International Labour Organization

Technical Note on

the 2022 Draft Occupational Safety and Health (OSH) Law

Proposed by the Government of Ukraine

Background

1. In July and November 2021, the EU-ILO project "Towards safe, healthy and declared work in Ukraine" provided comments on previous versions of the Draft Occupational Safety and Health Law.

2. In December 2022, the Cabinet of Ministers of the Government of Ukraine requested comments from the ILO on the proposed 2022 draft law "On Occupational Safety and Health of Workers" (hereinafter the Draft Law). The request included a very short time deadline, since the proposals will be considered before the end of the year. Given the urgency of the request, the Office is providing this short technical note highlighting some areas that should be addressed for greater alignment with the OSH Conventions.

3. Introductory Remarks:

    - The absence of comments on any particular provision should not be taken as indicating a particular view as to conformity with international labour standards.
    - These comments are provided based on an English translation of the proposed legislation. Therefore, some comments may not be relevant in relation to the original version.
    - The ILO encourages tripartite consultation during the revision of labour legislation. We would recommend that the government considers sharing the attached comments with the relevant employers' and workers' organizations.
    - The Office does not provide analysis of the draft legislation based on EU directives or other EU legislation or policies. The Office recommends that the Government seek separate expert guidance on whether the proposed draft legislation is consistent with EU norms. However, the Office may draw from the national legislation of European countries for comparison of good practices.

- These comments are provided without prejudice to any comments that may be made by the bodies responsible for supervising compliance with international labour standards.

4. In 2022, the ILO published a new resource regarding OSH Law reform. The Support Kit for Developing Occupational Safety and Health Legislation (available here) provides detailed guidance regarding OSH law reform process, content, and form. The Office is available to provide further technical assistance regarding the law reform process and the implementation of the fundamental OSH Conventions.

OSH as a Fundamental Principle of Rights at Work

5. At its 110th Session in June 2022, the International Labour Conference decided to amend paragraph 2 of the ILO Declaration on Fundamental Principles and Rights at Work (1998) to include "a safe and healthy working environment" as a fundamental principle and right at work (FPRW), and to make consequential amendments to the ILO Declaration on Social Justice for a Fair Globalization (2008) and the Global Jobs Pact (2009).

6. The International Labour Conference also decided to designate the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) as fundamental Conventions.

7. This historical decision entails that Conventions Nos. 155 and 187 will be subject (as of 2024) to a 3-year reporting cycle under the ILO regular supervisory system for Member States that have ratified these Conventions and to an annual reporting cycle under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.[1]

8. Convention No. 155 was ratified by Ukraine in 2012 and therefore will be subject to a 3-year reporting cycle under the ILO regular supervisory mechanism.[2] Ukraine has also ratified several governance and technical conventions relevant to occupational safety and health and is therefore subject to a 3-year (for governance) or 6 year (for technical OSH Conventions) reporting cycle depending upon the convention.[3] For Convention No. 187, not ratified by Ukraine, an annual report will be requested

[1] GB.346/INS/3/3/Decision (point d)

[2] As no report on the application of Convention No. 155 by Ukraine was received in 2022, the report on Convention No. 155 will once again be requested in 2023. As of 2024, a new three-year reporting cycle will commence, with Ukraine's subsequent report requested in 2026 (GB.346/INS/3/3/Decision (point d)). Note that the Committee of Experts on the Application of Conventions and Recommendations (ilo.org) will publish a new report addressing conformity with ratified OSH Conventions in February 2023.

[3] Ratifications of ILO conventions: Ratifications for Ukraine

commencing in 2024, under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.

9. The Occupational Safety and Health Law should be aligned with International Labour Standards (ILS), and in particular with the Conventions that have been ratified by Ukraine as well as those that are considered fundamental, since the fundamental nature of a Convention creates the obligation for Member States to respect and realize the principles concerning the rights that are the subject of the Convention in question (ILO Declaration on Fundamental Principles and Rights at Work) and the act of ratification creates a legal obligation on ILO Member States to make effective the provisions of such Convention (ILO Constitution, article 19 (5)(d)).

10. The Office have made an initial review of the Draft OSH law. Ideally, any gaps and inconsistencies with ILS should be addressed during tripartite consultations, before the proposal is submitted to Parliament.

Comments on the Draft Law

Scope of Application

11. The overarching policy goal of an OSH law is to protect all workers against sickness, disease and injury arising out of her or his employment in all branches of economic activity.[4] The ILO uses the term worker to apply more broadly to all persons who work, regardless of whether a formal employment relationship could be proven.

12. Draft Law Article 1 (25) defines the term "worker". It is not entirely clear from the English translation of the definition of worker whether the legislation would apply only to workers with in an "employment relationship" or more broadly. The drafters may wish to consider simplifying the definition to clarify that the scope of application includes all workers.

13. Subparagraph (25) expressly excludes domestic workers, self-employed, and "farm enterprise members". While Convention No. 155 permits the exclusion of particular limited categories of workers upon ratification "after consultation at the earliest possible stage with representative organizations of employers and workers concerned,"[5] these excluded categories must be listed in

[4] ILO Occupational Safety and Health Convention, 1981 (No. 155), Articles 1 and 2.
[5] ILO, Promoting a Safe and Healthy Working Environment: General Survey concerning the Occupational Safety and Health Convention, 1981 (No.164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981, ILC.98/III(1B), 2009, paras. 38–44.

the Government's first report. It is not permitted under the Convention to subsequently make additional exclusions. As the Government of Ukraine did not choose to exclude any categories of workers when its first report on the application of Convention No. 155 was submitted, it would not be compatible with the Convention to now exclude these categories of workers from legislation giving effect to the Convention. Further, the scope and application of OSH national policy, law and practice should be as broad and comprehensive as possible.[6] The Office strongly recommends the deletion of the exclusions from the definition of "worker".

14. In particular, the Occupational Safety and Health Recommendation, 1981 (No. 164), paragraph 1(2) states: "Provision should be made for such measures as may be necessary and practicable to give self-employed persons protection analogous to that provided for in the Convention and in this Recommendation". The drafters should consider expanding the scope of application so as to include self-employed and triangular relationships such as agency workers and subcontractors, in circumstances where work is performed under the control of the "employer" (e.g. when they perform at the workplace under the control of the employer).

15. Draft Law Article 1 (31) defines the term "employer". The definition provided in the Draft Law is narrowly limited to "the framework of an employment relationship". The Employer has primary responsibility to "ensure that so far as is reasonably practicable, the workplaces, machinery, equipment, and processes under their control are safe and without risk to health."[7] In addition to the employer, there may be more than one business operating in the same space. Some countries have added the concept of the "owner" or "occupier" to the scope of OSH legislation, extending the responsibility to minimize risks to the enterprise that manages or controls the premises where the work is taking place. Thus, the duty could be shared by more than one legal entity. Similarly, a joint liability doctrine could be applied in the OSH context to hold the main employer or undertaking jointly responsible with recruitment agencies, contractors, or subcontractors.[8]

16. Convention No. 155 Article 17 states: "Whenever two or more undertakings engage in activities simultaneously at one workplace, they shall collaborate in applying the requirements of this Convention." The Office welcomes the inclusion of this duty to cooperate within Draft Law Article

[6] Ibid, paragraph 33.
[7] Convention No. 155, Article 16.
[8] For more details see ILO Support Kit for Developing Occupational Safety and health legislation, 2022, p. 72 – 81.

25 (9). However, this provision is also limited to the narrow definition of "employer" included in subparagraph (31).

17. The Office recommends that the drafters consider expanding the definition of "employer" to include the concept of the "owner" or "occupier" to the scope of OSH legislation, extending the responsibility to eliminate hazards and minimize risks to the enterprise that manages or controls the premises where the work is taking place.

18. Draft Law Article 2(4) Scope of Application states "This law shall apply to relations under civil-law contracts in cases specified hereby." The intent of this provision is unclear. It is the only provision in the law to include the phrase "civil-law contracts". Therefore, the Office recommends that this subparagraph be deleted to avoid the risk of ambiguity.

Occupational Health Risk Management – prevention principle in the case of "high-risk work"

19. Draft Law Article 4 defines the national policy on occupational safety and health of workers. The Office welcomes the emphasis on prevention included in subparagraphs 1 and 2. However, the text of subparagraph 5 could be interpreted to undermine the hierarchy of controls to eliminate or minimize workplace hazards by focusing on compensation for workers in "high-risk conditions and/or harmful occupational factors". The Office suggests that the drafters clarify that the obligation to provide additional entitlements in the context of "high-risk" work in no way reduces the employers' duty to provide safe and healthy working conditions. Subparagraph 5 could be amended to begin with language such as: "In addition to the employers' obligation to eliminate risks and to minimize risks that cannot be eliminated, legislation and collective contracts…."

20. The same analysis applies to Article 11 Special conditions for performance of high-risk works, Article 25 Employers' obligations subparagraph (4), and Article 35 The employers' liability for violation of the legislation on occupational safety and health of workers. These provisions could be misinterpreted as to permit compensation in lieu of the employers' duty to provide safe and healthy working conditions. Compensation should only be provided in addition to preventative measures to eliminate or minimize exposure to occupational hazards.

21. The Office recommends that Article 11 (1) should be amended to require both of the conditions prior to the performance of "high-risk works". Therefore, an agreement for additional insurance and authorization for performance, or a registered declaration of conformity should be required.

22. Similarly, Article 35 should be amended to clarify that the Employer would be liable for both sanctions for violation of the legislation, and additional compensation to workers in case of harm caused during the performance of "high-risk works". Subparagraph 4(5) and 8 may be misinterpreted as to permit compensation to the worker or the worker's family in lieu of sanctions. The drafters should consider clarifying that the employer would be liable for both sanctions and compensation.

23. Draft Law Article 16 Occupational Risk Management should expressly include the hierarchy of prevention and control measures as defined in the ILO-OSH Guidelines on occupational safety and health management systems, 2001. Subparagraph 2 explains the approach to planning includes language that is similar but not the equivalent to the language suggested in the ILO Guidelines. "avoidance" of risk is not the same as "eliminate the hazard/risk" and "reducing" is neither equivalent to "minimizing". The drafters should review section 3.10 Hazard prevention of the Guidelines to ensure that the hierarchy of prevention and control measures is defined accurately.

Employer's Duties and Responsibilities

24. Draft Law Article 19 Workers' health surveillance and health examinations appears to grant employers with broad discretion to monitor the health of workers. It is strongly recommended that the competent authority define objective criteria to regulate when and how health examinations are conducted. The Occupational Health Services Recommendation, 1985, No. 171, paragraph 11 encourages Member States to adopt provisions to protect the privacy of the workers and to ensure that health surveillance is not used for discriminatory purposes or in any other manner prejudicial to their interests. Medical examinations may be discriminatory if they are not justified based on OSH principles. The employer should not have discretion to require workers to submit to medical examination for issues related to productivity rather than OSH. The Office recommends that the drafters consider amending Article 19 to ensure that the workers' rights to privacy is protected, and that the competent authority defines objective criteria based on OSH principles regarding when workers' should be required to submit to health surveillance and examinations.

25. Draft Law Article 24 Employers' rights includes provisions related to demands that may be made of workers. However, workers have an obligation to follow employers' instructions under Article 27. The drafters should consider whether Article 24 should be deleted as the formulation of "employers'

rights" is not typically used in modern OSH legislation.[9] The Office further suggests that the consolidation of employers' obligations within Article 25 would help to streamline the Draft Law.

Workers' Rights and Duties – imminent danger

26. Draft Law Article 26 Workers' Rights details the rights of workers. Subparagraph 1(10) indicates that the worker would be protected if they leave their workstation or workplace in the event of a "serious, imminent, and unavoidable" danger. Convention No. 155 Articles 13 and 19 (f) only requires that the worker has reasonable justification to believe that the danger is "imminent and serious" and does not include the term "unavoidable". The Office recommends deleting the term "unavoidable" from subparagraph (10) as it is not be reasonable to require the worker to determine whether the danger is avoidable or not. The Office recalls in this respect that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has, for a number of years, been requesting legislative changes in this respect to achieved conformity with Convention. No. 155. [10]

Other pending legislative issues raised by the ILO Committee of Experts on the Application of Conventions and Recommendations

27. The Office also draws specific attention to the pending comments (Observation and Direct request) of the ILO Committee of Experts on the Application of Conventions and Recommendations on the application of ratified OSH Conventions published in 2021, which requested measures be taken to bring the national legislative framework into conformity with ratified OSH Conventions[11], and in particular the following issues:

[9] See the ILO Global Database on Occupational Safety and Health Legislation, (LEGOSH).

[10]See, for example, the Observation published in 2021 on Ukraine's application of Convention No. 155: "Articles 13 and 19(f). Protection of workers who remove themselves from work situations presenting an imminent and serious danger. Further to its previous comments, the Committee notes the Government's indication that a draft act prepared in the context of the abovementioned OSH reforms provides that, when a worker who is faced with serious, immediate and unavoidable danger, leaves their workplace and/or the dangerous area, they shall not be liable for those actions. The Committee recalls that Article 13 provides protection to a worker that has removed themselves in any situation in which the worker has reasonable justification to believe presents an "imminent and serious danger" to their life or health, and does not require that such danger be "unavoidable". In addition, under Article 19(f), until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health. The Committee requests the Government to take Articles 13 and 19(f) of the Convention into account in its ongoing legislative revisions on OSH, and to continue to provide information on the measures taken to give full effect to these Articles."

[11] Guarding of Machinery Convention, 1963 (No. 119) (Ratification: 1970)
Hygiene (Commerce and Offices) Convention, 1964 (No. 120) (Ratification: 1968)
Occupational Cancer Convention, 1974 (No. 139) (Ratification: 2010)
Occupational Safety and Health Convention, 1981 (No. 155) (Ratification: 2012)
Occupational Health Services Convention, 1985 (No. 161) (Ratification: 2010)
Prevention of Major Industrial Accidents Convention, 1993 (No. 174) (Ratification: 2011)

Occupational Safety and Health Convention, 1981 (No. 155)

- Article 18. Measures to deal with emergencies and accidents, including adequate first-aid arrangements.

Occupational Health Services Convention, 1985 (No. 161)

- Article 10. Full professional independence of health services personnel.

Safety and Health in Mines Convention, 1995 (No. 176)

- Article 5(2)(f). Rights of workers and their representatives to be consulted on and participate in OSH measures.
- Article 10(d). Employers shall ensure that all accidents and dangerous occurrences are investigated and appropriate remedial action is taken in practice

Other suggestions for improvement stemming from unratified conventions, recommendations and codes of practice and based on legislative drafting techniques

28. The Office suggests that the drafters review the text of the Draft Law to ensure consistency and clarity throughout the document. In particularly, the Office suggests to:

29. Review the following defined terms in Article 1, which appear unnecessary, or may be functionally equivalent with other terms, including:
    - (14) "incident" could be replaced by "dangerous occurrence" to align with Protocol No. 155;
    - (15) "culture of safety" is preferable to (16) "preventative culture of OSH of workers";
    - (19) "hazard" is preferable to the phrases (20) "hazardous occupational factor" or (45) "harmful occupational factor";
    - (36) "working environment" is preferable to (41) "working conditions";
    - (42) "high-risk working conditions" does not appear to be used in the Draft Law;
    - the phrase "safe and healthy working environment" should be used consistently throughout the Draft Law;
    - the term "sanitary" is used in several Articles 10 and 15 but not defined, and is generally understood to be more limited in scope to OSH, which includes "sanitation";
    - the term "military" appears is Articles 11 and 12, even though it has been excluded from the scope of application in Article 2; and

Safety and Health in Mines Convention, 1995 (No. 176) (Ratification: 2011)
Safety and Health in Agriculture Convention, 2001 (No. 184) (Ratification: 2009)

- the term “genetic heritage” (Article 13) is undefined and may not be an appropriate term in modern legislative drafting.

30. Add in article 6 the requirement for employers to, as appropriate, record and notify commuting accidents as well, as per Protocol of 2002 to Convention No. 155 (not ratified by Ukraine).

31. Consider assigning the duty to establish a procedure for recording and notification of incidents to the competent authority instead to the employer in Article 6.1 and consider adding “incidents” to article 6.4, as per Article 2 of Protocol of 2002 (which uses the term “dangerous occurrences”).

32. Define the required content of annual reports (article 34), as per Protocol of 2002 to Convention No. 155, which requires Member States to annually publish national OSH statistics and analysis on occupational accidents, occupational diseases, and, as appropriate, dangerous occurrences and commuting accidents, using classification schemes drawn from the most up-to-date international schemes established under the auspices of the ILO or other competent international organizations. The code of practice on recording and notification of occupational accidents and diseases[12] provides further guidance in that regard.

33. Review article 34.2.1) as it seems to require the competent authority to include in its annual report legal provisions on the exercise of state control, while legal provisions are already public.

34. Determine the timing and frequency of medical examinations (article 19) as per Paragraph 11 of Recommendation No. 171, which suggests that medical examinations should be organized (a) before assignment to specific tasks that may involve a danger to their health or that of others; (b) at periodic intervals during employment that involves exposure to a particular hazard to health; (c) after a prolonged absence on health grounds for the purpose of determining its possible occupational causes, recommending appropriate action to protect the workers and determining the worker’s suitability for the job and needs for reassignment and rehabilitation; and (d) after termination of assignments involving hazards that might cause or contribute to future health impairment.

35. Clarify when internal and external audits of the occupational safety and health of workers management system are required (article 18).

[12] https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107800.pdf

36. Streamline the structure of the Draft Law with regards to employer's obligations taking into account that these are listed in article 25 and also elsewhere in the Draft Law; regrouping all obligations under one article/chapter could be an option.