



Confederation of Free Trade Unions of Ukraine (KVPU)

Str. Saksaganskogo, 38 B, office 8,
Kyiv, 01033,
Ukraine
kvpu.org.ua

tel. +380 44 287 33 38
tel. +380 95 917 16 21
tel. +380 96 862 47 29
e-mail: info@kvpu.org.ua

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Position of the KVPU on the Draft Labour Code of Ukraine

The Confederation of Free Trade Unions of Ukraine has reviewed the new draft of the Labor Code of Ukraine, developed by the Ministry of Economy of Ukraine (hereinafter referred to as the "draft Labor Code"), and has not approved it.

The explanatory note accompanying the draft Labor Code indicates that it was developed to fulfill the obligations defined in Annex XL of Chapter 21, "Cooperation in the Field of Employment, Social Policy, and Equal Opportunities," which is part of the Title V, "Economic and Sectoral Cooperation," in the Association Agreement between Ukraine, on one hand, and the European Union, the European Atomic Energy Community, and their member states, on the other hand (hereinafter referred to as the "Association Agreement").

In accordance with the Association Agreement, Ukraine has committed to gradually align its legislation with the laws, standards, and practices of the European Union in the fields of employment, social policy, and equal opportunities, as detailed in Annex XL of the Association Agreement.

Almost 10 years have passed since the signing of the Association Agreement. Therefore, the reference to the gradual approximation of the legislation of Ukraine to the law, standards and practice of the European Union simultaneously with the proposal to the Parliament of Ukraine to adopt a draft of a fundamental legislative act in the field of labor, which (according to the preamble of the draft Labor Code) "reveals the constitutional principles that declare Ukraine democratic, social and legal by the state, defines the legal mechanisms for the realization of the right to work, its protection and emphasizes the balance of the interests of employees and employers" and is "a modern stage of normalization of individual and collective labor relations based on the principles of freedom, equality, ensuring decent work with the implementation of international standards for the regulation of labor relations in national legislation", in the form submitted for approval to the subjects of social dialogue at the national level, is evidence, at least, of insufficient understanding by the authorities of their duties and challenges facing our state on the way to full European integration.

The explanatory note to the draft Labor Code also states that it ensures further approximation of national legislation to international labor standards established by the International Labor Organization.

Ukraine has been a member of the International Labor Organization since May 12, 1954, and during this time it has ratified more than 60 of its conventions. And according to the Statute of the ILO, the members of the Organization undertake to apply the conventions ratified by them (Article 35), and not to engage in permanent "approximation" of the norms of national legislation to international standards.

Unfortunately, the the draft Labor Code cannot be called fully compliant with both the norms of the International Labor Organization conventions ratified by Ukraine and the norms of European legislation.

This was a consequence of the continuation of the shameful practice of ignoring social partners by the government during the preparation of the draft Labor Code and not involving experts from the trade union side in its development.

On December 14, 2023, the Council of Europe decided to start negotiations with Ukraine on its acquisition of EU membership. At this stage, our country will have to prove that it is worthy of taking its rightful place among equal members of the European community.

Clumsy attempts of the authorities develop the Labor Code promptly by compiling the amendments already introduced in recent years to the current Labor Code, draft laws "On Labor" (of 2022, which was commented on by the ILO in the relevant Memorandum of technical comments of experts of the International Labor Office), "On Collective Labor Disputes" and "On the Safety and Health of Employees at Work", which are at various stages of development, and the Law of Ukraine "On Collective Agreements and Contracts", adopted in 2023, may in the future lead to serious issues in the form of the conflict of the norms of the Labor Code and relevant laws.

Several important, but not exhaustive (taking into account the limited time given by the developer to develop and approve the draft) reasons why the KVPU does not approve the draft Labour Code are below:

The the draft Labor Code is not a codification

Codification should promote the strengthening of the stability of legislation, the creation of a clear system of normative acts, ensure optimal coordination of current norms and the creation of consolidated normative blocks in the legislation. It allows you to solve two interrelated tasks - to improve the content and form of legislation. Codification acts constitute the foundation on which new legislation is built, organize the regulatory and legal array, eliminate existing contradictions, unify the legal categorical apparatus, ensure the unity of the terminological and linguistic design of legislative acts. Unfortunately, the draft Labor Code has nothing to do with the above mentioned statement.

Limitation of legal regulation of interaction between employers and trade unions in the context of labor relations

The draft Labor Code does not contain norms regulating the employer's legal relations with trade unions and the participation of employees in the management of enterprises, institutions, and organizations, which are currently provided for in Art. 243-250 of the current Code of Labour Laws of Ukraine (with the exception of Article 26 of the draft Labor Code), in particular, regarding the rights of trade unions and their associations, the rights of employees to participate in the management of enterprises, institutions, organizations, the powers of the elected body of the primary trade union organization at the enterprise, in the institution, organization, guarantees of trade union activity, employer's obligations to create conditions for this and provide information at the request of trade unions and their associations, guarantees for employees of enterprises, institutions, organizations elected to trade union bodies (with the fact that guarantees for other sub- objects of legal relations, for example, labor mediators, labor arbitrators, are provided for by the draft Labor Code (Article 219).

The draft Labor Code (clause 10 of the Final and Transitional Provisions) does not contain provisions on making relevant changes to Art. 4 of the Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Activity", which states that "legislation on trade unions consists of the Constitution of Ukraine, the Law of Ukraine "On Association of Citizens", this Law, the Code of Labor Laws of Ukraine and other normative legal acts adopted in accordance with them".

Lack of legal regulation of social insurance and pension provision

The draft Labor Code does not contain norms regulating the legal relationship between the employee and the employer regarding the provision of the employee's rights to mandatory state social insurance and pension provision (Articles 253-256 of the current Labor Code).

Restrictions on the rights of women, youth and released workers

The draft Labor Code does not contain rules, combined into separate sections, that regulate the legal relationship between the employee and the employer regarding the protection of the rights of women (Articles 174-186-1 of the current Labor Code) and youth (Articles 187-200 of the current Labor Code), employee benefits, which combine work with training (Articles 201-220 of the current Labor Code), ensuring the employment of released employees (Articles 492-494 of the current Labor Code), and those separate norms on the above-mentioned issues, available in the draft Labor Code, on the contrary, limit the rights employees compared to the norms of the current Labor Code.

Restrictions on employees' rights to wages and vacations

The draft Labor Code recognizes the laws of Ukraine "On Wages" and "On Leaves" as having lost their validity (clause 3 of the Final and Transitional Provisions). But the norms of the Tdraft Labor Code, which regulate the issues of remuneration (Articles 112-123 of Chapter 5 of Section II of the Second Book of the draft Labor Code) and vacations (Articles 94-105 of Chapter 2 of Section II of the Second Book of the draft Labor Code) limit the rights of employees compared to the norms of the current Labor Code and the laws "On Wages" and "On Leaves".

Depriving workers of unemployment protection

The draft Labor Code contains a discriminatory rule on depriving an employee of the right to receive financial support in the case of unemployment within two years from the date of entry into force of a court decision establishing the fact that a person performs work without concluding an employment contract and paying a single contribution to mandatory state social insurance and other mandatory payments (clause 6, clause 10 of the Final and Transitional Provisions). The employee cannot be held responsible for the actions (inaction) of another subject of labor relations which is the employer.

Restrictions on workers' rights to freedom of association and collective bargaining protection

The draft Labor Code contains mutually exclusive norms that, on the one hand, declare the right to freedom of association and guarantees of refraining from interference in collective negotiations, conclusion of collective agreements (Article 6), and on the other hand limit the rights of employees to conclude collective agreements (Article 9 of Final and Transitional Provisions), according to which employees who are not members of trade unions (organisations that have concluded a collective agreement with the employer) lose the rights provided for by such a collective agreement within one year from the date of entry into force of this Code. The provisions of the CBAs that are in force on the date of entry into force of this Code shall be valid for no more than one year from the date of entry into force of this Code.

Freedom of the employer to suspend and terminate the employment contract

The draft Labor Code contains discriminatory rules on the employer's suspension of an employment contract for the employee's participation in a legal strike (paragraph 6, part 2 of Article 60) or in general in cases provided for by the labor contract (paragraph 10, part 2 of Article 60). At the same time, wages are fully or partially retained for the period of suspension of the employment contract, if this is provided for by this Code, other laws, collective or labor contract (Part 4, Article 60). And if it is not provided, then it is not retained.

The draft Labor Code contains discriminatory norms on the termination of the employment contract by the employer on the grounds provided for in the employment contract (clause 6, part 1, article 63). The draft Labor Code does not contain legislative restrictions on such grounds.

Norms on terminating an employment contract at the initiative of the employer in connection with the employee's violation of the terms of the employment contract are also discriminatory (Articles 66-67). Because at the same time, the list of conditions of the employment contract, the violation of which is the basis for its termination, according to this article, is determined by the employer in the employment contract (Part 1 of Article 67).

The draft Labor Code contains a discriminatory rule on termination of the employment contract at the initiative of the employer "in connection with gross violation by the employee of the terms of the employment contract." At the same time, the list of conditions of the employment contract, the violation of which is the basis for its termination, in accordance with this article, is determined by the employer in the employment contract (Part 1 of Article 68).

The draft norm of the Labor Code regarding the right of the employer to terminate the employment contract in connection with the employee not showing up for work due to temporary incapacity for work for more than 80 consecutive working days or 100 working days during the working year significantly impairs the rights of employees provided for by the current norm of the Labor Code (clause 5 part 1 of article 40) – not showing up for work for more than four months in a row due to temporary incapacity.

The provisions of the same article of the draft Labor Code on the employer's right to terminate a fixed-term employment contract concluded for a period of up to 120 calendar days are discriminatory if the employee does not report to work for more than 10 working days in a row or 15 working days during the term of the employment contract due to temporary incapacity; of a fixed-term employment contract concluded for a period of up to 365 calendar days, if the employee does not show up for work for more than 40 working days in a row or 60 working days during the term of the employment contract due to temporary incapacity.

The norm of the Draft Labor Code, which gives the right to the employer to terminate the employment contract with a member of the trade union, having held time-limited formal consultations with employee representatives, the result of which has no legal significance (Article 73), significantly impairs the rights of employees to trade union protection. These rights are provided for in Art. 43 of the current Labor Code and Art. 39 of the Law of Ukraine "On Trade Unions, their Rights and Guarantees of Activity", according to which the termination of the employment contract at the initiative of the employer is allowed only with the prior consent of the elected body of the primary trade union organization, a trade union representative. If the decision of the trade union is properly justified, the employer does not have the right to dismiss the employee.

Restrictions on the rights of employees when the employer applies overtime working hours, night work, weekends and holidays

The norms of the draft Labour Code, which provide for the employer's use of overtime working hours (Article 84), give the employer more freedom in regulating overtime working hours - they do not contain a clearly established list of cases when the use of overtime hours is permissible (as provided for in Article 62 of the current Labor Code), and do not contain restrictions on the inadmissibility of exceeding four hours for each employee during two consecutive days, which reduces the rights of employees compared to the current norms (Articles 64-65 of the Labor Code).

The ban on engaging in overtime work (Part 8 of Article 84 of the draft Labor Code) is also limited compared to the current norm. It is allowed to engage in overtime work for women who have children over the age of one and a half (the current norm of Article 63 of the Labor Code

– from three years old) and has been canceled a ban on engaging workers who study in general education schools and vocational technical schools without a break from production, on the days of classes.

If the current Code of Labour Law provides for the obtaining of the trade union's permission to involve an employee in overtime work (Article 64), then the draft Labor Code allows only informing the trade union after the fact about this on the day after the day of involvement (Part 7, Article 84).

Similar to involvement in overtime work, the draft of Labour Code limits the rights of employees in cases of working at night and business trip. According to Part 6 of Art. 86 of the draft Labour Code, it is forbidden to involve pregnant women and women who are nursing a child under the age of one and a half to work at night. While the Code of Labour Law Ukraine is in force, there is a ban on the involvement of women who have a child under the age of three (Article 55 of the Labor Code of Ukraine). According to Part 7 of Art. 125 of the the Draft Labour Code prohibits the sending of pregnant women and women who are nursing a child under the age of one and a half on a business trip. While the current Code of Labour Laws prohibits sending women who have a child under three years of age on business trips (Article 176 of the Code of Laws on Labour).

Limitation of workers' rights to occupational safety

The changes proposed to be made in the sphere of legislative regulation of occupation safety and health (Book Three of the draft Labour Law) cannot be supported either.

According to the data of the State Statistics Service of Ukraine, almost 30% of full-time workers in Ukraine in various types of economic activity are employed in jobs with harmful conditions. A significant part of them work in conditions of exceeding hygienic standards for harmful production factors for several factors.

The draft Labor Code does not establish the norms of state guarantees regarding compensatory, preferential or any other legal instruments for the effective protection of the rights of this group of workers.

Against the background of the new conceptual approaches of the authorities and the social partners' vision of the content of collective agreements, this array of legal guarantees may be excluded from contractual regulation and completely lost when repealed as legislative norms.

Legalizing the lockout and limiting the constitutional right of workers to strike

The explanatory note to the Draft states that it complies with Ukraine's obligations in the field of European integration, including international legal obligations (the European Social Charter (revised). Although in fact it does not.

The draft of the Labor Code (Articles 24, 234-237) proposes to legalize the lockout in the legal system of Ukraine: a temporary full or partial suspension of the work of an enterprise, institution, organization, natural person-employer and/or restriction of admission of all or part of employees to workplaces (Article 234). According to Art. 235 of the The draft of the Labor Code, the lockout can be applied by the employer only at the local level.

However, the European Social Charter (revised) in Part 4 of Art. 6 "The right to conclude collective agreements" directly prohibits the use of lockouts at the local level. The specified norm refers to the right of employees and employers exclusively to collective actions, and there cannot be any collective actions of the employer at the local level.

The European Committee of Social Rights (hereinafter - ECSR) notes in its conclusions that the right to lockout and the right to strike should not be given the same degree of protection - the right to lockout should not be considered as providing full and wide-ranging protection, unlike the right to strike.

Among other things, the ECSR stated: "As regards the application of a lockout by employers who act individually, that is, employers who do not act jointly or under the auspices of an employers' organization or in some other way, such a lockout cannot be considered as a component of collective action and, accordingly, cannot may be subject to Article 6 of the ECHR".

The right to strike is a constitutional right of workers. It is guaranteed by Art. 44 of the Constitution of Ukraine, according to which those who work have the right to strike to protect their economic and social interests. At the same time, the Constitution does not establish or guarantee the right of employers to lockout.

In the form proposed by the draft Labour Code, a lockout, which provides for a temporary full or partial suspension of the work of an enterprise, institution, organization, individual employer and/or restriction of the admission of all or part of employees to workplaces, is one that prevents the implementation by employees the constitutional right to strike.

Thus, the lockout at the local level provided for by the draft Labour Code contradicts not only international law, but also the Constitution of Ukraine.

The analysis was prepared by the legal department of the Confederation of Free Trade Unions of Ukraine