCEEDINGS HAVE BEEN OPENED

5. Where, in accordance with national laws and regulations, an enterprise in respect of which insolvency proceedings have been opened is authorized to continue its activities, workers' claims arising out of work performed as from the date when the continuation was authorized should not be subject to the proceedings and should be paid, out of the funds available, as and when they fall due.

ACCELERATED PAYMENT PROCEDURES

6. (1) Where the insolvency proceedings cannot ensure rapid payment of workers' privileged claims, there should be a procedure for accelerated payment to ensure that the claims are paid, without awaiting the end of the proceedings, out of available funds or as soon as funds become available, unless the rapid payment of workers' claims is ensured by a guarantee institution.

(2) Accelerated payment of workers' claims may be ensured as follows:

- (a) the person or institution responsible for administering the employer's assets should pay such claims as soon as it has been determined that they are genuine and payable;

(b) if the claim is contested, the worker should be able to have its validity determined by a court or any other body with jurisdiction over the matter, so as to have it paid in accordance with clause (a).

(3) The accelerated payment procedure should cover the totality of the claim protected by a privilege, or at least a part of it to be fixed by national laws or regulations.

III. PROTECTION OF WORKERS' CLAIMS BY A GUARANTEE INSTITUTION

SCOPE

7. The protection of workers' claims by a guarantee institution should have as wide a coverage as possible.

OPERATING PRINCIPLES

8. Guarantee institutions might operate according to the following principles:

- (a) they should be administratively, financially and legally independent of the employer;
- (b) employers should contribute to financing these institutions, unless this is fully covered by the public authorities;
- (c) they should assume their obligations vis-à-vis protected workers irrespective of whether any obligation the employer may have of contributing to their financing has been met;
- (d) they should assume a subsidiary responsibility for the liabilities of insolvent employers in respect of claims protected by the guarantee and should, by way of subrogation, be able to act in place of the workers to whom they have made payments;
- (e) the funds managed by guarantee institutions, other than those from general revenues, may only be used for the purpose for which they were collected.

CLAIMS PROTECTED BY THE GUARANTEE

9. (1) The guarantee should cover the following claims:

- (a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during a prescribed period, which should not be less than three months, prior to the insolvency or prior to the termination of the employment;
- (b) holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;

(c) end-of-year and other bonuses provided for by national laws or regulations, collective agreements or individual contracts of employment, relating to a prescribed period, which should not be less than 12 months, prior to the insolvency or prior to the termination of the employment;

(d) amounts due in respect of other types of paid absence relating to a prescribed period, which should not be less than three months, prior to the insolvency or prior to the termination of the employment;

(e) payments due in lieu of notice of termination of employment;

(f) severance pay, compensation for unfair dismissal and other payments due to workers upon termination of their employment;

(g) compensation payable directly by the employer in respect of occupational accidents and diseases.

(2) The guarantee might cover the following claims:

(a) contributions due in respect of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(b) contributions due in respect of private, occupational, inter-occupational, or enterprise social protection schemes independent of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(c) benefits to which the workers were entitled prior to the insolvency by virtue of their participation in enterprise social protection schemes and which are payable by the employer;

(d) wages or any other form of remuneration consistent with this Paragraph, awarded to a worker through adjudication or arbitration within three months prior to the insolvency.

LIMITATIONS

10. Where the amount of the claim protected by means of a guarantee institution is limited, in order that this amount should not fall below a socially acceptable level, it should take into account variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

IV. PROVISION COMMON TO PARTS II AND III

11. Workers or their representatives should receive timely information and be consulted with regard to insolvency proceedings which have been opened and to which the workers' claims pertain.