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“Towards safe, healthy and declared work in Ukraine”

OSH

Draft Law

**“On Occupational Safety and Health of Workers”
of the Ministry of Economy
(Version of 18 July 2021)**

**Technical recommendations on its better
alignment with International and European
Labour Standards and best practices**

July, 2021

Executive summary

The Ministry of Economy (ME) draft Law “On Occupational Safety and Health of Workers” is aimed at transposing to the national juridical order the EU OSH Framework Directive 89/391/EEC, of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work.

This fifth set of technical recommendations are made to the most recent draft version of this Law (of 18 July 2021), and are provided within the scope of the EU-ILO Project “[Towards safe, healthy and declared work in Ukraine](#)”, under activities 1.1.1, 1.1.2 and 1.2.1.

These technical recommendations are intended to promote the further alignment of this draft Law (of 18 July 2021), with the main International¹ and the European² labour standards and best practices on Occupational Safety and Health (OSH) and, subsidiarily, on Labour Inspection³, as this draft law foresees amendments to the labour inspection legal framework.

They follow the preceding four sets of technical recommendations already provided by the EU-ILO Project (in October and November of 2020, and in [February](#) and [June](#) of 2021) to the previous versions of this draft Law.

They also build on the previous EU-ILO Project “[Enhancing the Labour Administration Capacity to Improve Working Conditions and Tackle Undeclared Work](#)” contributions. Specially in what concerns the analysis and recommendations contained in the supported “[National Occupational Safety and Health Profile Ukraine - 2018](#)”, the proposed “[Guidelines and Recommendations to the Concept on the Reform of the National System for Occupational Risk Prevention and](#)

¹ Namely: Occupational Safety and Health Convention, 1981 (No. 155); Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (No. 155); Occupational Health Services Convention, 1985 (No. 161); Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187); and Night Work Convention, 1990 (No. 171).

² In particular: Council Directive 89/391/EEC, of 12 June 1989, concerning the introduction of measures to encourage improvements in the safety and health of workers at work; Directive 2003/88/EC, of the European Parliament and of the Council, of 4 November 2003, concerning certain aspects of the organization of working time; Directive 2009/104/EC, of the European Parliament and of the Council, of 16 September 2009, concerning the minimum safety and health requirements for the use of work equipment by workers at work; Council Directive 89/656/EEC, of 30 November 1989, on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace; Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace; Council Directive 92/85/EEC, of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive No. 94/33/EC, of 22 June 1994, on the protection of young people at work, as amended by Directive No. 2007/30/EC, of 20 June 2007, of the European Parliament and of the Council; and Council Directive No. 91/383/EEC, of 25 June 1991, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.

³ In particular, concerning Labour Inspection Convention, 1947 (No. 81) and Labour Inspection (Agriculture) Convention, 1969 (No. 129).

[Promotion of OSH](#)", the "[Brief notes on the main aspects of the alignment between Ukrainian national legislation and selected EU directives](#)", the "[White Paper on EU Directives and Reform of OSH and Labour Relations' Legislation](#)", and the "[Roadmap for alignment of the Ukrainian legislation on working conditions with the EU legal framework](#)"

The present technical recommendations should not be seen as official comments of the ILO or as a replacement of the positions of its supervisory bodies.

Moreover, the expert technical opinions expressed therein neither reflect the official opinion of the European Union nor its responsibility can be attributed to the European Union.

It is our expectation that these technical recommendations may contribute to an improved legislation, which is better aligned with the main applicable International and European labour standards and best practices, and that can effectively improve the safety and health of workers in Ukraine.

Kyiv, 27 July 2021

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Summary of the main technical recommendations on how to improve the alignment with the relevant International and European Labour Standards and best practices of the ME version of 18 July 20021 of the draft Law “On Occupational Safety and Health of Workers”

1. **Article 1(1)(36):** revision of the definition of National System for OSH (“system of state management in the field of safety and health of workers”) as follows: “infrastructure which provides the main framework for implementing the national policy and national programmes on occupational safety and health”, to better align it with Article 1(b) of ILO Convention 187, as the definition of the draft restricts the composition of the system for OSH to public entities, thus excluding private, cooperative and third sector entities. In addition, in order to better align with Article 4 of ILO Convention 187, the main components of such system (which will be responsible for the implementation of the OSH Policy and programmes), should be clearly specified, for example: laws and regulations, collective agreements; authority or body (or authorities or bodies) responsible for OSH; mechanisms for ensuring compliance including the system of labour inspection); arrangements to promote cooperation between management, workers and their representatives at the level of the undertaking; national tripartite advisory body (or bodies) on OSH; information, training, research and advisory services on OSH; occupational health services; mechanism for the collection and analysis of data on occupational injuries and diseases; collaboration with relevant insurance or social security schemes covering occupational injuries and diseases; support mechanisms for a progressive improvement of OSH conditions MSMEs and in the informal economy; collaboration with Ministry of Education; standardization, etc.
2. **Article 11** (special conditions for performance of high-risk works):
 - a. **Article 11(1):** the offered possibility, of replacement of a prior authorization for the performance of high-risk works by an additional life and health insurance of the workers, undermines the objectives envisioned by the foreseen prohibition, limitation or establishment of prior authorization or additional controls for the performance of such works provided by Article 11(b) of ILO Convention 155. In fact, this provision of ILO C155, which provides for the subjection of such works to prohibition, limitations or authorization or control by the competent authority, does not foresee their replacement for an additional insurance. It provides that such works, due to their higher level of occupational risks, should be subjected to additional controls by the competent authority, in order to ensure the safety and health of workers in the performance of these particularly dangerous works.
 - b. **Articles 11(8):** the fixing of just 10 days for the issuance of such authorization and, most especially, its tacit consent (whenever the authorization is not decided within that time-limit), should be revised, as meeting such short deadline might be incompatible with the complex nature of some high-works to which performance the authorization is requested for, and/or with the available resources to meet it. In face

of the above, keeping the current wording of this provision is likely to lead to the tacit authorization of most of the requests for the performance of high-risk works and, consequently, to the non-applicability, in practice, of the Article 11(b) of ILO C155.

- c. **Articles 11(9) and 11(10):** It should also be considered, as constituting grounds for refusing/revoking an authorization for the performance of high risk works, the following:
- i. The applicant was convicted of violating OSH regulations regarding the performance of high risk works within the previous 2 years,
 - ii. The applicant had fatal or serious occupational accidents performing high-risk works within the previous 2 years
 - iii. Labour inspectors verify that employer is not able to ensure the safety and health of the workers performing such high-risk works;
3. **Article 15** (Authorized entities for safety and health of workers): the requirements and different modalities of OSH services that should be ensured by the employers (external/internal and of safety/health) should be defined by workplace (and not globally for the employer), depending on the number of workers of each workplace and the nature of the occupational risks to which they are or may be exposed at each workplace, in order to align this proposed article with Article 7 of EU OSH framework Directive 89/391/EEC.
4. **Article 16(5)** (Occupational risk management): the choice of the methodology to perform risk assessment should be left to the employer. There are dozens of methodologies to do so, and the most suitable depends on the specific nature of the risks and on the conditions at the workplace. The idea that “one size fits all” is a huge mistake! This provision is too prescriptive and is not in line with the logic beneath the EU OSH legal framework, which is focused on the results, rather than on the processes to achieve them. The law should ensure that the OSH professionals shall be able to perform risk assessment properly, on the basis of the conditions in each workplace, and not to try to define the methodology that should apply in all possible circumstances. Moreover, it is a utopia to think that the ME has the necessary resources, knowledge and skills to develop several different types of methodologies for risk assessment, each one to be applied to a specific circumstance and different type of occupational risk. The methodology to be applied should be developed by the employer, in consultation with the workers and, where necessary, with the competent authorized persons for OSH, taking into account the specificities of the workplace and the existing risks.
5. **Article 19** (Workers’ health surveillance and health examinations): it should be revised, in order to ensure the obligation of the employer to monitor the occupational health of all workers and not just some of them (although with different periodicities), as the health surveillance is aimed at both preventively assess (from the outset) the fitness of the worker for the job and work requirements, and assessing the repercussions of the work and the conditions in which it is performed in the health of the workers. The latter would also ensure a better alignment with Article 14(2) of EU OSH framework Directive 89/391/EEC.

6. **Article 35** (The employer's liability for violation of the legislation on safety and health of workers): this article should be revised, in order to ensure that "The enforcement system shall provide for adequate penalties for violations of the laws and regulations", as foreseen in Article 9(2) of ILO C155, in particular:

a. **Article 35(4)(1) to Article 35(4)(17)**: the infringements included in these provisions do not cover all the most serious infringements. Most of the infringements are aggregated into a residual provision [Article 35(4)(17)]. However, the different violations (and corresponding sanctions) should be, as much as possible, disaggregated into specific legal provisions (and not grouped in a residual provision) foreseeing specific and individualized infringements (and corresponding sanctions) for the violation of the more important legal provisions including, *inter alia*, on:

- i. Then protection of genetic heritage (Article 13);
- ii. The employers' obligations to implement the preventive and protective measures (e.g., replace de dangerous for the non-dangerous or less dangerous, formulate a occupational risk prevention plan, provision of collective protective equipment, provision of personal protective equipment) on the basis of the risk assessment and following the general principles of prevention (Article 16 - Occupational risk management and 25 - Employers' obligations);
- iii. Safety and health of pregnant workers, workers who have recently given birth, and workers who are breastfeeding (Article 28);
- iv. Safety and health of workers under 18 years of age (Article 29);
- v. Safety and health of workers with disabilities (Article 30).

b. **As for the amount of the fines:**

- i. **Article 35(4)(17)**: the amount of "half a minimum wage", established in this provision as the amount of the fine to be applied to all other violations not specifically provided in Article 35, should be revised, because it is inconsistent with the amount of "a minimum wage" foreseen in the equivalent residual provision proposed as sub-paragraph 8) of the second part of Article 268 of the Code of Labor Laws of Ukraine, for "the violation of requirements of the labour legislation other than those provided by paragraphs 1-7 of this part".
- ii. The amount of fines should also be increased by the amount of the financial gain of the employer with the commitment of the infraction, in order to dissuade non-compliance.

c. Regarding the **nature of the sanctions**: it should also be considered the introduction of non-monetary accessory sanctions, more directed to the vital interests of the employers.

d. **Article 35(8)**: should be reviewed, in order to better promote compliance and dissuade incomppliance. It should be reworded, to provide that the employer, to benefit from the offered discount of 50% of the amount of the fine, besides paying it

within 10 banking days, has also to correct the violation committed within the same period of time.

7. **Concerning the SECTION VIII - FINAL PROVISIONS**, in particular, **regarding the proposed alterations to CHAPTER XVIII - SUPERVISION (CONTROL) OF COMPLIANCE WITH THE LABOUR LEGISLATION of the Code of Labour Laws**, to regulate the activity of labour inspection, we refer to and reaffirm the content of the [EU-ILO Project technical recommendations to the ME Draft Law “On Amending Some Legislative Acts on the Procedure of State Supervision \(Control\) of Compliance with the Labour Legislation”](#), already provided in 3 April 2021, which content is similar to the one presented by this section.

It should be noted, as already mentioned and highlighted several times⁴ to the ME, social partners and other national stakeholders, these provisions⁵, by foreseeing that the basic principles of state supervision (control)⁶ apply to the state supervision (control) of compliance with labour legislation and by imposing restriction to the powers and activities of labour inspectors⁷, are not in conformity with the two ILO Priority Conventions on labour inspection ratified by Ukraine⁸, as the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) already observed⁹. This same assessment, moreover was also made by the Government of Ukraine in the “Concept of the OSH reform”, considering that *“the provisions of the Law of Ukraine ‘On the Basics of State Supervision (Control) in Economic Activities’ limit the labour inspectors’ powers as defined by the Conventions Nos. 81 and 129, due to which realization of some principles enshrined in these Conventions is hindered and efficiency of inspection activities to ensure the application of legal provisions is reduced”*¹⁰. This is particular serious, taking into account that both ILO Conventions C81 and C129 on Labour Inspection were ratified by Ukraine on

⁴ See, for example: [“Ukrainian Labour Inspection Legal Framework - Analysis and Recommendations”](#); [“White Paper on EU Directives and Reform of OSH and Labour Relations’ Legislation”](#) (in Part III - Labour Inspection System); [“Brief notes on the main aspects of the alignment between Ukrainian national legislation and selected EU directives”](#) (in point 3 of Chapter I - General Considerations); [“National Occupational Safety and Health Profile of Ukraine”](#) (Sections 3.2.1, 12.3 and 13.3); and, more recently, [EU-ILO Project technical recommendations to the ME Draft Law “On Amending Some Legislative Acts on the Procedure of State Supervision \(Control\) of Compliance with the Labour Legislation”](#).

⁵ Regarding the regulation of the State Supervision (Control) of Compliance of with the Labour Legislation, contained in the SECTION VIII - FINAL PROVISIONS of the ME draft Law “On Occupational Safety and Health of Workers” (amending CHAPTER XVIII of the Code of Labour Laws) and in the ME draft Law “On Amending Some Legislative Acts on the Procedure of State Supervision (Control) of Compliance with the Labour Legislation”.

⁶ Regulated by the Law of Ukraine 877 “On the Basics of State Supervision (Control) in Economic Activities”.

⁷ Including on the free initiative of labour inspectors to undertake inspections without prior notice, on the frequency of labour inspections, on the maximum duration of labour inspections, and on the discretionary powers of labour inspectors to initiate prompt legal proceedings without previous warning.

⁸ [Labour Inspection Convention, 1947 \(No. 81\)](#) and [Labour Inspection \(Agriculture\) Convention, 1969 \(No. 129\)](#).

⁹ *Vide* [Observation \(CEACR\) - adopted 2019, published 109th ILC session \(2021\)](#) and [Observation \(CEACR\) - adopted 2017, published 107th ILC session \(2018\)](#), both on the application of ILO C81 and C129 by Ukraine.

¹⁰ *Vide* section “Problems to be resolved” of the “*Concept of the labour protection management system reform in Ukraine*”, adopted by the by the Order of the Cabinet of Ministers of Ukraine (CMU) No. 989-p, of 12 December 2018.

8 September 2004 and, as such, and according to Article 9(1) of the Constitution of Ukraine should “(...) *be an integral part of the national legislation of Ukraine*”.

In addition, by weakening the labour inspection system in Ukraine and not implementing the two priority ILO Conventions on labour inspection ratified by Ukraine, these provisions contravene Article 291(3) of the [Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part](#) (AA)¹¹, according to which the Parties reaffirmed their commitment to “*effectively implement the fundamental and priority ILO Conventions that they have ratified*”, as well as Article 296(1) of the AA, according to which “*A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties*”.

It is also worth mentioning, in this regard, the recent [EU Parliament Resolution, of 11 February 2021](#), on the implementation of the EU Association Agreement with Ukraine (2019/2202(INI)), which, among other aspects:

- Calls on the Ukrainian Government to respect and enforce labour standards, and to ratify and fully implement all ILO conventions (paragraph 105);
- Calls on the Association Council to prioritize the implementation of international labour standards and EU legislation and practices, so as to ensure that the social partners’ interests are balanced and employees’ rights are protected in compliance with the provisions of the Association Agreement (Articles 419-421 and 424) and the relevant ILO conventions (81, 87, 98, 117, 122, 129, 144, 154 and 173) (paragraph 110);
- Reminds the Ukrainian Government that its efforts to improve the business climate, to attract direct investments and to promote economic growth must not take place at the expense of workers’ rights and their working conditions (paragraph 110).

¹¹ See pp. L 161/157 and L 161/1983, of the Official Journal of the European Union, of 29.5.2014.

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