

Ref:- FKEHQ/ED2023/LO314

6th November 2023

The ILO Standards Office,
NORMES@ilo.org

Dear Sir/Madam,

**RE: RIGHT TO STRIKE - TRIPARTITE SOCIAL DIALOGUE-BASED APPROACH
THROUGH STANDARD SETTING.**

The Federation of Kenya Employers (FKE) is the most representative employers' body in Kenya and is a member of the International Organisation of Employers (IOE). FKE has a broad membership across all sectors of the economy who together employ 70% of the formal private sector employees.

Regarding the issue of the Right to Strike and Convention 87 we wish to underscore the importance of upholding tripartism and promoting social dialogue in resolving any disputes that may arise between the tripartite social partners so that they can own the outcomes. The Federation of Kenya Employers believes that standard-setting is part of ILO's core mandate and has been the preferred way of creating clear and binding instruments on labour and social topics in the spirit of the ILO Centenary Declaration.

We are aware that the International Labour Conference (ILC) routinely deals with standard setting and has over the past centenary adopted several instruments including nearly 200 Conventions, 6 Protocols and over 200 Recommendations. Standard setting stands out as a well-established procedure for creating authoritative rules on far-reaching issues in the world of work.

The Federation of Kenya Employers notes with concern a push to make a referral of the issue over the Right to Strike and C.87 to the International Court of Justice. It is to be noted that such referral may not offer the desired and acceptable solution as Article 37(1) is silent on the binding nature of ICJ advisory opinions. An advisory opinion will be just that – with no obligation on ILO Constituents to submit to its enforcement.

The uncertainty regarding the enforceability and binding effect of ICJ advisory opinions for the ILO and its constituents therefore puts into question the ability of an ICJ advisory opinion to bring about an effective resolution to the dispute over the right to strike in C.87. On the other hand, through the adoption of a Convention or Protocol, the ILC can authoritatively provide legal certainty on the same.

Further, FKE prefers standard setting as it aligns with the ILO fundamental values of social dialogue and tripartism. The ILO Centenary Declaration declares that it is incumbent on the ILO to strengthen the capacity of its tripartite constituents to *“address all fundamental principles and rights at work, at all levels, as appropriate, through strong, influential and inclusive mechanisms of social dialogue.”*

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Standard-setting is the most advanced and developed form of social dialogue and is a central pillar to the ILO. The Federation does not wish to create an erroneous impression that the spirit of tripartism has been so much eroded that parties can only look up to third parties for adjudication. The Federation similarly believes in the doctrine of exhaustion, that ideally should look at exhausting internal well-established machinery in resolution of disputes before resorting to external avenues of redress.

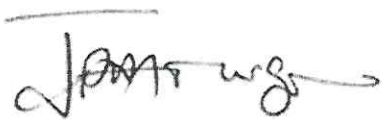
FKE submits that all is not lost. Placing a standard-setting item in the next International Labour Convention in 2024 is legally feasible under the statutory framework. We appeal to the Governing Body to place an item on the Right to Strike on the agenda of the ILC as soon as possible, which is 2024, to open a substantive engagement. We believe the decision to place a standard setting item on the right to strike on the agenda of the ILC can be taken by a simple majority and does not require unanimous consent. Article 5.1.1 of the Governing Body Standing Orders does not apply.

Secondly, the Governing Body can similarly approve a standard-setting item with a programme of reduced intervals as per past practices for other protocols. The Federation of Kenya Employers is strongly convinced that standard setting is the most obvious, appropriate, and logical step towards defining authoritative ILO rules on the right to strike, and thus resolving the dispute over interpretation. Only standard setting will ensure that all ILO constituents can actively engage in the process, that any solution achieved is based on consensus or at least a broad majority, and that any outcome adopted is universally relevant and accepted. Adoption of a legally binding instrument such as a Protocol to Convention 87 on the right to strike or more broadly on industrial action would determine the scope and limits of the right to strike at the international level, as far as is possible, and fill the regulatory gap that currently exists in the ILO body of standards. In doing so, the Protocol would make it clear once and for all that rules on the right to strike that have the support of ILO's tripartite constituents are only contained in the Protocol, and not in Convention 87.

Finally, the Federation of Kenya Employers expresses its commitment to social dialogue and tripartism, which are the cornerstones of the ILO, and we look forward to the substantive discussions during the two Governing Body special sessions that will take place in November 2023.

Yours Sincerely,

FEDERATION OF KENYA EMPLOYERS

A handwritten signature in black ink, appearing to read 'J Mugo', with a horizontal line above it.

JACQUELINE MUGO, EBS.

CHIEF EXECUTIVE OFFICER & EXECUTIVE DIRECTOR