

TOP CONCERNS WITH THE NOVEMBER 2015 TRADE UNION LAW

30 November 2015

On 13 November 2015, the government submitted to the Council of Ministers a proposed new Trade Union (TU) Law. This is a significant step in the legislative process, after which the bill will be submitted to Parliament for debate and approval. However, there has been a complete lack of consultation with trade unions since October 2014. Unions are only now seeing a revised draft, which had been released by the media. It is our understanding, however, that employers have had consistent access and influence on the draft law all along.

The International Trade Union Confederation (ITUC) is deeply concerned with the content of the proposed TU Law. The ITUC and its affiliates in Cambodia have undertaken a detailed review of the proposed TU Law. While some of our previous concerns appear to have been addressed, we still have many serious concerns outstanding. These must be addressed before the bill is submitted to the Parliament, or during the legislative process. Otherwise, the ITUC (and Global Unions) will have no choice but to vigorously oppose it.

The 10 articles below do not by any means represent all of our concerns, but represent those to which we have given priority.

#1 Article 3: Scope

The proposed TU law excludes various classes of workers by reference to Article 1 of the Labour Law. The Labour Law does not include the following classes of workers:

- a) judges of the judiciary
- b) persons appointed to a permanent post in the public service
- c) personnel of the Police, the Army, the Military Police, who are governed by a separate statute
- d) personnel serving in the air and maritime transportation, who are governed by a special legislation
- e) domestics or household servants, unless otherwise expressly specified under this law

The proposed TU law does extend the scope to personnel serving in the air and maritime transportation. Subsections d and e of the Cambodian Labour Law also provide that “These workers are entitled to apply the provisions on freedom of union under this law.” However, since the Labour Law articles on freedom of association would be superseded by the Trade Union Law, they would not be covered by the Trade Union law unless expressly provided (which is not the case). Further, the Labour Law does not apply to workers in the informal sector.

We would recommend that all workers, including civil servants but excluding non-civilian persons in the armed forces, should be allowed to form or join a union.

“All workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing.” ILO CFA Digest ¶ 216.

#2 Article 10: Structure of Unions, Employer Associations and Affiliation with Unions or Associations

The proposed Trade Union Law has reduced the number of workers required to form a trade union, consistent with Convention 87. However, a minimum of nine local unions to form a federation may be too high. Further, the minimum of six federations to form a confederation may also be too high.

“The requirement of an excessively high minimum number of trade unions to establish a higher-level organization conflicts with Article 5 of Convention No. 87 and with the principles of freedom of association.” ILO CFA Digest ¶ 714.

#3 Article 13: Requirements for Statutes

Article 323 of the Labour Code provides that “A strike shall be declared according to the procedures set out in the union’s statutes, which must state that the decision to strike is adopted by secret ballot.” The proposed TU law sets a quorum of at least 50%+1 of the total members for a decision-making meeting on strike, amendment to the statutes and for a general assembly of the union. Further, as to a strike, a secret ballot must be cast by at least 50%+1 of the total members participating in the decision-making to authorize a strike.

#4 Article 14: Effect of Registration

The law provides that trade unions may not enter into any legal arrangements prior to being registered. However, unions who have filed for registration should be able to enter into contracts, etc., and to sue if necessary. It should be clarified that unions should be able to operate legally during the registration process. Unions should only be deemed illegal if there is an affirmative decision that they have not met reasonable criteria for the establishment of a union.

“Although the official recognition of an organization through its registration constitutes a relevant aspect of the right to organize, as it is the first measure to be taken so that organizations can fulfil their role effectively, the exercise of legitimate trade union activities should not be dependent upon registration.” 2012 ILO General Survey, p. 31.

#5 Article 17: Maintenance of Registration

While a government may legitimately request that an audit be provided for its review, this article goes well beyond that. For example, unions are required to report on all of their activities on an annual basis, which is not consistent with Convention 87. Further, the union should not have to provide details of its bank accounts if it is already

supplying an audit from a certified auditor. This is particularly intrusive, given the belligerent nature of the government towards independent trade unions. Also, unions are required to provide information on changes of bank accounts and membership numbers within 15 days. It is likely that membership numbers will always be changing, requiring constant updates. Failure to do this would invalidate the registration, pursuant to the procedures in Articles 18 and 19.

Article 17 is significantly worse than the Oct 2014 draft.

Further, the law provides no right of appeal, as was provided in Article 20 of the Oct 2014 Draft. It should also be made clear that a revocation does not take effect until the appeals are exhausted.

“The control exercised by the public authorities over trade union finances should not normally exceed the obligation to submit periodic reports. The discretionary right of the authorities to carry out inspections and request information at any time entails a danger of interference in the internal administration of trade unions.” ILO CFA Digest ¶ 490.

#6 Article 21: Requirements for Leaders, Managers, and those Responsible for the Administration of Unions both within and outside the enterprise or establishment

Most of the requirements should be scrapped. The ILO has in the past found that literacy requirements are not in keeping with principles of freedom of association. Many workers, particularly in rural areas, will be unable to meet this requirement. Additionally, preventing anyone who has ever been convicted of a crime under the Cambodian justice system from holding elected office opens the door for abuse as employers and other authorities could easily levy charges on active or prospective union leader for crimes of any nature, including those of a “political” nature, as a means of preventing them from holding or seeking union office. This provision should be revised to limit leadership in the case of a conviction for a criminal offense that calls into question their integrity (fraud, embezzlement, etc.).

Further, the requirement of legal residence should be reconsidered, as that is an immigration matter, not a labour matter. If the migrant worker is employed in Cambodia, he or she should enjoy the same rights as the Cambodian worker. Further, the law requires that foreign workers not only be legally residing in the country but also be permanent residents, which would assume creates an even greater hurdle, as most migrant workers are not necessarily seeking permanent residence.

The law also has an open-ended provision whereby the Ministry can ask for any additional information, which could be open for abuse.

The Committee considers that national legislation should allow foreign workers to take up trade union office, at least after a reasonable period of residence in the host country. 2012 ILO General Survey, p. 40.

“The Committee considers, in particular, to be incompatible with the Convention the requirements that candidates for trade union office should have reached the age of majority, or be able to read and write.” 2012 ILO General Survey, p. 41.

“The Committee considers that conviction for an act the nature of which is not such as to call into question the integrity of the person concerned and is not such as to be prejudicial to the performance of trade union duties should not constitute grounds for disqualification from trade union office.” 2012 ILO General Survey, p. 41.

#7 Article 29. Grounds for Dissolution by Court

The dissolution of a trade union should be dealt with according to the provisions of the union’s constitutions and bylaws, not by allowing “any party” or 50%+1 of the members to use the courts to do so. As to the grounds for dissolution, if elected leaders have acted inconsistently with the law, action should be taken against them and should not jeopardize the existence of the union. Also, the law punishes employer domination but does nothing to address the equally large if not bigger problem of government domination of trade unions. If the government is truly worried about the lack of independence of unions, it should also address government/party domination. If the government has evidence that (a) or (b) has been violated, then they should proceed to seek deregistration of the union, with such deregistration taking affect only after all appeals have been exhausted.

“To deprive many thousands of workers of their trade union organizations because of a judgement that illegal activities have been carried out by some leaders or members constitutes a clear violation of the principles of freedom of association.” ILO CFA Digest ¶ 692.

The Committee considers that the dissolution of trade union organizations is a measure which should only occur in extremely serious cases; such dissolutions should only happen following a judicial decision so that the rights of defence are fully guaranteed. ILO CFA Digest ¶ 699.

#8 Article 65: Worker’s Actions Considered as ULPs

Given the contentiousness of industrial relations, particularly in the garment sector, we are concerned that employers or the government will use the vague language in Article 65 to punish trade unions. For example, (g) raises concerns as employers may try to undermine an otherwise legal strike that takes place outside a given enterprise if too many strikers congregate in front of the entrance. Additionally, the ban on agitating for purely political purposes could be invoked to prohibit activity by unions to change government policy; indeed, the government and employers have done exactly this in the past.

#9 CHAPTER 15: Administrative Measures and Sanctions

Employer sanctions under the law are far too low to be dissuasive. For nearly all violations, the maximum fine is 5 million riels (1 million riels = US \$250/Euros 233). Thus, the maximum fine permitted is a mere \$1,250. The majority of employers will simply pay the small fine as the cost of doing business, assuming the government attempts to collect it in the first place. In the previous draft, the maximum fine was 6 million – still too low. Astonishingly, the maximum fine for obstructing the formation of a union is a mere 1 million riels.

It is unclear whether the fines will be calculated by the illegal act or by number affected (e.g., if 5 people are illegally dismissed, the maximum fine 5 million or 25 million riels). Also, it appears that the admonishments are required each time before issuing a fine. However, if an employer has repeatedly violated the same article, e.g., dismissed union members on multiple occasions, it seems an admonishment need not be necessary for repeat offenses. There also appears to be no specific fine mentioned for unfair labour practices identified in the TU law, nor a catch-all fine for any other violation of the TU Law.

Finally, while the employer sanctions are too low, the worker sanctions may be too high. While \$1250 may be insignificant for a company, it may be crushing for a small union. Previous drafts of the law applied a lesser penalty for unions than for employers in recognition of this fact.

“Legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98.” ILO CFA Digest ¶ 822.

#10 Article 98: Labor Court

It should be noted that the government has been duty bound to establish a labour court since 1997 (with the passage of the Labour Code). We strongly urge the government to establish a competent and independent labour court as soon as possible. In the absence of the establishment of labour courts in the near term, we recommend these matters be directed to the Arbitration Council for a binding resolution. The Arbitration Council is the only independent and effective judicial tribunal in Cambodia. Matters in this law should not be referred to the common courts.