

Module 3

Labour Legislation

What this Module is about

This module focuses on labour legislation as a key function of labour administration relating to labour protection. It underlines the importance of labour legislation for promoting a balanced economic and social development. More specifically, this module looks at current challenges of labour legislation, makes reference to the relevant principles and rights at work – with the respective conventions - and mentions some good practices in labour legislation.

Objectives

At the end of this module, participants will be able to:

- Appreciate the role of labour administration in promoting a balanced economic and social development
- Discuss the role of labour legislation in regulating employment relationship, collective rights and equity at work
- Identify the main means for law enforcement

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Introduction

Labour legislation regulates both individual employment relationship and collective labour relations; it protects basic freedoms and rights at work; ensures minimum labour standards leaving the rest for social partners to define through collective bargaining and defines the contractual status (individual and collective) of employers and workers, including their mutual rights and responsibilities as well as dispute resolution machinery.

Convention No.150 on labour administration lays down the responsibility of labour administration with regards to national labour policy, specifying in particular that competent bodies within the system of labour administration shall be the instrument for preparation and implementation of labour policy. This relates also to labour legislation.

Article 6 paragraph 1 of the convention provides that the competent bodies within the system of labour administration will prepare and implement laws. ILO Recommendation No 158 on Labour Administration refers to labour laws as the first area in which the functions of a system of labour administration should be exercised

Labour legislation and Development

Labour legislation is vital to the economy of any country and to the achievement of balanced development which emphasizes both economic efficiency and the well-being of the population as a whole. This is a delicate balance to achieve. Experience shows that proposals imposed from above are less effective in taking into account the complex web of interests and needs involved than solutions that have been tested and honed through the process of social dialogue, and which therefore enjoy broad support within society.

The ILO Constitution confers upon the International Labour Office a special mandate to provide advice in relation to labour legislation. Article 10, paragraph 2, of the Constitution calls upon the Office *to accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference.*

It is generally felt that most of labour laws apart from a few from other regions came from Western Europe as a reaction to the excesses of the industrial revolution and the abuse of right arising from the 19th century civil law. At the heart of the labour law is the acknowledgement that strict civil law equality can lead to unacceptable situations when parties to a contract where labour is traded against wages do not have comparable bargaining strength.

Labour law deviates from the basic civil law and Roman law assumptions in that no party can complain against unfairness in terms of a contract which it has voluntarily adhered to. Instead, the goal of labour law is to ensure that no employer would be allowed to impose and no worker will in a given society will be obliged to accept conditions of work which fall below what is meant for a decent threshold in a given society in a given time. Thus, labour law is not just as a means to regulate the exchange between labour and capital like civil and commercial law do with respect to civil or commercial exchanges, rather it is a means to operationalise ILO's decent work¹.

In Western Europe, labour law expanded rapidly throughout the 20th century both in qualitative and quantitative terms. Labour law which was initially aimed at protecting the industrial worker and its scope was widened to include also the non industrial work, agricultural work and civil service.

Many of the Western European countries which had colonies in Asia, Africa and Latin America also introduced these laws in their colonies. Thus, in Asia labour laws were introduced in India, Pakistan, Malaysia Singapore, Hong Kong etc as early as the 1930's. The contents of the labour law were enriched from hours of work, work of women and children, industrial accidents, to new issues such as contract of employment, pay, conditions of work, trade union organization and industrial relations.

Most of all, the most important development was the contract of employment which provides the legal support of the employment relationship. Those who worked within the contract of service were protected while those who worked outside the scope were unprotected.

Many of Western Europe's law have found their way to ILO Conventions and Recommendations². Furthermore the EU members acting as a regional group were also influential in the elaboration of ILO standards during the ILO conferences.

In Central and Eastern Europe the labour law reform started at the beginning of '90. The process included provisions for recognizing the right to form workers' and employers' associations and for regulating collective labour disputes.³

¹ For further reading on this, see Auturo Bronstein paper prepared for International Society for Labour and Social Security Law, ILO, DIALOGUE, Geneva 2008.

² For a detailed account of all ILO Conventions and Recommendations see ILOLEX the database of ILO Standards www.ilo.org

³ Czechoslovakia has adopted a Collective Bargaining Act in 1991, while the former communist trade union regulation was repealed so that the right to form workers' and employers' associations became regulated under a law enacted in 1990, on the right to form civil associations. In Estonia, a new law on trade unions was adopted in 1989, which was followed in 1993 by a law on collective labour disputes. In Hungary, the right to strike was already addressed in a law adopted in 1989. In Lithuania, a law on collective agreements was adopted

Importance of Labour Legislation for Labour Administration

Labour legislation regulates both individual employment relationship and collective labour relations; it protects basic freedoms and rights at work; ensures minimum labour standards leaving the rest for social partners to define through collective bargaining and defines the contractual status (individual and collective) of employers and workers, including their mutual rights and responsibilities as well as dispute resolution machinery.

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The adoption of labour laws and regulations is an excellent means of implementing ILO standards, promoting the ILO Declaration and the Fundamental Principles and Rights at Work, and putting the concept of Decent Work into practice. Under the ILO Constitution, the International Labour Office is committed to assisting its member States. In doing so, it adopts the basic approach that where labour legislation is appropriately developed, with the support of the parties involved, it not only promotes social justice throughout society, but also has a positive effect on economic performance and contributes to social stability and the reduction of social conflict.

Today labour legislation is widely used to both regulate individual employment relationships and to establish the framework within which workers and employers can determine their own relations on a collective basis. A good example is of course through collective bargaining between trade unions and employers or employers' organizations or through mechanisms of worker participation in the enterprise.

The legislative regulation of the individual employment relationship typically entails the enactment of provisions governing the formation and

on 4 April 1991, which was followed in 1992 by a law on collective disputes. In Poland, two acts of 1991 have regulated trade unions and employers' associations respectively, while a third law addressed the settlement of collective labour disputes. In 1994 an amendment to the Labour Code dealt with collective agreements. In Romania, three laws adopted in 1991, 1996 and 1999 addressed trade unions, collective agreements and the settlement of industrial disputes respectively. In Slovenia, a law of 1993 already established criteria to determine trade union representative.

termination of the relationship (that is, the conclusion of contracts of employment, their suspension and termination) and the rights and obligations relating to the different aspects of the relationship (such as the minimum age for admission to employment of work, the protection of young workers, equality at work, hours of work, paid holidays, the payment of wages, occupational safety and health and maternity protection). Provision also has to be made for enforcement procedures and supporting institutions (such as labour inspection services and courts or tribunals).

Regulation of the collective relations of workers and employers typically includes laying down legal guarantees of the right of workers and employers to organize in occupational organizations, to bargain collectively and the right to strike, as well as mechanisms for worker participation at the enterprise level.

Labour Legislation on Freedom of Association

Freedom of association is a universally recognized civil liberty and one of the most fundamental rights of workers and employers. Time and again history has shown that recognition of the basic rights of workers and employers is a prerequisite for the emergence of democracy and for the overall development of national economies. Looked at the other way round, there can be no real democracy and little economic development if the majority of the population are suppressed and denied the right to organize themselves to protect and further their economic and civil interests.

Respect for the principles of freedom of association is vital for the proper functioning of a labour relations system and, more broadly, for any democratic system of governance. In turn, freedom of association has an important role to play in the development and operation of a market economy, which generally functions most efficiently under democracy.

Freedom of association is a fundamental principle for the ILO. It is protected and promoted by a number of ILO Conventions and Recommendations as well as by the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

The principle of freedom of association entails the right of employers and workers to establish, without previous authorization, organizations of their own choosing for the defence of their occupational and industrial interests. It includes the right of these organizations to conduct their internal administration in full freedom. It also comprises the promotion of collective bargaining between workers and employers and the right to strike.

Example of a ILO Draft Provision for a Member Country

Section 5. Basic employee rights. Every employee has the right to -take part in the formation of a trade union; be member of a trade union, subject to its rules; take part outside working hours, or with the consent of the employer within working hours, in the lawful activities of a trade union of which he or she is a member; seek and hold office in any trade union of which he or she is a member, subject to its rules; take part in the election of workplace representatives where provision is made for such election; be elected or appointed and serve as a workplace representative where provision is made for this; exercise any other right conferred by this Act.

Section 7. Basic employer rights. Every employer has the right to -take part in the formation of an employers' organization; be a member of any such organization, in accordance with its rules; take part in the lawful activities of any such organization of which it is a member; hold office in any such organization of which it is a member, in accordance with its rules; exercise any right conferred by this Act.⁴

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⁴ For further reading on this see Labour Legislation Guidelines <http://www.ilo.org>, Dialogue Branch, legislation.

Labour Law and the informal economy

Informal economy workers are the weakest and most vulnerable group of workers. In many developing countries; they form more than 70% of the workers. They not only have low income but very precarious jobs and conditions of employment. Most of them do not have social security coverage⁵. A great majority of informal sector workers are excluded from the application of labour law because either they are casual workers or they are not within an employer –employee relationship.⁶

Labour Law and the employment relationship

The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration.

It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security. The existence of an employment relationship is the condition that determines the application of the labour and social security law provisions addressed to employees. It is the key point of reference for determining the nature and extent of employers' rights and obligations towards their workers⁷.

The issue has become more and more important because of the increasingly widespread phenomenon of dependent workers who lack protection because of one or a combination of the following factors:

- The scope of the law is too narrow or it is too narrowly interpreted
- The law is poorly or ambiguously formulated so that its scope is unclear
- The employment relationship is disguised
- The relationship is objectively ambiguous, giving rise to doubt as to whether or not an employment relationship really exists
- The employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for them; and lack of compliance and enforcement

This is why points such as the following need to be addressed:

- When does an employment relationship exist?

⁶ For further reading, see "Showcasing Tools and Experience in Labour Administration and the Informal Economy", Eds: Giuseppe Casale, A. Sivananthiran, José Luis Daza, Cynthia Mar.

⁷ For further reading on Employment Relationship, consult the website: www.ilo.org/public/english/dialogue/ifpdial/areas/legislation/employ.htm

- What is an ambiguous employment relationship?
- What is a disguised employment relationship?
- What is a "triangular" employment relationship?
- Who is an employee?
- Who is an employer?

To address these issues, the 2006 International Labour Conference adopted the Recommendation concerning the Employment Relationship. This Recommendation covers:

- The formulation and application of a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship
- The determination - via a listing of pertinent criteria - of the existence of such a relationship, relying on the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement that may have been agreed between the parties, and
- The establishment of an appropriate mechanism - or the use of an existing one - for monitoring developments in the labour market and the organization of work so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship

Many countries today are taking action to redraw the boundaries of labour law taking an enlarged definition of workers who are recognized as employees so that it includes situations where the nature of work performed or services rendered or the type of the relations between work or service providers and those who benefit from work that is performed or services rendered fall within a grey zone. In this situation, the principle of reality of facts becomes a leading criteria. This is the approach followed by countries such as Canada, New Zealand, South Africa and the majority of Latin American countries. In Ireland the social partners have identified a group of indicators whose presence would allow to determine whether an employment relationship exists⁸.

⁸ For further information, consult the website:
www.ilo.org/public/english/dialogue/ifpdial/areas/legislation/employ.htm .

Security of Employment

Termination of employment or the protection of workers against unjustified dismissal is an important piece of labour law as protection against dismissal is crucial as in many countries workers who are dismissed do not have recourse to unemployment benefits as there is no unemployment insurance coverage. On the other hand employers are of the view that with rising labour cost and competition, protection against dismissal actually prevents employers from being able to deal with market and technological changes⁹.

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⁹ For further reading, see The Termination of Employment Digest at www.ilo.org Dialogue Branch -Legislation which has a database on termination of employment regulations. To illustrate the diversity of national approaches, the Digest on Termination of Employment reviews the legislation of more than 77 countries, as well as provides comparative tables for easy reference. Dealing exclusively with employees in the private sector, the Digest offers a practical guide for the lay reader, as well as for lawyers, government officials and employers' and workers' organizations. In an environment of heightened global competition, and financial crises in some countries resulting in mass layoffs, this subject is now more topical than ever. In reviewing the legislation of more than 70 jurisdictions, the Digest highlights commonalities between approaches taken to individual and collective dismissals, as well as differences in relation to key points.

Example of Provisions Pertaining to Termination of Employment in the United Kingdom

The United Kingdom's regulation on termination of employment is found in the law governing contracts of employment which derives from three main sources: common law, statutes and law of the European Community.

The main statutes governing termination of employment is the Employment Rights Act 1996 (ERA), the Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA), the Employment Act 2002, the Employment Relations Act 2004, and the Transfer of Undertakings (Protection of Employment) Regulations 2006. Legislation enacted to prevent discrimination includes the Disability Discrimination Act, 1995, the Sex Discrimination Act, 1975, the Race Relations Act, 1976, the Equal Pay Act, 1970, and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

Special provisions under collective agreements may achieve legal effect if they are incorporated into individual contracts of employment. Incorporation is not automatic. This is in sharp contrast to many other countries, where the clauses of collective agreements apply to employment contracts if the provisions are more favourable to the employee.

Mutual/Agreed termination of employment

Employment relationship may be terminated by mutual agreement of the parties concerned. Contracts of employment may also be frustrated by an event external to the parties that renders the further performance of the contract impossible, as well as by operation of law, or by the death of the employee or employer.

The employee is entitled to terminate an employment contract at will (by the provision of due notice), unless otherwise agreed in the contract. The employee must typically give one weeks notice if he or she chooses to terminate the contract (sec. 86(2), ERA). Under common law, if the employer breaks a fundamental term of the contract, the employee is not required to give any notice.

Dismissal

According to the common law, any contract may be terminated by either party with due notice. However, the common law has been restricted by legislation aimed at curbing unfair dismissal. The ERA provides that employees have the right not to be dismissed unfairly (sec. 94(1), ERA). A dismissal may be fair if the employer shows that the dismissal (Sec. 98(2), ERA, as amended):

- Relates to the employee's ability or qualifications to do the work;
- Relates to the employee's conduct;
- Is the retirement of the employee;
- Was because the employee was redundant; or
- Was necessary because continued employment would have necessitated a contravention by either party of a prior or legal duty.

The employee has the initial evidentiary burden of proving a "dismissal" has taken place, then the burden of showing cause shifts to the employer. Where the employer has fulfilled this requirement, it rests with the employment tribunal to decide whether in all circumstances the employer acted as a reasonable employer in dismissing the employee (sec. 98(4), ERA).

If the employee has been continuously employed for at least one month, an employer is required to give notice before termination. The length of notice relates to the length of continuous uninterrupted service, according to the provisions of sec. 86 of the ERA. The minimum periods of notice are (sec. 86, ERA):

- One week, if continuously employed for less than two years
- One week for each year of continuous employment if the period is between two and 12

years, and

- 12 weeks if the period of continuous employment is 12 years or more
- If the employer does not observe the period of notice, the employment tribunal may grant payment in lieu of the period that should have been observed

No severance payment is offered if an employee was terminated because of misconduct or personal attributes. However, an employee whose contract has been terminated on the grounds of redundancy is entitled to receive a redundancy payment in accordance with sec. 135 of the ERA. The amount of the payment is calculated according to the length of uninterrupted employment. The employee is to receive (sec. 162 (2), ERA):

- One-and-a-half week's pay for each year of employment in which the employee was not below the age of 41
- One week's pay for each year of employment in which the employee was not below the age of 22, and
- One half-week's pay for each year of employment for each year not falling within the above.

The maximum week's pay cannot exceed £310. Moreover, wherever an employee has been dismissed for redundancy reasons but the dismissal has been unfair, the redundancy compensation received will be subtracted from the compensation payable to the employee for the unfair dismissal (secs. 122(4) and 123, ERA). Employers and employees have to contribute to the National Insurance Fund, out of which redundancy payments are financed in case the employer is financially unable to do so (secs. 167, ERA).

Only after a minimum period of one year of uninterrupted service is an employee entitled to claim unfair dismissal (sec. 108, ERA). However, there is no such period for employees claiming to have been dismissed on grounds of union activities, health and safety activities, maternity, jury duty, family obligations, race or sex. A claimant can launch a claim through the employment tribunal or civil courts.

Employees who believe their rights have been infringed (i.e. that they have been dismissed unfairly) may make a complaint to the employment tribunal (sec. 111(1), ERA) within three months of the date of termination. If the tribunal is satisfied that the complaint could not be reasonably presented within three months, the complaint may be presented later (sec. 111(2), ERA).

The employee may appoint a representative at the hearing, while the tribunal decides if the employee's complaints are well founded. The employer must establish that the principal reason for the termination is capable of justifying the termination.

If the tribunal is not satisfied that the reasons for termination were justified, then the tribunal will require the employer to either reinstate or re-engage the employee. If the employer is required to reinstate, the tribunal will order the employer to offer back-pay and restore certain rights and privileges by a certain date (sec. 114, ERA). If the tribunal orders the employer to re-engage the employee, the tribunal will specify the terms of the re-engagement, including an amount the employer must pay, and rights and privileges that the employee must regain (sec. 115). If the employer refuses to comply with a reinstatement or reengagement order, the tribunal can award an additional 26-52 weeks' pay (to a maximum of £280 per week).

Employment Equity Laws

The elimination of discrimination at work is central to social justice. It underpins the concept of decent work for all women and men, which is founded on the notion of equal opportunities for all those who work or seek work and a living, whether as labourers, employers or self-employed, in the formal or the informal economy. The elimination of discrimination is an indispensable part of any viable strategy for poverty reduction and sustainable economic development.

Equality of opportunity and treatment in employment and occupation is a very important aspect of the overall principle of equality, which is now almost universally endorsed. It is one of the most fundamental principles underlying any democratic society and is set forth in many international instruments, national constitutions and laws. However, despite the substantial progress made, great inequality still persists in almost all parts of the world, between women and men, between races and on such grounds as religion, political opinion, national extraction and social origin.

The elimination of discrimination in employment and occupation are recognized as two sides of the same coin. They are promoted in several ILO Conventions and Recommendations, the most important of which are: ILO Convention on Discrimination (Employment and occupation), 1958 (No.111) and ILO Convention on Equal remuneration, 1951, (No.100).

These two Conventions have been named by the ILO's Governing Body among the eight fundamental or core Conventions which all member States should ratify.

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Race Discrimination

Race is among the 7 grounds of discrimination listed by ILO Convention No.111

Measures aiming at eliminating race discrimination in South Africa and Namibia

In South Africa and Namibia, the Employment Equity Act seeks to remedy the heritage of racial discrimination inequality that is a defining feature of the South African labour market. The Act prohibits discrimination in the workplace while at the same time require large employers to take affirmative action to ensure the equitable representation of black people women and disabled in all occupational categories and levels in the workforce. Discrimination includes harassment. The prohibition of discrimination is enforced by civil litigation in the labour court.

Gender Equality

Over the world, the most widespread ground of discrimination is gender discrimination.

There are key International Labour Conventions of particular relevance to gender equality - especially the four key equality Conventions. These are the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Equal Remuneration Convention, 1951 (No. 100), Workers with Family Responsibilities Convention, 1981 (No. 156) and the Maternity Protection Convention, 2000 (No. 183). The mandate is also informed by Resolutions of the International Labour Conference - the highest level policy-making organ of the ILO - in 1975, 1985, 1991 and the June 2004 Resolution on Gender Equality, Pay Equity and Maternity Protection.

Labour force participation rates for young women are lower than for young men. The largest gaps in labour force participation of young men versus women are found in South Asia (35 percentage points) and the Middle East and North Africa (29 percentage points). The gaps mainly reflect differing cultural traditions and the lack of opportunities for women to combine work and family duties. This is true not only in the developing world but also in the industrialized world. The lower value placed on women's economic contributions and prevailing views that women only generate second or third incomes in households contribute to this reality. They may face discrimination because of the perception that as soon as they marry and have children they will be less productive or will leave their jobs. Many young women may become despondent and wonder whether academic achievement actually leads to access to employment commensurate with their qualifications.

An important employment challenge is to tackle occupational segregation of traditionally accepted "male" and "female" jobs and to break the barriers in opening up professions to both sexes. Unaware of their legal

rights and often lacking enough role models, women are only slowly penetrating into the professions traditionally dominated by men. Young women, particularly in developing countries, are often unable to take advantage of training opportunities due to barriers to entry, discrimination in selection and gender stereotyping. Improved access to desegregated training opportunities will help increase the employability of young women and improve their future earnings and socio-economic conditions. Efforts should be supplemented by vocational guidance better suited to their capabilities and needs, as well as by gender-sensitive counseling and placement services to enable young women to fulfill their potential.

Equality Law in the European Union

The recent EC Directive 2006/54/EC embodies in a single instrument, seven directives adopted between 1975 and 2002, concerning equal treatment for and equal pay for men and women. This approach is increasingly followed in national law. For example under section 17 of the Swedish Act on Equality between Men and Women, 1991, prohibits against sex discrimination, apply when the employer:

- Decides on an employment issue
- Selects a job seeker for employment interview or implements other measures during employment procedure, decides on promotion
- Applies pay or other terms of employment at work
- Manages and distributes work
- Gives notice of termination

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HIV/AIDS

The statistics on infection rates and mortality have indicated the extent of the HIV/AIDS crisis. According to the latest UNAIDS-WHO AIDS Epidemic Update (2006), an estimated 3.5 million men and women worldwide were living with HIV in 2006. It is estimated that since the virus was first detected in the 1980s, more than 26 million people have died from HIV/AIDS related illnesses, most of them in the developing world already bearing social and economic burdens. Sub-Saharan Africa is at the epicentre of the epidemic¹⁰.

Behind the above figures lies a veritable human tragedy that the ILO has reacted to with particular vehemence because of the impact the epidemic has on the world of work. The ILO estimates that 48 million labour force participants will be lost to the global workforce by 2010 as a result of HIV/AIDS, and 74 million by 2015 if nothing changes.

Indeed, the workplace is an ideal entry point for implementing policy to break the stigma attached to the virus and to deliver treatment and care, and social dialogue is the process that can ensure that policy covers all issues and is workable for the women and men it must serve. The 2001 “Code of Practice on HIV/AIDS and the World of Work” was a first major step. Among other things, it calls on member States to engage in legislative reform to strengthen laws on HIV/AIDS and to train their labour administration officers, as well as labour judges, in better prevention and enforcement of the law, including sensitive handling of complaints related to HIV-status, real or perceived.

The Digest of Good Legislative Practices Relating to HIV/AIDS in Selected African Countries notes that many details on HIV/AIDS in the workplace are contained in one particular piece of labour legislation: a proclamation in Ethiopia, an amendment to the Labour Code in Lesotho, a Bill providing for the prevention of HIV-based discrimination now before the National Assembly in Nigeria, an HIV/AIDS law in Mozambique, Togo and Benin, a Bill in Burkina Faso, the Employment Equity Act and the Labour Relations Act in South Africa, the Labour Act and the Labour Relations (HIV and AIDS) Regulations in Zimbabwe. In Mauritius, an HIV and AIDS Act of 2006 has not yet been promulgated. The Regulations are regarded as a serious deterrent, but very few complaints have been recorded – only one in the Zimbabwe Industrial Relations Court. It is speculated that the fear of stigma attached to the revelation of HIV status is a cause – as appears to be the reason as well in other countries examined. A large majority of the countries covered have specific laws that ban work related testing or screening.

¹⁰ For further reading, see Jane Hodges (2008) *Digest of Good Legislative Practices Relating to HIV/Aids in Selected African Countries* ILO, Dialogue Branch.

Disability

According to the ILO, more than 600 million people in the world have a physical, sensory, intellectual or mental impairment of one form or another (see Achieving equal opportunities for people with disabilities through legislation, ILO, 2007).

ILO Standards and other international instruments require states to take specific measures in order to promote integration of persons with disabilities. It is therefore important to make sure that equality law mentions persons with disabilities (at constitutional and/or legislative level.)

Legislative provisions prohibiting discrimination on the ground of disability are a key element in order to promote decent work for all. These provisions will ensure that discrimination on the ground of disabilities is prohibited. But they can also provide affirmatives measures (like quotas).

Modern legislative provisions also provide the concept of "reasonable accommodation". These provisions require employers to take into account workers with disabilities' needs and help them in overcoming social and physical barriers. The definition of reasonable accommodation shall be defined by legislation. The UN Convention on the Rights of Persons with Disabilities, 2006, the major international instrument regarding disabilities defines "reasonable accommodation" as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;"

When drafting labour legislation on disabilities, it is of major importance to consult not only with employers and workers' organizations representatives but to also include organizations representing and advocating people with disabilities. Consulting with organizations providing services to persons with disabilities (like training, rehabilitation services or workplace services) is also important in order to make sure that the future legislation will be relevant and sustainable.

In the phase of implementation, the Labour inspectorate has a role to play, not only enforcing legislation, but also when collecting data's regarding workers with disabilities.

Law Enforcement and the Rule of Law

There is need to promote stable institutions guaranteeing democracy, the rule of law, human rights and respect for minority. A reliable system of labour inspection, and efficient delivery of justice by a competent and independent judiciary are indispensable for the rule of law being enforced in any country.

Labour inspection has an important role in law enforcement. Labour Inspection is dealt with by the ILO Labour Inspection Convention, 1948 No. 81.

Settlement of labour disputes

In Malaysia, for example, senior labour officials who have passed departmental law exams can hear complaints on non payment of wages and related payments and appeals against their decision can be referred to the high court. A number of EU member States, such as Belgium, Germany, Ireland and the United Kingdom have established a specialized labour jurisdiction, which is made up of panels of magistrates sitting alongside lay members representing each side of industry¹¹.

In the case of France which is unique, as first instance labour tribunals are made up of employer and worker lay members only, while the jurisdiction of appeal is made up of magistrates only. By contrast, Portugal and Spain have a specialized labour jurisdiction by tribunals that are made up of magistrates only, while in the Netherlands and Italy labour jurisdiction is carried out by ordinary civil law courts.

In the Nordic countries the approach is different as in principle the Labour Courts deal only with disputes that are referred to them by the unions and employers' associations, while individual litigation falls within the competence of ordinary tribunals.

In the case of Hungary, Malta, Slovenia and Turkey they all have a distinct labour jurisdiction while in other countries in Eastern Europe, labour litigation falls within the competence of the ordinary tribunals, although in a few countries there are bipartite labour dispute commissions - a feature that has been inherited from the old regime - that hear and adjudicate complaints submitted by the workers, with a right to further appeal before tribunals that are made up of magistrates only.

Under Convention No. 81, the State has a major responsibility in this area, which calls for the establishment of solid labour inspection bodies within the ministries or other government agencies in charge of labour that would be endowed with a wide range of faculties, as well as

¹¹ For further information and reading see Document GB.274/3 (ILO, Geneva, March 1999), Blanpain and Engels (eds.), *Comparative labour law and industrial relations in industrialized market economies*, 6th and revised edition (Kluwer International, 1998).

adequate means so that they can fulfil their labour inspection responsibilities.

Though adopted more than fifty years ago, the Labour Inspection Convention still offers a reliable referential framework for labour inspection activities that are to be undertaken by ILO member States.

There are different approaches to the organization of the judiciary machinery that is entrusted with the settlement of disputes relating to the application and enforcement of the labour law

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Individual dispute settlement

Claims arising from individual disputes over the application of employment and labour law (e.g. over the existence of an employment relationship, terms or termination of employment contracts) are heard by specialised labour courts in Poland, Hungary, and Slovenia. Most of the costs of such labour court procedures are paid by the state, except in certain cases where employers must cover part of the expenses. Slovakia is an exception, as individual labour disputes are considered as Civil Code cases and are handled by the civil courts.

A common problem in all countries examined is that litigation in the courts over individual labour disputes is an extremely time-consuming process. In Hungary, such a case, including the possible rounds of appeals, may last for several years, with approximately 10% of cases lasting longer than one year. Similar delays are reported from Slovenia. In Slovakia, civil courts are currently overloaded with non-labour cases, and the settlement of individual labour disputes thus usually takes several months or years. The social partners, and especially trade unions, have criticised the slow procedures in Slovenia, Slovakia and Hungary.

In some Caribbean countries, collective labour agreements provide for voluntary arbitration, either by mutual consent or at the request of one party, while legislation provides for voluntary arbitration or for the establishment and operation of industrial tribunals, industrial court, or compulsory arbitration in the essential services or in situations where the national interest is at stake. In this connection, there are industrial tribunals in Bahamas, Bermuda, Cayman Islands, Dominica, and Jamaica; industrial/labour courts in Antigua and Barbuda, and Trinidad and Tobago; while Guyana can be cited for compulsory arbitration in essential services, and where the national interest is at stake.

Labour Courts in Germany

Most of the cases handled by labour courts concern individuals rather than trade unions or works councils (as collective suits). Half of all cases are settled at an initial hearing before a lower labour court, but the other half of the cases a year eventually go through the full appeals process.

There are three levels of court that is the labour court, higher labour court (-appeal) and the federal Supreme Court (final court of appeal).

These courts deal with private law disputes involving statutory rights - such as wrongful dismissal, infringements of works council procedures, wage payment problems and the interpretation of collective agreements. Social security cases are heard by separate courts of social affairs. Conflicts of interest between works councils and employers are dealt with by ad hoc settlement committees. There is a right of appeal for all cases before the labour courts. An appeal to the Federal Court requires consent from a higher labour court or (on complaint) the Federal Court itself.

Only cases that are believed to infringe constitutional rights may be sent on further appeal to the Federal Constitutional Court. Each court contains a mixture of professional and lay judges. A court of first instance (labour court) is composed of one professional and two lay members drawn from both sides of industry.

A preliminary meeting is normally set in order that a labour court judge may achieve an amicable settlement without recourse to a formal hearing. If a settlement is concluded at this stage, the court will generally not charge court fees (other than the initial filing fee).

Although each party must meet their own costs for legal representation before a labour court, the losing party will have to pay court fees plus witness expenses.

It is not necessary to be represented by a lawyer during lower labour court proceedings. However, if cases go before the higher labour court, the parties must be represented by a lawyer, trade union official, or employers' association official. All cases before the Federal Labour Court must be legally represented. Cases are not generally expected to go to mediation before being heard by a labour court.

EXERCISE

GROUP WORK

According to the Recommendation No. 158 *concerning Labour Administration (Role, Functions and Organisation)*, "the competent bodies within the system of labour administration should - in consultation with organisations of employers and workers and in a manner and under conditions determined by national laws or regulations, or national practice - take an active part in the preparation, development, adoption, application and review of labour standards, including relevant laws and regulations."

1. In your group, share your experience and analyse how the systems of labour administration deal with the different steps of law making (**preparation, development, adoption, application and review**) in the represented countries.
2. Specify in which step(s) the social partners are involved and how.
3. Summarize the discussion and report the group findings in plenary.

TIME: 45' or more, according to the size of the group and the number of countries represented.

Summary

Labour legislation regulates both individual employment relationship and collective labour relations; it protects basic freedoms and rights at work; ensures minimum labour standards leaving the rest for social partners to define through collective bargaining and defines the contractual status (individual and collective) of employers and workers, including their mutual rights and responsibilities as well as dispute resolution machinery.

Among the key areas a labour law should cover, the module calls the attention on the following:

- Freedom of association and collective bargaining
- Employment relationship
- Termination of employment and the protection of workers against unjustified dismissal
- Non discrimination and equality of opportunity and treatment (race, sex, HIV/AIDS, disabilities)

According to the Recommendation No. 158 *concerning Labour Administration (Role, Functions and Organisation)*, the competent bodies within the system of labour administration should - in consultation with organisations of employers and workers and in a manner and under conditions determined by national laws or regulations, or national practice - take an active part in the preparation, development, adoption, application and review of labour standards, including relevant laws and regulations.

Concerning the enforcement of the law, two means are particularly important: the labour inspection and the machineries for the settlement of rights-based disputes.

Bibliography

Bronstein, A. (2003), *Labour Law Reform in the EU Candidate Countries: Achievements and Challenges*

ILO (2003), *Contract labour*, Report VI (1) International Labour Conference, 85th Session, 1997, ISBN 92-2-109894-X

Mätää, P. (1998), *Equal pay policies: International review of selected developing and developed countries*, ISBN 92-2-111451-1

Arrigo, G.; Casale, G., *Glossary of labour law and industrial relations (with special reference to the European Union)*, ISBN 92-2-115731-8

ILO Labour Legislation Guidelines

On equality:

ILO (2007), *Equality at work: Tackling the challenges*, ILO Global Report, May 2007

Chicha, M.T. (2007) , *A Comparative Analysis of Promoting Pay Equity: Models and Impacts*, ILO.

ILO (2003), *Time for equality at work*, ILO InFocus Programme on Promoting the Declaration, ISBN 9221128717

ILO WEB Page of Declaration:

<http://www.ilo.org/dyn/declaris/DeclarationWeb.IndexPage>

ILO WEB Page on Equality and Discrimination:

http://www.ilo.org/global/Themes/Equality_and_Discrimination/lang--en/index.htm

ILO's Information base on Equal Employment Opportunities for Women and Men:

<http://www.ilo.org/public/english/employment/gems/eeo/law/main.htm>

On HIV/AIDS:

Hodges, J. *Paper 12: Digest of good legislative practices relating to HIV/AIDS in selected African countries.*

ILO (2004), HIV/AIDS and work: global estimates, impact and response, ILO, HIV/AIDS Unit, 2004, ISBN 9221158241

ILO IPEC (2008), SCREAM: A special module on HIV, AIDS and child labour, Guidelines and Training Material, ISBN 9789221197201

ILO "Guidelines on addressing HIV/AIDS in the workplace through employment and labour law":

<http://www.ilo.org/public/english/dialogue/ifpdial/downloads/papers/hiv aids.pdf>

ILO "Code of Practice on HIV/AIDS and the World of Work"

<http://www.ilo.org/public/english/protection/trav/aids/code/languages/index.htm>

ILO Resolution concerning HIV/AIDS and the world of work of the International Labour Conference

ILO WEB Page on HIV/AIDS:

<http://www.ilo.org/global/Themes/HIVAIDS/lang--en/index.htm>

ILO SHARE Report: Saving lives, protecting jobs, 14 April 2008 :

<http://www.ilo.org/public/english/protection/trav/aids/publ/share08.pdf>