

International Centre for Policy Studies

REFORMING LABOR RELATIONS

Kyiv 2011

Content

EXECUTIVE SUMMARY	3
GOAL OF THE REFORM	4
PROBLEMS IN THE SECTOR	6
THE COST OF NON-DOING	7
POLICY DECISIONS	8
ANALYSIS OF STAKEHOLDER POSITIONS	11
Government	11
Government opposition	11
Employees	11
Employers	11
Obstacles to policy	12
Timetable of the reform	13
The European (international) framework	14
Civil society impact	15
Employer associations	15
Pro-Labor Code professional organizations	15
Anti-Labor Code professional organizations	16
Community organizations	16
International projects and organizations	16
Recommendations	17



USAID
FROM THE AMERICAN PEOPLE



This report was prepared by the International Center for Policy Studies (ICPS) on commission from PACT, Inc., which is funded by the US Agency for International Development (USAID). The research for this project was made possible through the generous support of the American people, provided through USAID. The contents of this report are the sole responsibility of ICPS and do not necessarily reflect the opinions of USAID, PACT or the US Government. This report may not be copied or any portion of this research used in any format whatsoever, including graphic and electronic, photocopied or otherwise used in any other form without appropriate reference to the original source.

The purpose of this study was to assess the impact of civil society organizations (CSOs) on the formation of state policy regarding labor law reform. This report is part of a project that includes similar studies on reforms in five other sectors: land, pension, education, consumer rights, and regional integration.

ICPS would like to extend particular thanks to the non-government organizations, government bodies, independent experts and international donor community for their contributions to discussions and for their advice during the preparation of this report.

Project manager: Ihor Shevliakov

Author: Serhiy Kischenko

Translation: Lidia Wolanskyj

Design and typesetting: TOV Optima Publishing

Executive summary

The basis for labor legislation currently in force in Ukraine is a Code of Labor Laws that has been in effect since soviet times. Even the more than 600 amendments made to it over the last 20 years have not made it capable of regulating labor issues in a democratic country with a market economy.

The current Administration has positioned the new draft Labor Code, a document that will form the basis of labor reform, as one that is in line with best international standards in labor relations. At the same time, members of the opposition and voters say that individual provisions of the new Code conflict with Sec. 3 Art. 22 of the Constitution of Ukraine, which prohibits narrowing the nature and extent of existing rights and freedoms in establishing new regulatory acts.

An analysis of the Code by ICPS experts indicates that, should the new Code be adopted as it is, the basic problem with Ukraine's labor legislation will not be eliminated: the great imbalance in rights and duties between hired labor and those that employ it. Among others, it includes provisions that could even further restrict the rights of unions, complicate the procedure for settling labor disputes through Labor Arbitration Commissions, and make it possible to replace labor contracts and/or collective agreements by unilateral employer decisions.

The confrontation between various associations of unions was an unexpected consequence of public debate over the new Labor Code. Although they are by their nature intended to protect the rights, freedoms and interests of workers, in Ukraine today, labor unions are actually run by various political forces. This has led to diametrically opposed views regarding changes to labor law among various unions.

The international donor community could assist in switching from a merely formal to a real adoption of world and European standards by the participants and proper procedures for social dialog, which would help reduce social tensions in Ukraine around the issue of reforming labor legislation. Constructive dialog among the government, employers and professional unions is an essential condition for successful reforms of labor relations in Ukraine.

Goal of the reform

In his speech during the second meeting of the Economic Reforms Committee, President Yanukovich stated that one of the main objectives of the reforms is to establish decent conditions for workers and employers, for small and medium businesses, for public sector employees, teachers and doctors, students and academics, workers and peasants, and the military and police. New labor legislation should help maximize the potential of the country's workforce, which is one of the main foci of the President's Economic Reform Program.

Vice Premier Serhiy Tihipko says, "The Labor Code is supposed to help business develop by taking into account the interests of employers, which should provide additional incentive to invest in Ukraine." From his other statements, it appears that the Labor Code "will properly protect hired workers and reflect the interests of employers and investors," while "the reform of labor law should provide a transparent and liberal regulatory environment between investors and hired workers."

This suggests that the new version of the Labor Code will be aimed at liberalizing labor relations and making them more beneficial to employers. Despite strong statements from government officials to the contrary, the new Labor Code keeps the essence of state regulation of labor relations entrenched from soviet times and contains only a series of cosmetic changes that will not ensure a balance of interests between workers and employers.

Mykhailo Volynets (BYT), head of the Confederation of Independent Trade Unions of Ukraine, says that the authors took a draft of the Labor Code that had been written with the support of the International Labour Organisation as their basis, a document that had the full support of labor. But under pressure from pro-Government parties, they spoiled it considerably.

Compared to current labor law, the new draft Labor Code:

- more clearly defines the reach of labor law, including limits on its application to foreign workers and employers;
- rules, for the first time, on legal succession in labor relations when legal entities are wound down and their assets rolled over into new legal entities, with the aim of preventing violations of workers' interests;
- excludes discriminatory restrictions on the right of those hired on fixed-term employment contracts to resign on their own initiative;
- formulates regulations on the top priority of paying wages out of cash flow or the employer's expense;
- establishes a standard workweek of 40 hours while nevertheless allowing the total number of hours worked to be accumulated for certain sectors, plants, factory shops, divisions or departments and certain types of work where the conditions of production or work do not allow working hours to be determined on a daily or weekly basis, with a daily limit of 12 working hours. However, this provision also allows for time spent by workers on the job "waiting to start work" not to be counted as working hours and extended hours are not subject to overtime payment;
- simplifies the procedure for firing an employee;
- leaves the status of trade unions in the air and lacks provisions to regulate their activities to protect workers and the socio-economic rights of employees;

- restricts the rights of employees when material liability is being determined while allowing the employer to solely and unilaterally determine both the fault of an employee in causing the employer harm and the value of the damage to be recovered. Moreover, employers retain the option of garnisheeing wages of employees whom they deem "guilty" of causing losses, while the right of employees to be compensated for any damages caused by their employers remains very unclear;
- increases the probationary period for new employees while allowing minimal compensation if they fail to pass;
- grants employers the right to monitor employees in the performance of their duties, including using technical means, if this is justified by "the nature of the production," while allowing "the nature of the production" to be determined at the discretion of the employer;
- provides exemptions for small businesses with regard to employees.

Problems in the sector

The main problem with labor in Ukraine is the incompatibility between existing regulations and their institutional support, which is entirely soviet in essence and will never ensure real relations between workers and employers that are standard for democratic countries with market economies. The emergence of new entities subject to labor law in the form of organizations and employer associations, and significant changes in the entire set of social relations involving employees, employers and unions have led to the failure of existing mechanisms regulating labor relations to effectively resolve problems that arise in the labor market.

This problem is complicated by the fact that, in addition to the Labor Code, there are a large number of regulatory acts that are supposed to ensure the implementation of its provisions—and they are often in conflict with norms established in the Code itself. As a consequence of this outdated and contradictory state regulation of the labor market, employed persons effectively cannot defend their rights as workers when these have been violated because:

- an unworkable system of labor arbitration because of the existence of two parallel procedures for hearing disputes: courts and labor arbitration commissions;
- the inability of the State Labor Inspection Service and the law enforcement system to ensure the necessary carrying through of their functions, including enforcement;
- passive and politicized trade unions that are often controlled by employers.

The symptoms of this inability of the state to effectively regulate labor relations are what make reforms in this sphere especially urgent:

- employers carry only nominal responsibility, leaving workers unprotected and leading to widespread violations of their rights, especially in terms of job safety and working conditions, gender parity, and child and forced labor;
- overtime pay remains unregulated, a fact that is widely exploited by employers;
- the procedure for firing workers or taking them to court when they are in violation of their job duties is overly complicated.

The cost of non-doing

There is no consolidated official position on the cost of not undertaking labor reform. However, delaying it any further will inevitably have extreme consequences for the country's economy:

- maintaining an ineffective economic structure and the loss of opportunities for growth due to the poor investment climate;
- a gradual decline in household incomes, which will stimulate both a growing brain drain abroad, especially among highly qualified individuals, and rising social tension;
- a reduction in budget revenues, especially for key social areas: education, healthcare and public safety.

Policy decisions

In drafting the new Labor Code and other regulatory acts, the authors anticipated policies in a number of key areas.

Regulatory

- codifying, that is, shifting a number of issues that are covered by existing regulations and common law practice to the Code. This especially refers to procedures for hiring, promoting or transferring, firing, launching disciplinary proceedings or holding employees materially liable;
- maximally simplifying the hiring of workers for small businesses and cooperatives, which could lead to the violation of workers' rights because of the absence of proper restrictions and oversight, neither of which is currently provided for;
- establishing the nature of job functions for an employee and its relation to the lists of jobs compiled in the National Qualification Framework;
- prioritizing payroll payments based on money received in cash registers or on the employer's account and increasing liability for not paying out wages;
- instituting the option for employers, with the employee's consent, to establish a work schedule based on the specific nature of commercial activity;
- expanding the list of grounds for firing or taking to court workers who violate their job duties;
- allowing workers the right to file suit in court if there are reasons to believe their employer has made a biased decision.

Institutional

- reforming the State Labor Administration by adding more powers to oversee labor relations;
- empowering state oversight and control bodies to enforce labor law;
- recognizing the existence of unofficial labor relations and bringing the guilty parties to court.

Financial

- instituting a mechanism to establish a minimum hourly wage that, in the absence of effective regulation, will largely remain on paper only in labor relations;
- considerably increasing liability for violating labor legislation on the part of employers and avoiding legitimizing relations with their workers;
- instituting a range of minimum wages depending on the qualifications and positions of the individual worker. This should bring more revenues in to the State Budget and Pension Fund, but unless mandatory contributions are capped, it could lead to actual wages being paid "under the table" even more.

Alternatives

Opposition parties are critical of the current bill for violating international labor standards,¹ especially in terms of the deteriorated position of employees and trade unions,

¹ http://lb.ua/news/2010/11/11/73715_Oppozitsii_ne_nravitsya_proekt_Tr.html

but they are not offering alternatives in the form of draft regulations, programs or other specific propositions.

ICPS's analysis indicates that reforming labor legislation in the proposed bill will not only fail to eliminate the problems evident in the sector but could possibly give rise to additional complications:

- expanding the list of grounds for firing workers could lead to employers abusing their position;
- allowing employers to send employees on unpaid vacation leave for the duration of a work stoppage effectively legalizes hidden unemployment;
- allowing employers to set flexible work schedules and to regulate labor relations through internal company regulations also raises the risk of abuse;
- the existing mechanism for settling labor disputes through labor arbitration commissions is ineffective as the procedure for courts to hear such disputes is not clearly defined;
- maintaining the largely declarative nature of the draft Labor code in terms of ensuring worker's rights regarding job protection, the rights of women with children, minors and invalids means that, in practice, these rights will continue to be upheld only in the public sector;
- the ambiguous status of trade unions and the lack of provisions to regulate their activities weakens their ability to protect the labor and socio-economic rights of workers;
- innovations such as the extended probationary period for new hirees, the length of the work week, and in-house regulation by employers that has the status of provisions in a collective agreement all greatly strengthen the position of employers at the expense of employees.

Key changes needed to regulatory policy:

- instituting a mechanism to balance the rights and duties of hired labor and employers, including liability for violating labor law;
- maintaining already-established social standards in the labor sphere, in line with the requirements of Sec. 3, Art. 22 of the Constitution, which states that when new laws are adopted they may not reduce the nature and extent of existing rights and freedoms.

Key changes needed to institutional policy:

- instituting an understandable and workable procedure for arbitrating labor disputes and designating a single authorized entity to hear such disputes;
- ensuring the protection of workers' rights by increasing the powers of trade unions and guaranteeing they are neither dependent on nor accountable to employers.

Key changes needed to financial policy:

- instituting a workable mechanism for hourly wages with clear tracking of time worked and payable. This will make it possible to ensure that invalids, students, mothers with minor children, and pensioners can exercise their right to work, and will offer a transparent means to pay for overtime.
- reducing the burden on payroll budgets.

In essence, the draft Labor Code and other regulatory acts initiated by the Government are unable to fully resolve the problems of the labor market in Ukraine. Despite a number of progressive norms, they suffer from a slew of serious flaws:

- not providing serious guarantees of social protection for hired workers;
- setting up unequal conditions of work for employees of large and small enterprises;
- removing any real influence of trade unions over employers;
- increasing the opportunities for abuse by expanding the rights of employers;
- not providing the necessary conditions for effective oversight of how laws are upheld in labor relations.

Analysis of stakeholder positions

Government

Ukraine's Cabinet of Ministers, together with line ministries were the initiators of the revised Labor Code and other regulations intended to bring unofficial wages out into the open, and are, of course, interested in seeing it pass in the Verkhovna Rada as soon as possible. Government officials are confident that it will allow them to:

- increase revenues to the State Budget and Pension Fund;
- simplify the process of hiring and firing employees;
- legalize jobs by bringing some 5 million unofficial workers out of the shadow economy;
- make it easier for entrepreneurs to run their businesses by simplifying the mechanisms for hiring, firing and establishing labor regulations.

Government opposition

Most opposition forces have taken a flatly negative stance towards current efforts to reform labor relations, calling on the Government to not adopt the draft Labor Code in its current form. The shadow Minister of Labor and Social Policy, VR Deputy Andriy Pavlovskiy (BYT) has declared that "the draft Labor Code...has been put together on behalf of Big Business run by the oligarchs and effectively eliminates the rights of hired labor."

Yet when the draft Code passed first reading in the legislature, deputies representing opposition parties voted in favor of the bill nearly unanimously.

Employees

Hired workers are the main interest group that wants reforms to labor legislation that will ensure opportunities to exercise their right to work in line with international standards. There is no single, consolidated public position among hired workers regarding the draft Labor Code. Trade unions that are supposed to represent the interests of hired labor have taken the opposite position when it comes to reforming labor legislation.

Employers

For employers, the changes to Ukraine's labor legislation have varying effects. On one hand, employers generally support the draft Labor Code, but insist on certain changes to protect their interests. On the other hand, many are terrified in anticipation of the adoption of a series of regulations whose aim is to bring unofficial wages out in the open.

Obstacles to policy

Among the obstacles in the way of reforming labor law are:

- public opposition and dissatisfaction with the reforms that the government has initiated so far;
- provisions that violate the Constitution of Ukraine in the draft Labor Code and the ILO Convention ratified by Ukraine regarding any narrowing of the rights of hired workers, trade unions and their associations.

Timetable of the reform

There is no clear, approved timetable for reforming labor law at this point. The government has been tasked with changing the regulation of labor relations for more than a decade. According to Government plans, the Labor Code should have been adopted, along with the Tax and Residential Services Code, by the end of 2010.

Realizing it cannot afford a repeat of the situation with the adoption of the Tax Code, when the bill forced through the legislature by the Government nearly led to its dismissal, the Government submitted its draft Labor Code for further work with the promise to take all the feedback into account. Statements by members of the Government suggest that the adoption of the rewritten draft Labor Code in second reading is planned by August 2011, and its final passing by the end of the year. In addition, the Cabinet is currently putting together a package of documents to reform the State Labor Service and regulations aimed at bringing salaries out of the shadows.

The European (international) framework

Reforming domestic labor legislation in line with international and European standards is essentially part of carrying out Ukraine's existing international commitments before the European Commission, the Council of Europe and the International Labour Organisation.

Ukraine has ratified the European Convention on the Protection of Basic Human Rights and Freedoms. Ukraine has also joined a slew of CoE conventions, the most important of which are the European Social Charter (revised) and the European Convention on the Legal Status of Migrant Workers.

In its relations with the EU at the moment, Ukraine is governed by two documents that regulate cooperation in the labor market to a certain extent. These are the Partnership and Cooperation Agreement (PCA) and the Ukraine-EU Association Agenda. Neither of these clearly establishes the commitments of the two sides: their cooperation in the labor sphere is quite fragmented.

Cooperation with the EU on labor issues will be much more clearly regulated in the future Association Agreement between Ukraine and the EU (AA), including the full-scale adaptation of Ukraine's legislation to match European Union legislation in this area over the 3 – 10 years after the AA comes into effect.

Among the international organizations that are actively involved in the process of reforming labor law, the main role is played by the International Labour Organisation (ILO) and the International Labor Bureau that has been formed by it. ILO specialists directly participated in drafting the provisions of the new Labor Code. After the Labor Code passed first reading, the ILO came up with nearly 40 observations, some of which were taken into account when preparing the draft for second reading. The ILO has so far not offered its official position regarding the extent to which the current version of the Labor Code meets international standards of labor law.

Civil society impact

Table 1. The impact of civil society on the reform of labor legislation

Civil society	Employer associations	Trade union associations	Community organizations	International projects and organizations
Interest group	Business	Workers	Part of Ukrainian society	Ukraine’s international partners
Position on reforming labor law	Support, provided certain changes are made	Federation of Ukrainian Trade Unions favors; the remaining associations of unions are oppose.	Against	Support, provided certain changes are made
Means of influence	Lobbying	Lobbying, activism	Activism, advocacy	Consultations, advocacy
Institutional means of influence	Social dialog	Social dialog	Public actions, open letters	Working groups

Employer associations

Employer associations, the most powerful among which are the Federation of Employers of Ukraine, the Confederation of Employers of Ukraine and the Association of Employer Organizations of Ukraine all support the draft Labor Code. However, they also insist that it be amended to protect the interests of employers more.

Employers and their associations are flatly against any such provisions appearing in the draft Labor Code as:

- the right of workers to participate in the management of a legal entity;
- fines for not paying wages on time;
- unjustified payment of educational leave;
- mandatory collective agreements;
- a clearly structured system to establish minimum wages.

Pro-Labor Code professional organizations

The draft Labor Code has made the already-problematic relations among trade unions that much worse. One part of them, represented by the Federation of Ukrainian Trade Unions (FUTU) and those organizations with close ties to it completely support the draft Labor Code.

The president of FUTU is a PR deputy in the Verkhovna Rada and one of the authors of the draft Code. He is certain that this Bill is a compromise between the interests of hired labor and employers and that it is a comprehensive, effective instrument for regulating labor relations.

Anti-Labor Code professional organizations

The remaining influential associations of unions, led by the National Forum of Trade Unions of Ukraine (NFTUU) and the Independent Confederation of Trade Unions (ICTU) are completely against the adoption of this draft Labor Code. They are calling on the Government to refuse to reform labor legislation in the proposed manner, as they say that this Bill will only worsen the situation on the labor market in Ukraine. They are particularly critical of two key provisions in the Code:

- extending the workweek from 40 to 48 hours, which basically does not strictly speaking violate ILO standards, but, given the lack of proper regulation—the current version of the Code does nothing in this direction—could lead to even greater abuse on the part of employers;
- reducing the rights of union organizations and restricting their involvement in the social dialog.

Community organizations

Representatives of civil society who have an active position on labor issues have formed the Coalition of Civil Organizations (CCO), which is completely against the adoption of the new Labor Code. It includes over 200 CSOs, representing different regions, different social groups, and different political forces and ideologies.

The Coalition presented an open letter to the Speaker of the Verkhovna Rada, the Premier and heads of political parties, stating that adopting certain provisions in the draft Labor Code “will turn Ukraine’s hired labor into the unprotected slaves of employers.” It is demanding that the controversial elements of the Labor Code be maximally open for debate and reviewed publicly at VR hearings involving all interested parties.

At the same time, a coalition of NGOs, trade unions and activists called the Civil Front Against the Legalization of Slavery, established in September 2008 to oppose regressive changes to domestic labor law, has been running continuous series of public protests against the adoption of the new Labor Code. In addition, NGOs such as the Foundation for Regional Initiatives (FRI), Krai (The Land), Patriot Ukrainy, Syla Krainy (Power of the Country), Hromadskiy Kontrol (Public Oversight), and the Agency for the Development of Private Initiative, hold roundtables to debate the prospects and impact of the predicted changes to labor law. They also run public awareness campaigns to give voters a better idea of what provisions are being drafted to regulate employer-employee relations.

International projects and organizations

The most influential and authoritative international organization in labor is the International Labour Organisation, a UN entity. Ukraine has ratified 66 of the ILO’s 188 conventions, of which 58 are in effect now.

Over 2006 – 2007 and 2008 – 2010, the ILO was carrying out the “Proper Working Conditions” project in Ukraine, whose priorities included bringing Ukraine in closer line with EU standards. The Organisation has stated that “the main responsibility of the Government is to make sure there is a proper legal base that meets international and European standards in labor relations.”

Among other international organizations implementing projects and programs in Ukraine and playing a significant role in the development of labor relations, the Management Systems International’s Rule of Law Country, a USAID-funded project, the American Solidarity Center and Germany’s Friedrich Ebert Foundation stand out.

Recommendations

Given the strong opposition among Ukraine's voters to the current approach to reforming labor relations, one priority for the international donor community could be to help establish dialog between the opposing sides. Taking on this role requires several steps:

- identifying all interested parties;
- determining their positions and interests;
- organizing public debate;
- facilitating the public presentation of the interests of all stakeholders.

One of the obstacles to constructive cooperation among different interest groups in labor relations is the nominal, ineffectual way that social dialog is organized. On paper, at least, its institutional support in Ukraine completely meets international standards; in practice, however, it does not allow hired labor to defend its interests—clearly at the roots of the current widespread opposition to labor reform.

The situation is further complicated by the fact that Ukraine's trade unions are essentially soviet. *De facto*, they are less representatives of hired labor than political projects. The partisanship of most leading professional unions has led to a stand-off among them and has made it impossible for them to present a consolidated position in dialog with the government or employer associations.

The international donor community could assist in switching from a merely formal to a real adoption of world and European standards by the participants and proper procedures for social dialog. This would help reduce social tensions in Ukraine around the issue of reforming labor legislation. Constructive dialog among the government, employers and professional unions is an essential condition for successful reforms of labor relations in Ukraine.

In a situation where the average Ukrainian voter is fairly ignorant of the law, increasing public awareness in this area is also an important priority. This means, first of all, supporting those community organizations that are working on programs and campaigns to increase public awareness of changes to labor legislation and explain the consequences of new regulations.

Voters must play a major role in lobbying for the rights of the working population in the process of reforming labor laws. This means carrying out measures that make it possible to understand both sides:

- organizing national forums dedicated to reforming Ukraine's labor legislation jointly with line ministries and the International Labour Organisation and involving all interested parties;
- supporting the drafting and passing of a national program to reform labor legislation that will explain clearly the need for various steps, establish key reform priorities, and bring together the interests of all those subject to labor law—which is currently lacking in Ukraine;
- organizing and supporting roundtables and public hearings to prevent any reduction in the rights of hired labor.