

Technical advice on discrimination: Definition and prohibited grounds of discrimination

INTRODUCTORY REMARKS

Background

1. The Ministry of Labour – Invalids and Social Affairs of the Socialist Republic of Viet Nam (hereinafter referred to as “the Ministry”) is leading work within Viet Nam on the reform of the Labour Code 2012. The ILO is supporting this process, including providing technical advice from the International Labour Office (hereinafter referred to as “the Office”) on the amendments to the Labour Code through the ILO Country Office in Hanoi and Hanoi and the New Industrial Relations Framework (USDOL) project.
2. In this context, the Ministry and social partners need to be provided with technical information and guidance on a number of issues being examined during the reform process. In particular, they wish to benefit from existing guidance on how to ensure alignment with ILO Conventions as well as understand the way comparative countries have ensured this alignment.
3. This note covers one of the issues being considered as part of this reforms: the definition of discrimination, and prohibited grounds of discrimination.

Preparation of ILO’s technical advice

4. The Office in Geneva has examined the issues raised and answered the questions in light of both international labour standards and comparative labour law and practice.
5. The Office wishes to clarify that these comments are provided without prejudice to any comments that may be made by the ILO bodies responsible for supervising compliance with international labour standards.

SPECIFIC QUESTIONS

Definition of discrimination: direct and indirect.

6. International labour standards guidance with respect to discrimination in employment and occupation can be found in the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – ratified by Viet Nam – and the accompanying Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).
7. Article 1(1) of Convention No. 111 defines discrimination as “any distinction, exclusion or preference made on the basis of certain grounds, which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation.”
8. Article 1(3) of Convention No. 111 provides important guidance on the wide range of circumstances that are covered by the terms “employment and occupation”. It provides that these terms “include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.”
9. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has specified that this broad definition covers any discrimination, in law or in practice, direct or indirect.¹ Therefore, it is recommended that the law reflects the definition of both direct and indirect discrimination:
 - a) “Direct discrimination” occurs when less favourable treatment is explicitly or implicitly based on one or more prohibited grounds. It includes sexual harassment and other forms of harassment;² and
 - b) “Indirect discrimination” refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons.³
10. The CEACR has reiterated the importance to defining in labour law both direct and indirect discrimination.⁴ It has welcomed initiatives that explicitly prohibit and define direct and indirect discrimination in national legislation in Europe, such as Germany, Portugal, Slovenia and Sweden, as well as in other parts of the world, such as Fiji, Kenya and Namibia.⁵

¹ ILO: *Giving globalization a human face: General Survey on the Fundamental Conventions (2012) concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III (Part 1B), International Labour Conference, 101st Session, Geneva, 2012, para. 743.

² *Ibid.*, para. 744.

³ *Ibid.*, para. 745.

⁴ *Ibid.*, para. 746.

⁵ *Ibid.*, para. 747.

Prohibited grounds: inclusion of “age” and “sexual orientation”.

11. Convention No. 111, which was ratified by Vietnam in 1997, establishes the general principle of equality and non-discrimination in the context of the world of work. It covers all forms of discrimination in employment and occupation, and it specifies at least seven grounds on which discrimination should be prohibited: race, colour, sex, religion, political opinion, national extraction and social origin (Article 1(1)(a)).
12. The ILO supervisory body monitoring the application of Conventions (the Committee on the Application of Conventions and Recommendations – CEACR) in ILO member states has noted the omission of “political opinion” and “national extraction” within the existing definition of discrimination in Vietnam’s Labour Code 2012. It has also previously requested clarifications from Vietnam on the use of term social class in the Labour code, rather than “social origin”, which is the term used in the Convention.
13. The convention also provides that governments may extend the protection to address discrimination based on other grounds (Article 1(1)(b)). Additional grounds that have been added by a number of countries include age and sexual orientation, as well as health, disability, HIV and AIDS, employment status and nationality.⁶

Sexual orientation

14. As regards discrimination on grounds of sexual orientation, two ILO instruments, the Private Employment Agencies Recommendation, 1997 (No. 188), and the HIV and AIDS Recommendation, 2010 (No. 200), explicitly refer to prohibiting and preventing discrimination on the basis of this ground.
15. Recommendation No. 188 states that employment agencies should be prohibited, or by other means prevented, from drawing up and publishing vacancy notices or offers of employment in ways that directly or indirectly result in discrimination on several grounds, among them, sexual orientation (Paragraph 9).
16. Recommendation No. 200 states that measures should be taken in or through the workplace to reduce the transmission of HIV and alleviate its impact by promoting the involvement and empowerment of all workers regardless of their sexual orientation (Paragraph 14(e)).

⁶ Ibid., para. 654.

17. Regarding employment and occupation, in the 1990's, the CEACR started to draw attention to sexual orientation as one of the grounds of discrimination emerging at the time.⁷ It considered that, to ensure specific protection against all discrimination based on sexual orientation, this ground should be expressly included in national legislation.⁸
18. More recently, in its General Survey of 2012, the CEACR was encouraged by the increasing number of member States that had adopted legislative and practical measures aimed at eliminating discrimination on the basis of this ground and promoting equality of opportunity and treatment in employment of lesbian, gay, bisexual and transgender people. The CEACR also noted that the progressive legal recognition in a number of countries of marriage or cohabitation of same-sex couples reflected a growing awareness of the need to provide employment rights and benefits derived from legally recognized marriage or partnership.⁹
19. More specifically, the CEACR has welcomed the inclusion of sexual orientation as a prohibited ground of discrimination on several occasions. In 2017, the CEACR noted with interest that the new Labour Law of Bosnia and Herzegovina (FBiH) had covered all the grounds enumerated in Article 1(1)(a) of the Convention, as well as multiple grounds including age, sexual orientation and disability.¹⁰ Similarly, the CEACR has welcomed an Argentinean provision which prohibits the employer "at the time of recruitment, during the contract or with a view to the termination thereof, to conduct any kind of inquiry or investigation into the political, religious, trade union or cultural views or sexual orientation of the worker."¹¹
20. In the European Union, both article 21 of the Charter of Fundamental Rights of the European Union and article 1 of the Framework Directive on Equal Treatment prohibit any discrimination based on sexual orientation. European Union Member States have had to align their national legislation on equality with these provisions. In other countries, such as Ecuador, sexual orientation has been included in the Constitution.
21. In Australia, China, Mauritius and Mozambique, this ground has been included in the general labour legislation. Sexual orientation has also been referred to in human rights legislation or in specific legislation on non-discrimination and equal treatment, for example, in Canada, Mexico, Malta and South Africa.
22. The Equality Act of the United Kingdom refers to both sexual orientation and gender reassignment, and the non-discrimination legislation in Albania and Serbia prohibits discrimination based on sexual orientation and gender identity. Furthermore, discrimination

⁷ ILO: *Special Survey on Equality in Employment and Occupation in respect of Convention No. 111*, Report III (Part 4B), International Labour Conference, 83rd Session, Geneva, 1996, paras. 273- 277.

⁸ *Ibid.*, para. 277.

⁹ ILO: *Giving globalization a human face: General Survey on the Fundamental Conventions (2012) concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III (Part 1B), International Labour Conference, 101st Session, Geneva, 2012, para. 824.

¹⁰ *Bosnia and Herzegovina - Direct Request (CEACR) - adopted 2016*, published 106th ILC session (2017).

¹¹ *Argentina - Observation (CEACR) - adopted 2016*, published 106th ILC session (2017).

in employment and occupations based on sexual orientation has also been addressed through collective agreements, surveys, and complaints structures.¹²

23. It should be borne in mind that the health and well-being of lesbian, gay, bisexual, and transgender persons that fear of discrimination might be affected, reducing their workplace productivity. Moreover, workplaces that dismiss these workers based on their sexual orientation may also lose skills and waste resources on recruiting replacements. Therefore, it is necessary that, apart from employment legislation against discrimination, employers adopt equal treatment and diversity policies in the workplace.¹³

Age

24. As regards discrimination on grounds of age, the ILO specifically addressed the particular situation of older workers in the Older Workers Recommendation (No. 162), 1980. Significantly, Recommendation No. 162 calls on member States to take action to promote equality of opportunity and treatment, as well as taking measures to prevent discrimination in employment and occupation (Paragraph 3). It further specifies categories in which discrimination should be prevented, among them, access to employment, career development, vocational training, employment security and social security (Paragraph 5).
25. According to the CEACR, age discrimination relates primarily to age limits imposed in access to particular occupations, compulsory retirement age and unjustified restrictions between men and women regarding entitlement to social security benefits.¹⁴
26. Over the last two decades, the CEACR has noted a rapid increase in the adoption of legal provisions prohibiting discrimination on grounds of age. A number of countries have included “age” in their constitution, such as the Dominican Republic. However, in most cases, the ground of age has been included in general labour legislation, for instance in China (Macau Special Administrative Regions), Chad, Georgia, or the Russian Federation. In other countries, especially in Europe, specific anti-discrimination or equality acts have been adopted, for example in Croatia, Germany and Slovenia. Another approach is to adopt specific legislation prohibiting age discrimination, such as in the Republic of Korea, or providing that awards and enterprise agreements must include terms that prohibit discrimination based on age, such as in Australia. Moreover, the CEACR has particularly welcomed clauses in collective agreements aimed at eliminating discrimination on this

¹² ILO: *Giving globalization a human face: General Survey on the Fundamental Conventions (2012) concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III (Part 1B), International Labour Conference, 101st Session, Geneva, 2012, para. 825.

¹³ ILO: *Equality at work: The continuing challenge. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report I(B), International Labour Conference, 100th Session, Geneva, 2011, para. 207.

¹⁴ *Ibid.*, para. 813.

ground, for instance, the General Collective Labour Agreement for the Central Public Administration in Argentina.¹⁵

27. Having age-specific legislation gives the advantage that its provision can be clearly identified by employers and workers alike. Moreover, policies at the national and enterprise level should complement legislation and play a major role in addressing myths and overcoming stereotypes concerning older workers.¹⁶

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¹⁵ Ibid., para. 814.

¹⁶ ILO: *Equality at work: The continuing challenge. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report I(B), International Labour Conference, 100th Session, Geneva, 2011, paras. 198-199.