

GARMENT WORKERS UNDER THREAT FROM LABOUR DEREGULATION IN ASIA

*A review of recent labour and
employment law changes in Cambodia,
India, Indonesia and Sri Lanka*

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FOREWORD

This report is being released at an unprecedented time of crisis for garment workers.¹ The COVID-19 pandemic has exposed that precarious contract labour, poverty-level minimum wages, and hollowed-out social safety nets have left workers in the garment sector, primarily women, to face the brunt of the impact when global economic shocks like COVID-19 occur. Millions of garment workers have been laid off since the onset of COVID-19 in March, leaving working families throughout Asia without resources to cover basic subsistence needs through this crisis. Government relief packages are only covering a portion of garment workers' pre-COVID incomes, as AFWA has documented in its report series, *The Emperor Has No Clothes*.²

This crisis was the product of decades of inequitable labour practices in garment-exporting countries, driven by fashion companies and garment-exporting governments. Fashion companies have demanded production at a certain price and schedule that are often incompatible with compliance with labour and employment laws. Nevertheless, governments have prioritised garment exports as a means of economic growth, especially as part of broader agendas to attract manufacturing. Doing so has required governments to allow lax enforcement of labour and employment laws that guarantee certain wages, conditions of work and rights to associate in unions and organise. This is “de facto” deregulation – deregulation in fact, if not in law. During COVID-19, these weak systems of labour

protection have exposed workers to unfair practices by employers, such as wage theft and layoffs of contract workers, who are not eligible for severance payments.

As the global community works towards a “just transition” towards fair and decent work, it is apparent that states should consider abandoning plans, in full swing in the months prior to COVID, to change their labour laws to transform “de facto” deregulation into law. As this report, *Garment workers under threat from labour deregulation in Asia: A review of recent labour and employment law changes in Cambodia, India, Indonesia and Sri Lanka*, shows, governments throughout Asia have announced plans to change their labour laws to make it even easier for employers to undermine workers' rights to employment, their social protections and their ability to organise in unions and bargain for fair wages.

It is inconceivable that a new social contract that protects workers will involve legislative changes that undermine workers' rights. Already, unions have been making tremendous efforts to oppose these reforms, including protesting during a global pandemic. It is vital that states cancel reforms as proposed and commit to strengthening worker protections, not undermining them. Addressing these labour law reforms should be part of ongoing international advocacy to strengthen workers' access to decent work now and after COVID-19.

-The AFWA Team

1. Note this report refers to the textile, garment and footwear sectors collectively as the “garment industry.”
2. The Emperor Has No Clothes: Garment Supply Chains in the Time of Pandemic, Issue II (May 2020) <https://asia.floorwage.org/wp-content/uploads/2020/05/The-Emperor-Has-No-Clothes-Issue-II-May.pdf>

EXECUTIVE SUMMARY

During the past five years, governments in Cambodia, India, Indonesia and Sri Lanka have deregulated labour and employment law by replacing all or most of the existing laws. There is no evidence that labour and employment deregulation boosts worker productivity or economic growth. Yet governments, backed by industry, are initiating sweeping changes that reduce worker power at every opportunity. COVID-19 has exposed the full extent of impacts that deregulating labour protections has on workers' livelihoods. It is vital that any future legislative changes promote worker power and rights at work, not undermine them.

This report, *Garment workers under threat from labour deregulation in Asia*, explains the legislative changes to labour law in Asia, and how they will likely impact garment workers. Garment-exporting countries in Asia do not have effective systems for guaranteeing decent work in garment factories. Employers pay garment workers poverty wages for difficult and challenging work. Garment factories commonly discriminate against and harass workers, and often fire workers in retaliation for filing complaints or attempting to join a union. Labour and employment laws that protect workers against employers are rarely enforced in order to protect domestic industrial interests.

The following changes in Asia are under way:

In India, a 2019 Code on Wages sets wages by region and skill level, permits low minimum wages and reduces protections against wage theft. The Industrial Relations Code attacks worker power in several ways: formalising fixed-term employment, making termination of permanent employees easier, imposing barriers to striking and restricting union leadership. The Occupational Safety, Health and Working Conditions Code and the Code on Social Security do not ensure workers' safety or security.

In Sri Lanka, the draft labour and employment law eliminates tripartite wage setting. As in India, it attacks workers' freedom of association and the right to organise, and offers limited health and safety and social security protections.

In Indonesia, several provisions of existing labour and employment laws were deregulated by introducing an Omnibus Law on Job Creation. The Law exempts certain sectors from minimum wages, increases overtime, reduces availability of paid leave and eliminates limitations on fixed-term and on subcontracting.

In Cambodia, the 2016 Trade Union Law restricts the right to form and join a union, ability to register a union and make rules in full freedom, to lawfully strike and to represent members without government interference. More recently, the government has engaged in tripartism to set national minimum wages and clarify limits on fixed-term contracts, but sectoral bargaining is weakened and restrictions on use of fixed-term contracts remain thin.

Comparing these changes across Asia, several trends stand out. Workers are being exclud-

ed from drafting laws and setting wages that affect their interests. Wages are being kept low and arbitrary. Fixed-term employment has been fully integrated into employment and labour and employment law reforms, while union protections have been restricted and social safety nets and workplace inspections are stagnant. Garment workers' interests have long been under threat from under-enforcement of employment and labour and employment laws. Moving forward, garment workers' interests will continue to be under threat, but even when enforced, laws will provide less protection than before.

INTRODUCTION

Before COVID-19, workers in garment-exporting countries in Asia faced dangerous and challenging work for poverty wages without protections against discrimination, harassment, or retaliation for filing complaints or attempting to join a union. During and after COVID-19, garment workers, including contract and informal workers, have faced mass layoffs, non-payment of owed wages, food insecurity and lack of healthcare at a time when basic social protection is more important than ever.

The COVID-19 crisis illustrates that recent labour law reforms proposed in several garment-exporting countries are untenable moving forward. As this report, *Garment workers under threat from labour deregulation in Asia: A review of recent labour and employment law changes in Cambodia, India, Indonesia and Sri Lanka*, shows, in recent years, Cambodia, India, Indonesia and Sri Lanka have responded to political and economic crises by deregulating labour and employment law. While new laws have adopted prohibitions on discrimination at work, overall they undermine workers' power and increase informality by expanding legal uses of fixed-term employment, maintaining low minimum wages, hollowing out social safety nets, undermining strikes and sectoral bargaining and otherwise excluding workers from consultation.

Undermining workers' rights cannot be part of any country's plan for post-COVID eco-

nomics development. For garment workers, as for millions of low-income workers, garment-exporting countries have largely been unable to provide adequate social safety nets during this crisis. Social protection should be strengthened as we move forward, not undermined.

As countries look to recover from the economic shock of COVID, they must abandon the old idea that deregulating labour and economic law stimulates economic growth.³ Critically, macroeconomic studies have not shown any connection between deregulation and growth. Outside of Asia, in the United States⁴ and in Australia⁵, regulation has had a moderate or positive impact on growth. In response to proposed deregulation in India and Indonesia, the World Bank has actually recommended higher wage floors, stronger enforcement and better safety nets.⁶ Workers have long known that more, not less, should be invested in their livelihoods, and COVID-19 has exposed that reality for all to see. Governments must take note and act accordingly.

This report, explains the labour and employment law changes that governments initiated before COVID. For each country, a brief introduction is followed by explanations of what the changes are why they are new, and why they matter. Assume countries are signatories to the ILO Conventions discussed unless otherwise noted.

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4. Regulation, employment, and the economy: Fears of job loss are overblown (Econ. Policy Inst. Apr. 2011) https://www.epi.org/publication/regulation_employment_and_the_economy_fears_of_job_loss_are_overblown/.
5. In Australia, in 2017, Sunday and public holiday penalty rates were slashed for workers in the retail and hospitality industries, with employers arguing (and the Fair Work Commission agreeing) that reductions in labour costs would lead to higher employment. A 2018 parliamentary inquiry found that in the quarter immediately following the rate cut, no new jobs were created, there was no statistically significant change in hours worked and consumer spending dropped. Parliamentary of Victoria Legislative Assembly Penalty Rates and Fair Pay Select Committee, Inquiry into penalty rates and fair pay: Final Report Victoria Gov. Printer July 2018), https://www.parliament.vic.gov.au/images/stories/committees/penalty_rates/PRFPSC_58-02_Text_WEB.pdf.
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Cambodia

In Cambodia, national coalitions of garment worker unions have been conducting massive strikes for a higher minimum wage since 2010, when exports began picking up after the 2008 economic crisis and the government signalled they would be able to increase wages.⁷ In 2010, workers began striking for a 93 USD monthly minimum wage; by March 2013, the government had agreed only to 80 USD, prompting unions to continue strikes.⁸ In July 2013, the government got re-elected, but only narrowly. The slim victory was a relative success for opposition parties, whose increasingly popular platform included an increase in the minimum wage. Faced with this growing movement, in January 2014, the government banned public gatherings and cracked down violently against striking garment workers and anti-government protestors, resulting in the deaths of four garment workers. Key independent trade union leaders in the protests have been charged and convicted of instigating violence during the protests in a criminal process that Human Rights Watch called a “charade” for its lack of evidence.⁹ The trade union leaders’ sentences were overturned by an appeals court.¹⁰ Cambodia has a unitary system of government in

which the central government has exclusive governing authority, including enacting laws on labour and employment.

This crackdown is critical context for the legal developments that followed. In May 2016, Cambodia’s legislature passed a Trade Union Law that heavily limits trade union powers. Though a draft had been released in October 2014, there was no meaningful consultation with unions in development of the law. International civil society has spoken out strongly against the law and urged the government to engage meaningfully with unions in amending the law in January 2020.¹¹ However, the 2020 amendments have been marginal and do not address unions’ concerns.¹²

After the 2016 Trade Union Law, Cambodia has enacted more worker-friendly policies. In June 2018, supported by the ILO, Cambodia’s legislature passed the Law on Minimum Wage, 2018.¹³ In May 2019 the government clarified use of fixed-term contracts, as discussed further below. However, both policies fall short of unions’ demands for secure work at a decent wage.

Issue #1: Wages

Issue 1.1: Minimum wages to cover all workers under labour and employment law

What it is:

The Law on Minimum Wage, 2018 extends minimum wages set via tripartite minimum wage setting to all workers who fall within the 1997 Labour Code.

Why it is new:

Previously, tripartite minimum wage setting mechanisms existed only for the garment and footwear sectors, with public servants', teachers' and doctors' salaries unilaterally set by the Government.

Why it matters:

More workers in Cambodia will be entitled to minimum wages, though the law still excludes any workers outside the 1997 Labour Code. This includes workers who would benefit from minimum wages, such as construction, food and service and hotel workers.

Issue 1.2: Minimum wages to be set by tripartite council

What it is:

According to Article 17 of the Law on Minimum Wage, 2018, the National Minimum Wage Council, composed of 48 worker, employer and government representatives (16 each, with the head of the Ministry of Labour and Vocational Training (MoLVT) as Chairperson), will be responsible for negotiating minimum wages. They met in August for their first term¹⁴ and set the 2020 minimum wage at \$190 in September.¹⁵ The minimum wage has been set for the garment industry.¹⁶

Why it is new:

Under Article 357 of the 1997 Labour Code, the minimum wage rate was set by the MoLVT in consultation with Labour Advisory Committee. The Committee was established in 1999, and ultimately consisted of 51 representatives (17 each from government, worker and employer organisations).

Why it matters:

Only 2 of the 17 union representatives come from independent trade unions.¹⁷ Wages are still below independent unions' demands.¹⁸ Many unions have pointed out the need for sectoral bargaining rather than the national bargaining for which the Council provides.¹⁹

Issue 1.3: Proposed elimination of night wage

What it is:

The MoLVT is preparing to eliminate night wages for night work, having conducted a tripartite consultation in January 2020 to discuss the issue.²⁰ MoLVT argues that eliminating night wages is important for attracting investment.

Why it is new:

Currently, night wages are 130% of the day rate, reduced further from 2007, when they were 150% of the day rate.²¹ According to workers' rights advocates, in 2007, rates were reduced in order to attract investment, but in practice failed to do so. Yet the same justification is being used again to justify further cuts.

Why it matters:

Article 8 of the C171 - Night Work Convention, 1990 (No. 171) states "Compensation for night workers in the form of working time, pay or similar benefits shall recognise the nature of night work." Although Cambodia has not ratified C171, Cambodia should recognise the nature of night work in setting compensation.

Issue #2: Employment (in)security

Issue 2.1: Use of fixed-term contracts clarified

What it is:

On May 17, 2019, MoLVT issued a Guideline on Determination of Types of Employment Contracts clarifying the timeframe and purpose for the use of Specified Duration Contracts (SDCs), or fixed-term contracts. Section 67 of the 2007 Labour Code states a fixed-term contract "cannot have a duration of over two years. Such a contract may be renewed one or more times so long as the renewals have a maximum duration not exceeding two years."

The new guidelines clarify the meaning of Section 67. The first time a fixed-term contract between an employer and employee is made, it can be for any length of time up to two years. After this, renewals can also be made for up to two years. For example, if the initial employment contract is for a period of six months, the total maximum duration of the contract, if renewed, is six months and two years. If the initial contract is for a year, the total maximum duration of the contract, if renewed, is three years. After the contract is over, after a month lapse of the contract and all severance payments, if any, being paid, the clock is "reset." Any fixed-term contract entered into between the same parties will be considered to be a new contract, entered into for the first time.²²

Why it is new:

In February 2009, the Cambodian government proposed amending Article 67 so that fixed-term contracts could be renewed for two years, without any limit on the number of renewals.²³ This would permit industry to legally hire on fixed-term contracts indefinitely, a practice which they had already begun doing, and which garment manufacturers and some officials within the MoLVT argued was in fact the correct interpretation of the law.²⁴ However, in the Jacqsintex case, the Arbitration Council held that a fixed-term contract could only last for two years in total, including both the initial contract and any renewals.

The guidelines compromise between industry and the Arbitration Council's positions. The guidelines allow fixed-term contracts for up to four years, rather than two years, since both the first contract and the renewal period can last two years each. However, they limit the use of fixed-term contracts for four years, rather than permitting indefinite renewals. Nevertheless, considering contracts to be new after a month lapse is a loophole that permits indefinite renewals in practice.

Why it matters:

As discussed elsewhere in this report, fixed-term contracts are used by the industry as a tool to undercut worker power. In Cambodia, fixed-term contracts have been used extensively in the garment industry to ensure industry can fire workers for otherwise impermissible reasons and thereby deter behaviour such as organising or filing complaints, as well as exclude workers from benefits.²⁵

Issue #3: Freedom of association and right to organise

Issue 3.1: Unionisation limited to those covered by labour and employment law

What it is:

In Cambodia, only workers who fall under the provisions of the Labour Law are able to unionise under Article 3 of the 2016 Trade Union Law.

Why it is new:

This is inconsistent with Article 36 of Constitution of Cambodia, which guarantees that “Khmer citizens of either sex shall have the right to form and to be members of trade unions.” It is also inconsistent with Article 2 of the ILO C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ILO, which states that workers shall have the right to organise without distinction, including distinctions as to sector.

Why it matters:

As discussed above regarding the Law on Minimum Wage, 2018, workers outside the 2007 Labour Code do not have the right to form and be members of trade unions under the 2016 Trade Union Law.

Issue 3.2: Burdensome requirements for registration of a union and union leadership

What it is:

Following amendments in December 2019, Article 12 of the 2016 Trade Union Law, registration of a union entails burdensome registration requirements including that they are 18 years old (or have been emancipated under the Civil Code) and that they make a declaration of a specific residential address. Article 38 requires a shop leader or worker representative to have worked in the establishment for three months and to have attained an educational level sufficient to be able to read and write Khmer; in addition, non-citizens must also have the right to legally reside in Cambodia to be a worker representative.

Why it is new:

Equivalent provisions regarding shop stewards were included under Article 286 of the Labour Law. The age limit was higher (25) for union leaders under the original Article 269 of the Labour Law, as well as requirements for Khmer literacy, never having been convicted of a crime and having worked in the job for at least one year. Union registration under Article 268 of the Labour Law required submission of statutes and a list of names of those responsible for management and administration.

Why it matters:

Registration requirements are likely to be used to limit workers' rights to establish organisations and may interfere with workers' right "to elect their representatives in full freedom" under Article 3 of the ILO C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

Issue 3.3: Union rules must include majority vote requirement for strike

What it is:

Article 13 of the 2016 Trade Union Law requires unions to include in their statutes a rule requiring an absolute majority of members (51%) to vote in order to authorise a strike, modification of its statute or general assembly of the worker's union.

Why it is new:

Article 323 of the Labour Law required a strike to be declared according to the procedures set out in the union's statutes, which only required that the decision to strike be adopted by a secret ballot.

Why it matters:

This creates barrier for unions, especially for particularly larger unions, in conducting legal strikes. The new rule may logistically require them to assemble thousands of members in order to vote to authorise a legal strike, which is a major barrier to striking. Article 3(1) of the ILO C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) states workers' organisations shall have the right to draw up their own rules without government interference.

Issue 3.4: Government to determine “most representative status” of a union

What it is:

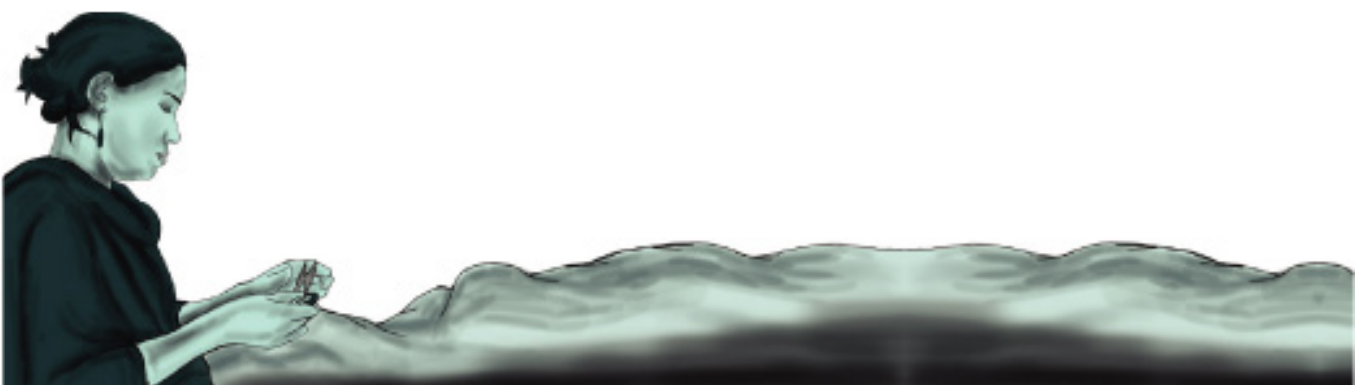
Only unions with “most representative status” have the right to engage in collective bargaining and dispute resolution. If no union secures “most representative status” by winning 30% worker support (or the most support, among those with at least 30% worker support), the union with “most representative status” is the union that wins 30% in a special election whose rules Prakas No. 303/18 sets out. If no union wins, a bargaining council with rules determined by the Minister of MoLVT (TUL Article 72) will engage in collective bargaining. However, there is no bargaining council Prakas yet.

Why it is new:

In the 1997 Labour Code, The Ministry was empowered to decide upon “most representative status” applications and the Minister was empowered to conduct investigations under Article 277.

Why it matters:

Interference by MoLVT, if conducted to support industry, would violate Article 2 of the C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98), which considers acts designed to promote establishment of workers' organisations under the domination of employers to be interference against which unions must be protected by law.



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India

In 2014, Prime Minister Narendra Modi announced his intention to enact major labour and employment law changes as part of his economic agenda. India is a federal system with authority at both the central government and state government level. Under the Indian Constitution, labour and employment is an area where both the central and state governments have authority to enact laws. However, most labour and employment laws have come from the central government and permit state governments (or in certain industries and centrally-run territories, the central government) to make further changes.

By March 2015, the government had introduced two bills, the Industrial Relations Code, 2015, and the Code on Wages, 2015, which were intended to replace all other bills on these subjects. The bills were part of Modi's agenda to deregulate industry in India in order to attract investment, with a focus on manufacturing. They followed several years of notable and visible crackdowns on union activity in manufacturing in India; for example, in Gurgaon, during the protests at Viva Global, a garment factory, and at a Maruti Suzuki factory.

In May 2015, consultations with some unions were held, but changes to the proposed laws were marginal.²⁶ As a result, on 2 September 2016, central trade unions in India conducted a pan-India strike of 150 million workers, or 30% of the Indian labour force, uniting permanent and informal workers against the proposed changes. The strikes represented a

major statement by workers against the state whose failure to engage in meaningful consultation with workers has made direct action critical.

In response, the government made marginal changes to the Code on Wages, 2015, and re-released the Code on Wages, 2017. Overall, workers' demands were not adequately addressed in the updated draft. On January 8, 2019, unions went on strike again against the 2017 bill.²⁷ Nevertheless, after a landslide re-election for Modi in May 2019, on 8 August 2019, the Code on Wages, 2019 was passed. Furthermore, the Code on Social Security, 2019 was introduced on 11 December 2019 and the Occupational Safety, Health and Working Conditions Code, 2019 was introduced on 23 July 2019. An updated Industrial Relations Code, 2019 was introduced on 28 November 2019. All three drafts after consideration in the lower house of India's parliament were referred to Standing Committees for review.

On 8 January 2020, central unions again coordinated a pan-India strike against the remaining three laws, even gaining the support of the ruling party's affiliate union.²⁸ Subsequently, new versions of the three bills were introduced and passed by both houses of the parliament in September 2020, amidst a boycott by the opposition party and large-scale protests by unions.²⁸

Issue #1: Wage and hour protections

Issue 1.1: Creation of a low and arbitrary national floor wage

What it is:

Chapter II of the Code on Wages, 2019 provides for two wages: one national universal wage, referred to as a floor wage, and one minimum wage to be set by the “appropriate government” (either states or the central government in central territories or industries where the central government has wage-setting power). Section 9 states that no minimum wage can be at or below the floor wage, and Section 5 states no employer shall pay less than the minimum wage. Section 14 governs overtime, which is to be paid at twice the basic wage, as before.

Why it is new:

A national floor wage being written into law is new; previously, the floor wage was only policy. Indian labour and employment law prescribed only a state-level minimum wage. This minimum wage must be set according to accepted government policy and Supreme Court precedent defining the criteria that must be considered.³⁰

Why it matters:

The creation of a new floor wage in the law separate from the existing minimum wage effectively eliminates the protective effect of wage legislation. While trade unions wanted a national wage standard, their intention was to raise the bar for minimum wages, rather than to permit low wages through a floor wage. Section 9(2) of the Code on Wages, 2019 states that minimum wages cannot be lower than they were at the time of enactment, but the floor wage puts no pressure on them to increase. Instead, it permits them to remain extremely low, given the government’s tendency to fix floor wage at very low levels.³¹

Because there are no requirements for setting the “floor wage,” the central government has the power to set the wage arbitrarily. Section 9(1) of the Code on Wages, 2019 states that the floor wage must be set “taking into account minimum living standards of a worker” and “may be fixed for different geographical areas.” However, the Code does not define “minimum living standard” or require that the government do more than “take it into account.”³²

By contrast, using the required methodology for setting the minimum wage, in January 2019 the Expert Committee on Determining the Methodology for Fixing the National Minimum Wage (NMW) recommended fixing the daily minimum wage at 375 INR or the monthly NMW at 9,750 INR, with an additional house rent allowance averaging 1,430 INR per month (55 INR per day) for the urban areas. This is much higher than the current daily floor wage of 178 INR the central government has set.³³

A low national floor wage means a state-level race to the bottom on wages is likely. If states are competing for industry and have discretion to set minimum wages – and if industry is attracted to states with the lowest wages – then states are likely to compete for industry by setting wages lower than competing states. This has already occurred in recent years; factories have shifted out of India’s capital, Delhi, to neighbouring states of Haryana and Uttar Pradesh, to take advantage of lower minimum wage rates there.³⁴

Issue 1.2: No more sectoral minimum wages

What it is:

Section 6 of the Code on Wages, 2019 requires minimum wage to be set per “skill level” (“unskilled, skilled, semi-skilled and highly-skilled”) and type of location (metropolitan, non-metropolitan and rural), rather than per job (tailor, mason, etc.).

Why it is new:

Under the Minimum Wages Act, 1948, the “appropriate government” had the power to set minimum wages for a given sector in the government’s employment schedule, a list of government-recognised jobs that set minimum wages for each job. This system was criticised because of its complexity and the arbitrariness of some of its distinctions.³⁵

Why it matters:

The new system under the Code of Wages, 2019 creates barriers to sectoral bargaining. The Minimum Wages Act, 1948 schedule of employment facilitated sectoral collective bargaining with both industry and government, since workers could ask for inclusion in the government employment schedule or a revision in the minimum wage for their particular job. This was a major benefit for informal sector and unorganised sector workers, for example, domestic workers.

Moving forward, job classification as unskilled, semi-skilled, skilled or highly-skilled will determine the minimum wage for that job. This is not a determination in which workers have any formal input.



Issue 1.3: Obstacles to claiming bonuses

What it is:

Section 31 of the Code on Wages, 2019 provides for mandatory bonuses to be paid as a certain percentage of the allocable surplus of a company. However, in a dispute about the amount of bonus, while the government may require an establishment to show them its balance sheet, the government may not share the balance sheet with workers or their representatives without the employer's permission.

Why it is new:

The previous law, the Payment of Bonus Act, 1965, did not require the government to obtain an establishment's permission before sharing their balance sheet.

Why it matters:

The restriction on disclosure is a barrier to an important area of collective bargaining. Without being able to find out what an establishment's profits were, workers do not have evidence that the bonuses received are less than what is owed.

Issue 1.4: Less protection against discrimination in wages

What it is:

Section 3 of the Code on Wages, 2019 prohibits discrimination on the basis of gender in pay or recruitment, and in event of such discrimination, the employer may not reduce the wage to eliminate discrimination.

Why it is new:

The law is moving backwards in remedies for gender discrimination. Previously, the Equal Remuneration Act, 1976 provided for a government advisory committee and discretionary government power to create authorities to hear complaints regarding gender discrimination in hiring or pay.

Why it matters:

Without such committees and special complaint mechanisms regarding gender discrimination, workers must file complaints within the wage dispute resolution system only. Under Section 57 of the Code on Wages, 2019, lawsuits regarding discrimination in wages on the basis of gender are barred, though lawsuits regarding discrimination on the basis of gender in recruitment are permitted.

There is extensive case law on the principle of equal pay for equal work on the basis of gender in India's Supreme Court that should be considered in deciding any complaint regarding gender discrimination. Barring of suits regarding gender discrimination in pay limits workers' access to a forum where such case law must be considered. ILO C100 - Equal Remuneration Convention, 1951 (No. 100) requires that member states "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value." ILO materials

highlight the need for expertise in understanding equal pay and discrimination among dispute resolution officials.³⁶

Like previous labour and employment laws in India, Section 3 of the Code on Wages, 2019 does not protect against any other basis of discrimination besides gender. This falls far short of the requirements of Article 1 of the C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which requires states to prevent discrimination on the basis of “race, colour, sex, religion, political opinion, national extraction or social origin” or other relevant distinction that eliminates or damages equality of opportunity and treatment at work.

Issue 1.5: Weak enforcement systems

What it is:

The Code on Wages, 2019, Chapter VII, creates a “facilitator-cum-inspector” role. Section 51 describes the role as both providing information and advice and inspecting. Inspections include web-based certification systems. Section 54 prohibits penal sanctions for first-time violators, and permits employers to correct violations to avoid sanction if they are notified of the violation and correct it within a specified time period. Section 51 also permits randomised inspections.

Why it is new:

The draft Code on Wages, 2017 called facilitators “facilitator-cum-inspectors”, though the role was the same as in the Code on Wages, 2019. Penal sanctions were available for the first offence, while in the Code on Wages, 2019, they are not.³⁷ Permitting employers to correct violations without penalty was not included in any previous law or draft code on wages.

Why it matters:

The ILO India Wage Report recommended “taking stronger measures to ensure a more effective application of the minimum wage law.”³⁸ For inspectors’ role to produce better compliance outcomes requires a credible threat of loss if employers do not comply. The relatively low fines and penal sanctions in the Code on Wages, 2019 does not create a credible threat. Similarly, the World Bank promoted the web certification scheme as a way to create a single filing system across laws, but that also requires credible threat of loss in the event of fraudulent filings, which the Code does not provide for.³⁹ Furthermore, requiring inspector-cum-facilitators to give employers a chance to comply before citing them violates Article 17(2) of the ILO C081 - Labour Inspection Convention, 1947 (No. 81), which requires a decision to give warning and advice instead of recommending proceedings to be left to the discretion of inspectors.



Issue #2: Employment (in)security

Issue 2.1: Formalisation of fixed-term employment

What it is:

Section 2 of the Industrial Relations Code, 2020 permits fixed-term employment. When an employer does not renew a fixed-term contract, workers are not entitled to notice or pay associated with termination, though such provision is granted for firing prior to end of the contract.

Why it is new:

Prior to this, contract labour was not permitted to be employed under law if they were working in core activities under the Contract Labour (Regulation & Abolition) Act, 1970

Why it matters:

Fixed-term contracts are one of industry's most powerful tools to undercut worker power. Employers use fixed-term contracts, which may be set for as little as a few weeks or months, to ensure they can fire workers for otherwise impermissible reasons and thereby deter behaviour such as organising or filing complaints. Fixed-term contracts also provide a means of excluding workers from certain benefits that are only provided to employees who have worked for a company for a certain period of time, such as maternity benefits. India has not signed C158 - Termination of Employment Convention, 1982 (No. 158). However, Article 2(3) of C158 states that "Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention." There are no such safeguards in the law other than to file a complaint against an employer.

Issue 2.2: Increased legalisation of contract labour

What it is:

Section 57(1) of the Occupational Health, Safety, and Working Conditions Code 2020 prohibits contract labour in core activities, but it lists certain exceptions such as when there are activities that do not require full time workers, there is a sudden increase in the volume of work, and the normal functioning of the establishment is done. The provisions pertaining to contract labour apply to establishments with 50 or more workers.

Why it is new:

Prior to this, under the Contract Labour Regulation and Abolition Act, 1970 ("Contract Labour Act"), contract labour was prohibited in core activities and no such exceptions were listed. The 1970 Act also applied to establishments employing 20 or more workers. The threshold for application of the provisions pertaining to contract labour has increased from 20 to 50 workers.

Why it matters:

For the same reasons as fixed-term contracts, contract labour is one of industry's most powerful tools to undercut worker power.

Issue 2.3: Ease of termination and closures increased

What it is:

Under the Industrial Relations Code, 2020 states can exempt establishments of a certain size from having to get government permission to fire workers.

Why it is new:

Under 25M-O of the Industrial Disputes Act, 1947, establishments employing at least 100 workers on a regular basis were required to seek prior permission from the government for lay off, retrenchment or closure, with three months' notice in cases of retrenchment or closure. Under Section 77(1) of Industrial Relations Code, 2020, the government has increased the threshold for provisions relating to lay-off, retrenchment and closure from establishments employing at least 100 workers to 300 workers.

Why it matters:

Fewer establishments will be required to get government permission for layoffs, retrenchment or closure if a state increases the threshold. In Rajasthan, Andhra Pradesh and Madhya Pradesh, the government had already increased the threshold to 300 workers in 2017.⁴⁰ However, there is no evidence that such changes attracted business.⁴¹

Issue #3: Freedom of association and right to organise

Issue 3.1: Mandatory conciliation limits striking

What it is:

Section 62(1) of the Industrial Relations Code, 2020 prohibits striking in breach of contract without advance formal written notice within 60 days of the proposed strike as well as striking within 14 days of such notice. Such notice triggers mandatory conciliation proceedings under Section 53 of the Industrial Relations Code, during which striking is prohibited.

Why it is new:

This provision is not in the Industrial Disputes Act, 1947, which currently covers strikes.

Why it matters:

In practice, the Industrial Relations Code, 2020 makes a legal strike impossible, since striking triggers mandatory conciliation during which striking is prohibited. India has not ratified C154 - Collective Bargaining Convention, 1981 (No. 154), which states “The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.”⁴²

Issue 3.2: Restrictions on union leadership and representation

What it is:

Section 23(2) of the Industrial Relations Code, 2020 requires that at least one-third or all but five of the office bearers of a union – whichever is less – be “persons actually engaged or employed in an industry with which the Trade Union is connected.” In addition, Section 14(3) requires the sole negotiating union to have 51% support among the unions on a muster roll. Under Section 14(4), if no union has 51% support, the government constitutes a negotiating council of representatives of trade unions with at least 20% support, proportionate to their support among workers.

Why it is new:

Regarding representation, the Industrial Disputes Act, 1947 does not prescribe a procedure for selecting a sole negotiating union or council union at a workplace.

Why it matters:

The Industrial Relations Code, 2020 limits unions’ freedom to determine their own leadership and to be the sole representative of workers. India has not ratified ILO C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Article 3 of ILO C087 states “Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes” and that “The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.” Nevertheless, freedom of association is a principle that, as a member of the ILO, India has an obligation to respect, promote and realise. Arguably, interference in unions’ freedom to determine their own leadership violates workers’ “full freedom” to “elect representatives.”

Issue 3.3: Union access to courts for industrial disputes eliminated

What it is:

Section 97 of the Industrial Relations Code, 2020 bars civil courts from jurisdiction “in respect of any matter to which any provision of [the Industrial Relations Code] applies. In addition, workers are only permitted legal representation in a labour tribunal with consent of the other parties and leave of the tribunal.

Why it is new:

Previously, industrial dispute resolution could ultimately be appealed to a civil court (Industrial Disputes Act Chapter II), and workers could have legal representation at labour tribunals.

Why it matters:

Access to a civil court is important if a specialised tribunal is not fairly adjudicating a case. Not having the freedom to have counsel in industrial disputes, workers will be disadvantaged in their ability to represent their interests.

Issue #4: Social security

Overall, social security schemes have been included without change in the Code on Social Security, 2020. In India, in the formal sector, 95% of workers are covered by at least one system of employer-based social security, but in the unorganised sector less than 1% are covered.⁴³

This reflects the fact that social security systems - such as the public distribution system (PDS) for food or NREGA (National Rural Employment Scheme) - targeting the poor in the unorganised sector are income-based, not employer-based. Therefore, the Code on Social Security, 2020 has largely maintained the current system of employer-based social security for the formal sector but has not attempted to universalise it to include the large majority of the workforce employed in the unorganised sector.

Issue 4.1: Gig workers

What it is:

Section 114 of the Code on Social Security, 2020 permits the central government to notify schemes for gig and platform workers (such as working for a ride-hailing or food delivery platforms) on matters relating to life and disability cover, health and maternity benefits, old age protection and any other benefit the central government may see fit.

Why it is new:

Social security schemes did not cover gig and platform workers previously.

Why it matters:

Growth in the use of platforms in India has focused attention on providing employment security for gig and platform workers, though social security does not address risk of wage and hour violations by and lack of accountability from platforms.⁴⁴



Issue 4.2: Fixed-term contract worker eligibility for gratuity

What it is:

Section 53(1)(d) of the Code on Social Security, 2020 makes gratuity available to fixed-term contract workers at the termination of the contract period.

Why it is new:

Under Section 4 of the Payment of Gratuity Act, 1972, a worker must have completed five years of continuous service to be eligible for payment.

Why it matters:

Fixed-term employment workers are now eligible for entitlements that were previously given only to permanent employees.

Issue #5: Health and safety

Issue 5.1: Exclusion of small enterprises without consultation from workers

What it is:

According to Section 2(v) of the Occupational Safety, Health and Working Conditions Code, the Code applies to establishment “in which ten or more workers are employed.” However, there are specific provisions, which pertain to only factories. Under Sec 2(w) factory is defined as premises where (i) at least 20 workers are carrying out a manufacturing process with the aid of power, (ii) premises where at least 40 workers are carrying out manufacturing process without the aid of power.

Why it is new:

The threshold for applicability for certain provisions relating to factories have increased. Under the Factories Act 1948, factory is defined as premises where : (i) at least 10 workers are carrying out a manufacturing process with the aid of power (ii) premises where at least 20 workers are carrying out manufacturing process without the aid of power.

Why it matters:

Workers at enterprises employing less than ten people have no safety and health workplace protections, and workers working in smaller factories have lesser protection India has not ratified ILO C155 - Occupational Safety and Health Convention, 1981 (No. 155), which requires states to consult with workers before excluding them from protection of occupational safety and health laws.

Issue 5.2: Occupational safety and health advisory boards

What it is:

Section 16 of the Occupational Safety, Health and Working Conditions Code, 2020 creates an Occupational Safety and Health Advisory Board at the central and state levels to advice on creation of standards and policies under the code and implementation. The Board is to be composed of five employer representatives, five employee representatives, five eminent persons connected with the field of Occupational Safety and Health, and government employees as specified.

Why it is new:

A single such board previously did not exist for occupational safety and health.

Why it matters:

This is an effort to standardise recommendations across industries, where possible. However, the retention of distinctions between workers in certain industries (such as journalists and audio-visual workers) in the Code maintains a piecemeal approach to regulation. Furthermore, there is concern that this board alone cannot provide adequate administration for all the issues covered under the Code.

Issue 5.3: Employer-friendly systems for accident liability

What it is:

Section 106(2) of the Occupational Safety, Health and Working Conditions Code, 2020 states that if employee contravenes their duties (other than to report a situation), they are subject to a fine of up to 10,000 INR, and the employer shall be deemed not guilty, unless they failed to take “all reasonable measures for its prevention.”

Why it is new:

Previously, occupational health and safety laws did not detail duties of employers and employees. The Occupational Safety, Health and Working Conditions Code, 2020 stipulates general duties of employers (Section 6) and of employees (Section 13). Section 14 of the Code also explains the rights of employees. To summarise, employers must provide a safe workplace and employees must ensure they follow workplace rules, report unsafe situations, and not wilfully misuse, interfere with or neglect safety equipment. Employees also have the right to certain information from employers about health and safety and to act in event of immediate danger.

Why it matters:

The Code incentivises employers to hold employees liable for an accident at work because doing so will mean the employer cannot be held liable.

Issue 5.4: Single inspection system

What it is:

Under Section 34 of the Occupational Safety, Health and Working Conditions Code, 2020 if an “Inspector-cum-facilitator” is appointed, conducting inspections is required. Section 34 also provides for a Chief “inspector-cum-facilitator” who will use a single system to request compliance information and conduct inspections.

Why it is new:

Previously, a different authority checked compliance with each law on occupational safety and health, which covered different areas such as mines and plantations.

Why it matters:

The single Code and inspection system is intended to lower compliance costs, though without more and better-trained inspectors; so compliance levels are unlikely to improve.

Issue 5.5: Access to courts eliminated

What it is:

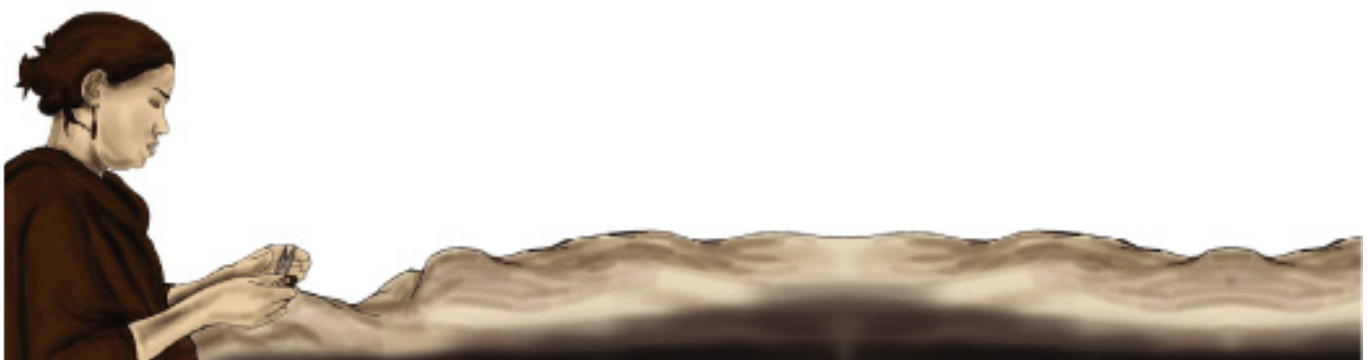
Section 117 of the Occupational Safety, Health and Working Conditions Code, 2020 bars jurisdiction of civil courts.

Why it is new:

Previously, disputes involving health and safety could be appealed to a civil court.

Why it matters:

As discussed above, the Code as written creates incentives for employers to attempt to hold employees liable for workplace accidents. The statutory duties of employers and employees written in the Code should be read against the backdrop of tort law in India, and appeal to lower civil courts at an early fact-finding stage would facilitate such interpretations.



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Indonesia

Indonesia has already had a major labour and employment law deregulation. In 2003, Law No. 13/2003 Concerning Manpower (“2003 Law on Manpower”) combined all of Indonesia’s labour and employment laws, an effort driven by the ILO and funded in part by the United States.⁴⁵ Despite demonstrations and protests from unions, President Megawati Sukarnoputri pushed through the Law No. 13/2003 in a losing effort to win re-election in 2004.

Since the enactment of Law No. 13/2003, the Indonesian government has made further attempts to deregulate the labour and employment law. In 2006, the government attempted to reduce payments associated with firing permanent employees and this was met with major protests by unions; ultimately the changes were not enacted. In 2008, in response to the global economic recession, the Indonesian government attempted to use the crisis to put downward pressure on wages by requiring regional governors to “not try to reach beyond the national growth” in setting minimum wages.⁴⁶

In his inaugural address after taking oath in 2019, President Joko Widodo announced his intention to include labour and employment law changes in an omnibus bill to boost investment. Widodo was elected in 2014 on a platform of economic, infrastructure and

social welfare reform, and re-elected in May 2019 to continue that agenda with a focus on human development, including strengthening vocational training and skilling programs. However, since 2014, Indonesia’s economic growth has slowed to roughly 5% despite Widodo’s target of 7% growth. As his second term began in October, Widodo faced significant loss of public support as he approved a law that stripped the anti-corruption commission of its key powers. In November, Widodo proposed an omnibus bill to address “job creation,” taxation, labour and employment law and Small and Medium Enterprises (SMEs).

The process through which labour and employment law changes were proposed received criticism in Indonesia as it excluded workers and their representatives in several ways. First, they were excluded from framing the agenda for the legal changes.⁴⁷ Second, by enacting labour and employment law changes in a massive omnibus bill, opportunities for deliberation were limited. Third, Widodo stated that he wanted the bill to be passed in 100 days, which left little scope for adequate consultation. Fourth, the government passed the law even though the country was facing a looming healthcare crisis due to the COVID-19 pandemic.

In January 2020, several thousand workers protested against the proposed laws in an effort to register their disapproval. Moreover, the appearance of multiple versions of the laws generated widespread confusion in the public. On October 5, 2020, the Draft of Omnibus bill of Job Creation was officially ratified at the Indonesian Parliamentary Plenary meeting under the name of Act No 11 of 2020 about Job Creation with a total of 1,187 pages. On October 9, 2020, a different version of the Law which was 1,052 pages was circulated; on October 12, 2020, another version of the Law with 1,035 pages appeared in the media and was considered to be the final text. However, on October 13, 2020, an 812-page version of the Law appeared, but a manuscript of 1187 pages was the final version of the document which was signed by the President on November 2, 2020.

The Job Creation Law No. 11/2020, widely known as the Omnibus Law on Job Creation consists of 9 clusters:

- business licensing
- investment ecosystem
- manpower
- micro, small and medium-sized enterprises and cooperatives
- research, innovation and ease of doing business,
- taxation,
- economic zones and land procurement,
- government administration
- government investment and facilitation to national strategic projects

This chapter focuses on the revisions regarding the cluster of Manpower particularly on Article 81 that changes, removes or sets new provisions revising the Manpower Law No 13/2003.

Issue #1: Wage and working hours

Issue 1.1: Abolition of sectoral minimum wage

What it is:

As per Law on Job Creation, minimum wages are set at the provincial level (UMP) and city/regency level (UMK). As per Article 88C, minimum wage (UMP) will be calculated based on a formula that will be set out by the Governor, which takes into account certain conditions like economic growth and inflation at the provincial level, the data for which will be provided by the statistics agency. The provisions of a city/regency sectoral minimum wage (UMSK) are revoked. In Verse 25, Article 88B, employers can determine wages on the basis of output units, which is a piece-rate system.

Why it is new:

As per Manpower Law, wages were set by Government Regulation and there were tiers of wages at the provincial, regency and sectoral level. The minimum wage formula was calculated on the basis of need for decent living component and taking into account the national economic growth and inflation.

Why it matters:

Differences in living costs and purchasing power of workers in different cities are no longer considered as minimum wages are set at the provincial level. Wage rates can be arbitrarily reduced if the provincial economic growth is low and this can lead to income security among workers. The special provision for labour-intensive industries can be used to drive down wages, especially in the garment industry. Though employers are not allowed to pay below minimum wage levels, piece-rate systems give greater discretion to employers in setting unrealistic production targets that harms workers.

Issue 1.2: Exemption for minimum wage permitted for micro and small enterprises

What it is:

Article 90B of the Law on Job Creation excludes Micro and Small Enterprises (MSEs) from minimum wage provisions; wages are to be set based on agreement between the worker and the employer.

Why it is new:

There was no such provision in the 2003 Law on Manpower.

Why it matters:

Permitting minimum wage exemptions for MSEs can be used to allow lower minimum wages in export-oriented sectors like garment. There are no definite criteria on what can be classified as an MSE which can be used as a loophole to underpay workers.

Issue 1.3: Increased overtime permitted

What it is:

The Law on Job Creation amended Article 78 that permits overtime for up to 4 hours in a day and 18 hours in a week.

Why it is new:

In Article 78 of the 2003 Law on Manpower, overtime is permitted for 3 hours in a day or 14 hours in a week. This does not apply to certain sectors, which will be determined by government regulation.

Why it matters:

Extended overtime hours will likely be used in the garment sector where there is significant pressure to increase the working hours.

Issue 1.4: Sabbatical is removed

What it is:

The Law on Job Creation amends Article 79 that removes the provision that requires employers to provide “long leave” for workers.

Why it is new:

Article 79(d) of the 2003 Law on Manpower required workers be granted a long period of rest after six years, awarded in the seventh and eighth years of work for at least one month each.

Why it matters:

Workers lose a significant entitlement of time-off under the new law.

Issue #2: Employment (in)security

Issue 2.1: Eliminates limitations on fixed-term employment

What it is:

The Law on Job Creation amends Article 59 of the 2003 Law on Manpower that removes time restrictions on fixed-term employment and eliminates conditions that automatically change the status of temporary workers to permanent workers.

Why it is new:

Article 59 of the 2003 Law on Manpower permitted fixed-term contracts only in jobs or activities that were non-permanent or seasonal. The period of fixed term contracts was limited to three years.

Why it matters:

As discussed elsewhere in this report, fixed-term contracts are often used to flexibilise employment relations and perpetuate employment insecurity. Temporary workers can remain in a precarious position for indefinite periods of time without access to social security and the employer is no longer required to change their status.



Issue 2.2: For termination, notify first and then negotiate

What it is:

The Law on Job Creation amends Article 151 of the 2003 Law on Manpower to require an employer to inform the worker regarding termination of employment first and then negotiate the dispute if the worker rejects the termination.

Why it is new:

The new law eliminates the requirements for termination to be based on an agreement between employers and workers.

Why it matters:

The employer can terminate the employment unilaterally and it is not certain that workers can reject the notification of employment termination from the company.

Issue 2.3: Expanded bases for termination of employment

What it is:

The Law on Job Creation Article 154A provides several reasons by which an employer can terminate employment, which include various forms of financial distress for the company. The Law also eliminates Article 155 of the 2003 Law on Manpower, which required terminations of employment under certain circumstances to be ruled on by an industrial dispute settlement institute. Note that the Law also eliminates Article 161 of the 2003 Law on Manpower which requires an employer to issue warning letters before terminating employment for workers who commit violation.

The Law on Job Creation eliminates Article 162, which requires workers to compensate employers if they resign under certain circumstances, and to follow certain procedures for resignation.

Why it is new:

These are significant changes to the 2003 Law on Manpower.

Why it matters:

Workers and unions would have fewer rights in event of termination, while employers are empowered to fire workers as needed.

Issue 2.4: Decreasing compensation for terminated workers

What it is:

The Law on Job Creation amends Article 156 of the 2003 Law of Manpower that removes the compensation for housing allowance, medical and health care allowance which was determined at 15% (fifteen hundredth) of the severance pay and or reward for years of service pay for those who are eligible to receive such compensation. The Law on Job Creation also eliminates Article 163, Article 164, Article 165, Article 166, Article 167, Article 168, Article 169 and Article 170 of the 2003 Law on Manpower that provides formula to calculate compensation for terminated workers due to several reasons.

Why it is new:

These are significant changes to the 2003 Law on Manpower.

Why it matters:

This reduces the amount of compensation received by workers that are terminated from employment.

Issue 2.5: Eliminating restrictions on subcontracting

What it is:

The Law on Job Creation eliminates Articles 64 and 65 of the 2003 Law on Manpower, which regulated subcontracting, requiring written contracts between companies and between subcontractors and workers, and restricting activities that could be subcontracted.

Why it is new:

These are significant changes to the 2003 Law on Manpower.

Why it matters:

The Law on Job Creation makes it legal for businesses to subcontract in areas where it is previously not permitted, and lifted requirements for written contracting.



Issue 2.6: Eliminating restrictions on use of labour supply companies

What it is:

The Law on Job Creation amends Article 66 of the 2003 Law on Manpower to permit labour supply companies to be hired for any part of a business.

Why it is new:

Article 66 currently does not allow labour supply companies to be used for “activities that are directly related to production process.”

Why it matters:

Labour supply companies may be used more frequently in the garment sector, which would likely further weaken workers’ rights.

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Sri Lanka

In January 2015, Maithripala Sirisena won a surprise victory for president over Mahinda Rajapaksa, who had held the presidency for the previous ten years; Sirisena formed a coalition government in which his party, which is known for neoliberal and pro-industry policy, was dominant. Within months, trade unions had discovered that the ILO had been working with the new government to redraft the labour and employment laws, including major changes to the Industrial Disputes Act, without having consulted trade unions.⁴⁸ Sri Lanka has a unitary system of government in which the central government has exclusive governing authority, including to enact laws on labour and employment.

From the outset, trade unions were excluded from the process. Unions, including the Independent Trade Unions Alliance, wrote to the ILO asking why the ILO was undertaking reforms, why workers had not been informed and why the ILO terms of reference had not been disclosed, especially given that the ILO was being consulted by judges who had previously restricted the exercise of the right to strike.⁴⁹ By November, recommendations for labour and employment law changes had been circulated, but trade unions said their recommendations had been ignored.⁵⁰ Late in 2015, Sri Lanka's parliament enacted the National

Minimum Wage Act No. 3 of 2016, introducing a national minimum monthly wage of 10,000 LKR and daily wage of 400 LKR.⁵¹ It does not appear that unions were consulted in the Law's development. However, in February 2016, the government assured members of the National Labour Advisory Council (NLAC) that no changes would be made to the labour and employment law without consultations.⁵²

Yet, despite the government's promise to engage in social dialogue, unions continued to be excluded. By November 2016, the United States Agency for International Development (USAID) began a program to push for labour and employment law changes in Sri Lanka. The USAID Supporting Accelerated Investment in Sri Lanka (SAIL) Project, November 2016-October 2020, has two goals: first, to assist policy makers in drafting new legislation and policies, and second, to build support for them, in part by pressuring Sri Lanka to rise in "doing business" indicators compared to other countries. The focus areas for the project are contract enforcement, investment approvals, and labour and employment law reform. The SAIL project involves providing "advice aimed at introducing a new, unified labour and employment law." According to the SAIL website, USAID is collaborating with an "inter-agency work-

ing group led by the Ministry of Labour and Trade Union Relations (MOLTUR); trade unions; the Employers' Federation; the Attorney General; and [Ministry of Development Strategies and International Trade] MODSIT." It is unknown which trade unions have been involved. USAID is explicit about industry driving the reforms, stating, "The Employers' Federation is the main civil society advocate for labour reforms, and SAIL is working with the trade unions to build their interest in advocacy."⁵³

Despite earlier assurances to unions that they would be included, it appears that USAID and MODSIT are working especially closely to change the law and exclude workers from the process. USAID is "providing MODSIT with onsite support as well as technical assistance to support policy analysis and implementation of agreed reforms related to making improvements in the investment climate."⁵⁴ In August 2017, a collective of trade unions wrote to the Ministry of Labour objecting to the role of USAID and MODSIT in the negotiations. In response, the Minister of Labour appointed a working committee regarding reforms, though a majority of unions in the National Labour Advisory Council objected to the Minister usurping the right of unions to nominate their own representatives.⁵⁵ The Ceylon Federation of Labour has strongly

rejected USAID's role in the project, saying "We insist that the decisions the government has taken to go along with the USAID project to reform the labour market should not proceed without a proper and constructive engagement with the people more especially the working people in the country. It needs to be a transparent process and the public made aware through the media both electronic and print."⁵⁶

Finally, a draft labour and employment law, the "Employment and Service Contracting Rights Act" (ESCRA) was released on 2 November 2018. Though changes to the Industrial Disputes Act, 1950 were rumoured in 2015, none has yet been announced.⁵⁷

ESCRA was released a week before a constitutional crisis. In late October 2018, the ruling coalition in Sri Lanka fell apart. ESCRA is dated 2 November 2018. Sri Lanka's parliament was dissolved on 9 November 2018 (and subsequently reinstated). In March 2019, Prime Minister Wickremesinghe reaffirmed his support for labour and employment law changes.⁵⁸ However, Wickremesinghe was ousted after the November 2019 election when Mahinda Rajapaksa, who Sirisena ousted in 2015, was appointed Prime Minister (having previously been president).



Issue #1: Wage and hour protections

Issue 1.1: Tripartite wage setting eliminated

What it is:

Section 106 of ESCRA sets a national minimum wage of 13,500 SLR per month and 500 SLR daily for daily wage workers. The wage will be adjusted annually according to the National Consumer Price Index, calculated by the Department of Census and Statistics.

Why it is new:

The National Minimum Wage of Workers Act No. 3 of 2016 introduced a national minimum monthly wage of 10,000 LKR starting 1 January 2016, which has been adjusted up to the current 13,500 LKR. However, for the garment industry the Minimum Wage is now in practice 15,500 LKR. In August 2018, the government added a total of 2000 LK of allowances via Section 29(3) of the Wages Boards Ordinance (Chapter 136).

Previously, wage setting was tripartite and was provided for in two laws: The Wage Boards Ordinance, 1941, and the Shop and Office Employees [Regulation of Employment and Remuneration] Act, 1954.

Why it matters:

No input from workers or their representatives is required to set minimum wages. Article 4(2) of C131 - Minimum Wage Fixing Convention, 1970 (No. 131) states “Provision shall be made, in connection with the establishment, operation and modification of such machinery, for full consultation with representative organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned.” No such consultation has been provided for under ESCRA.

Furthermore, minimum wage increases are automatic and done only according to the National Consumer Price Index. Article 4(1) of C131 states “Each Member which ratifies this Convention shall create and/or maintain machinery adapted to national conditions and requirements whereby minimum wages for groups of wage earners covered in pursuance of Article 1 thereof can be fixed and adjusted from time to time.”

Issue 1.2: No penalties for non-compliance with labour and employment law

What it is:

Under Sections 121-124 of ESCRA, any employer who discriminates in employment, fails to make required payments or unjustly terminates a worker must only remedy the situation and pay for costs of filing the complaint including reasonable attorney’s fees. ESCRA does not impose any civil or criminal penalties for non-compliance.

Why it is new:

Under the Wage Boards Ordinance, 1941, and the Shop and Office Employees [Regulation of Employment and Remuneration] Act, 1954, any employer who fails to pay minimum wages (or certain other violations of the relevant acts) is held liable for a fine (250-500 rupees) in case of first two offenses and subsequently to imprisonment for up to six months.

Why it matters:

Employers do not face punishments or deterrents for non-compliance with ESCRA. Article 18 of the ILO C081 - Labour Inspection Convention, 1947 (No. 81) states that “Adequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced.” As discussed below, in Sri Lanka inspection activities are a matter of policy. However, it is anticipated that labour inspectors would be able to enforce the above laws and therefore C081 is applicable.

Issue 1.3: Budgetary relief act payments eliminated

What it is:

ESCRA Part III stipulates that all payments are to be set forth in an employment contract and does not appear to include the required payments under the Budgetary Relief Allowance of Workers Act No. 36 of 2005 (BRAWA).

Why it is new:

BRAWA provided for additional payments to be added to workers' salaries. ESCRA appears to replace the BRAWA scheme.

Why it matters:

ESCRA eliminates a payment to which workers are entitled under BRAWA. It does not appear that such payments have been incorporated through an increase in the minimum wage.

Issue 1.4: Longer working hours permitted

What it is:

Under Section 34 of ESCRA, the maximum working week remains 8 hours a day and 45 hours a week. However, Section 36 permits a “Compressed Work Week” “requiring or permitting an employee to work up to twelve (12) hours in a day,” though not more than 45 hours a week, or more than 10 hours of overtime a week, or on more than five days a week. Under Section 36, hours worked can be averaged over a month to determine whether daily or weekly maximums have been exceeded, to which an employee must explicitly agree.

Why it is new:

Previously, “compressed work weeks” were not permitted.

Why it matters:

Under ESCRA, in response to temporary production schedules, workers may be required by their employer to work up to 12 hours a day; for example, if the limit for number of hours permitted to be worked in a month is 180 (45×4), then a worker could be required to work for fifteen days for 12 hours a day and then given a two week leave, since this would average out to 180 days over the course of the month. Sri Lanka has not signed Article 2 of the ILO C001 - Hours of Work (Industry) Convention, 1919 (No. 1), which permits averaging of hours only over a period of three weeks, rather than four as ESCRA permits.

Issue #2: Employment (in)security

Issue 2.1: Formalisation of fixed-term, seasonal and casual labour contracts

What it is:

The proposed ESCRA permits several contractual forms. These include:

- Section 19 fixed-term contracts, which may be specified in days, months, or years and may be entered into with the same individual repeatedly. Section 64 clarifies that fixed-term contracts terminate upon expiry;
- Section 20 seasonal contracts, which are to be specified in working days or months, can be entered into on an annual or other basis, and cannot be considered indefinite term contracts if the time of engagement in each year is a period for the Ministry of Labour to specify;
- Section 21 casual labour contracts, which cannot be made for more than 20 working days in a year.

Why it is new:

In Sri Lanka there was previously no statute governing employment relationships other than permanent employment.

Why it matters:

Fixed-term, seasonal and casual contracts are the industry's most powerful tools to undercut worker power, as discussed throughout this report. Sri Lanka has not ratified C158 - Termination of Employment Convention, 1982 (No. 158). Article 2(3) of C158 states that "Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention." There are no such safeguards in ESCRA other than to file a complaint alleging such recourse.

Issue 2.2: Ease of termination increased

What it is:

Under Sections 62 and 63 of ESCRA, termination may either be voluntary or involuntary. Involuntary terminations may either be disciplinary or non-disciplinary, though the only basis for non-disciplinary involuntary terminations is reaching retirement age, retrenchment or closure of operations of the employer. Section 65 requires involuntary and disciplinary terminations to be on grounds of misconduct or of non-performance of employment tasks. Section 66 states that except in severe cases, termination must have been preceded by counselling, a written warning, internal dispute resolution, and suspension.

According to Section 67, if an employee is terminated, she has the right to challenge it through the Employer's Internal Grievance Mechanism, and subsequently through labour courts and civil courts on appeal. Sections 68 and 69 of ESCRA protect workers from unjust termination for prohibited reasons, and provides for constructive termination when the employer's conduct has made it "impossible, unreasonable or unsafe for the Employee to continue working."

Why it is new:

Under the Termination of Employment of Workmen (TEWA) Act, 1971, any termination of a permanent employee in scheduled employment is required to be either voluntary or approved by the Commissioner of Labour, unless it is a disciplinary firing.

In 2003, TEWA was revised to include a formula for payment for voluntary termination that was much higher than similar formulas in Asia and considered to be an incentive for workers to accept voluntary termination. In 2005, a new compensation formula linked the amount of severance pay to the worker's length of service and set the maximum compensation at 1.25 million LKR. Critically, Section 74 of the proposed ESCRA appears to retain the 2005 formula for compensation for terminations.

Why it matters:

Under ESCRA, government permission is not required for terminations of permanent employees. Furthermore, although the compensation for terminations is retained, the proposed ESCRA explicitly provides for non-permanent employment forms, which facilitates employers shifting to non-permanent employment to avoid costs associated with permanent employment.

Issue #3: Freedom of association and right to organise

Issue 3.1: No inclusion of freedom of association and right to organise as fundamental principles

What it is:

Part I of ESCRA covers “Fundamental Principles.” In Part I, Section 9 of ESCRA states “It shall be an offense against this Act for an Employer to discriminate against any person in terms and conditions of hiring and employment on the basis of union membership or any other freely expressed opinion or association.”

Why it is new:

Previous Sri Lankan labour and employment laws did not have an explicit section on fundamental principles.

Why it matters:

ESCRA reflects Article 1(1) of the ILO C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98), which requires states to protect workers against discrimination on the basis of expression in the workplace. However, trade union leaders note that ESCRA Part I does not affirm fundamental principles of freedom of association and protection of the right to organise more broadly. Sri Lanka has ratified ILO C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and ILO C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98), which require states to protect freedom to establish and join unions freely, govern them without restriction, and organise without union, industry, or government interference.⁵⁹ Trade unions note the government has failed to implement these ILO core conventions and that ESCRA should include these protections among its “fundamental principles.”

Issue 3.2: Employees’ councils as obstacle to freedom of association

What it is:

ESCRA does not change the system of employees’ councils. The Employees’ Councils Act, No. 32 of 1979 mandated establishment in certain businesses of an Employees’ Council, an organisation that makes recommendations to the employer about matters that would benefit both employer and employees and makes sure that laws are implemented in the workplace. The Employees’ Councils Act dictates Councils’ rules and composition. In practice, employees’ councils are management controlled.

Why it is new:

Employees' councils are not new, but unions have fought against them, especially in Export Processing Zones (EPZs), for years.

Why it matters:

In Export Processing Zones (EPZs), the Industrial Relations Department within the Board of Investment (BOI) handles resolution of industrial disputes. The BOI primarily resolves disputes through employer councils under modified BOI rules, rather than with unions, though if a union has recognition in the workplace, then the employer must deal with it.⁶⁰

BOI preference for employee councils limits organising in EPZs. Trade unions have explained that management chooses most Employees' Council representatives, stacks the councils with supervisors and office-based (rather than shop floor) workers and sets the schedules and agendas for meetings. Employers thereby limited discussions to marginal workplace issues, avoiding issues of wages, hours and most other conditions of work.⁶¹ Management has offered benefits to Employees' Council members if they do not join a union and threatened members if they do. Overall, trade union leaders have cited Employees' Councils in EPZs as the single most pressing issue facing workers.⁶²

In EPZs, ILO Committee on Freedom of Association (CFA) has asked the Sri Lankan government to guarantee that unions have access to EPZs workplaces even if they do not have representative status in such workplace.⁶³ However, freedom of association and the right to organise are not protected in EPZs as a matter of practice. As one example, the CFA has previously found that management in Biyagama FTZ, one of the two main EPZs, had retaliated against workers for having attempted to set up a union and participated in a work stoppage to protest the company having failed to pay wages and benefits.⁶⁴

Issue 3.3: Prevention of terrorism act

What it is:

On 4 January 2020, the Sri Lankan government under Prime Minister Rajapaksa announced it would withdraw the Counter-Terrorism Act (CTA), a proposed replacement for the Prevention of Terrorism Act (PTA). The PTA, enacted in 1979 as temporary emergency legislation to counter separatist insurgencies, allows arrests without a warrant for unspecified “unlawful activities” and allows authorities to detain a person for up to eighteen months without the government having to bring them before a court.⁶⁵

Why it is new:

In 2015, then-President Maithripala Sirisena committed Sri Lanka to replacing the PTA. In 2018, he submitted to Parliament an alternative law, the Counter-Terrorism Act (CTA), which would have replaced the most abused provisions of the PTA.

Why it matters:

Prime Minister Rajapaksa used the PTA during his ten-year presidency to arbitrarily arrest and torture detainees, including union leaders.⁶⁶ There is concern that, as Prime Minister, Rajapaksa will use the PTA as he did as President, creating a threat to union activists.

Issue #4: Discrimination

Issue 4.1: Limits on eligibility for maternity benefits

What it is:

Section 55 of ESCRA limits the right to maternity leave for employees on indefinite term or fixed-term employment contracts in excess of twelve months. Women who work on fixed-term contracts of twelve or fewer months, seasonal contracts and casual labour contracts are not entitled to maternity leave.

Why it is new:

The Maternity Benefits Ordinance, 1941 extended its protections to all women. It also prohibited employment of women before four weeks after their delivery, which Section 2 of ESCRA eliminated.

Why it matters:

Many women who need maternity leave will not have access to it, especially in the garment industry, where seasonal and short fixed-term contracts are likely to be the main form of employment. Article 3 of the C103 - Maternity Protection Convention (Revised), 1952 (No. 103) stated that women employed in industrial undertakings and in non-industrial and agricultural occupations, including women wage earners working at home “shall, on the production of a medical certificate stating the presumed date of her confinement, be entitled to a period of maternity leave.”

Issue 4.2: Legal right against discrimination

What it is:

Regarding gender, Section 5 of ESCRA prohibits discrimination in hiring, employment, pay, promotion or termination on the basis of gender. In addition, Section 6 of ESCRA specifically prohibits “employers, manpower supply agencies and employment agencies to inquire into the family status, marital status or parenting responsibilities of any prospective or current employee,” as well as “to inquire into the pregnancy status of any prospective or current female Employee or to inquire into her childbearing plans or childcare arrangements.”

Section 5 of ESCRA also prohibits workplace discrimination on the basis of “race, origin, ethnicity, language, creed, caste, age, family or marital status or disability.”

Why it is new:

Rights against discrimination were not previously included in Sri Lanka's labour and employment law.

Why it matters:

Workers who face discrimination in the workplace now have a basis on which to file a legal complaint against their employer.

Issue 4.3: Legal right against sexual harassment

What it is:

Section 7 of ESCRA prohibits anyone from engaging in sexual harassment in the workplace. Section 129 of ESCRA defines sexual harassment as direct or implied physical contact, demand or request for sexual favours, making sexually coloured remarks, showing pornography, or any other unwelcome physical, verbal or non-verbal conduct of a sexual nature. Section 105 of ESCRA requires the Commissioner to issue regulations stating "requirements for meeting the non-discrimination provisions of [ESCRA], including the prevention of sexual harassment."

Why it is new:

Sexual harassment was not previously included in Sri Lanka's labour and employment law.

Why it matters:

Workers facing sexual harassment in the workplace now have a basis on which to file a legal complaint against the person engaging in harassment.

The proposed language in the ESCRA is consistent with Article 7 of C190 - Violence and Harassment Convention, 2019 (No. 190), which has not yet entered into force. C190 states "each Member shall adopt laws and regulations to define and prohibit violence and harassment in the world of work, including gender-based violence and harassment." However, Article 5 of C190 also states that "With a view to preventing and eliminating violence and harassment in the world of work, each Member shall respect, promote and realise the fundamental principles and rights at work, namely freedom of association and the effective recognition of the right to collective bargaining" As discussed above, ESCRA likely hampers freedom of association and collective bargaining, which impairs workers' ability to organise against sexual harassment in the workplace.

Issue #5: Inspections and remedy

Issue 5.1: Investment in improving inspections

What it is:

The ILO states that “The Government is making efforts to restructure the labour inspection system with ILO assistance, develop the prevention side of labour inspection, promote qualifications of labour inspection staff and increase the number of both female and male labour inspectors.”⁶⁷

Why it is new:

Sri Lanka does not have a written policy on labour inspections. The Department of Labour is responsible for inspections, which are done separately for 13 different areas that correspond to major labour and employment laws. Inspection activities are regulated by departmental circulars under the responsibility of the Commissioner General of Labour.⁶⁸

Why it matters:

Labour inspections are essential for incentivising employers to follow labour and employment law, especially in the garment industry.

Issue 5.2: New labour dispute system

What it is:

Section 111 of ESCRA creates a new system of Labour Courts that has original jurisdiction over complaints alleging violations of ESCRA. Section 109 requires the Labour Commissioner to establish mediation and conciliation facilities at the Department of Labour. Complainants must first attempt to mediate and then, if mediation fails, can proceed to conciliation, unless mediation has not concluded within 120 days from an initial application for mediation. Labour courts appear to have equal powers as civil courts as provided by Section 114. Section 115 allows petitioners to have a lawyer represent them before labour courts, which under Section 116 must issue an order within 180 days of receiving an application. Sections 119-20 provide for appeals of their decision within 30 days to a High Court.

Why it is new:

Currently, complaints alleging violation of labour and employment laws – except of the Industrial Disputes Act No. 3 of 1950 – are submitted to Magistrate’s Courts (lower courts with original criminal jurisdiction). Complaints regarding the Industrial Disputes Act, 1950 are submitted to the Labour Tribunal the Act creates, from which appeals can be made to the High Court on questions of law, and then to the Supreme Court.

Why it matters:

The system appears to attempt to expedite dispute resolution with a dedicated system of labour courts while still maintaining access to civil courts.

Issue #6: Social security

Issue 6.1: Employer control over retirement age

What it is:

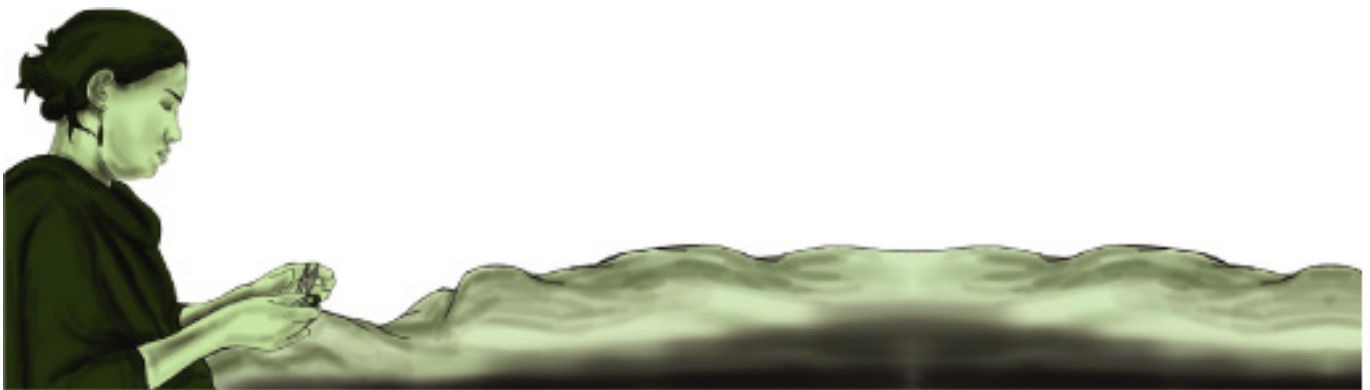
Section 129 of ESCRA gives employers the power to set the retirement wage at an age older than that at which workers can claim retirement benefits. Section 10 permits employers to set retirement age in their rules, and Section 24 permits a retirement age to be included in an employment contract.

Why it is new:

Currently, employers cannot set a retirement age.

Why it matters:

It appears that the policy is intended to encourage workers not to claim their benefits prematurely. Currently, workers formally retire and claim their benefits at 55 years of age. However, they continue working as contract employees while receiving retirement benefits. Under ESCRA, employers can require workers to formally retire after 55. This policy appears to be motivated by concerns over Sri Lanka's aging population, which is straining available retirement funds.⁶⁹



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CONCLUSIONS

In summary, the pre-COVID agenda to change labour and employment law in Cambodia, India, Indonesia and Sri Lanka puts an already devastated labour force under further strain in the following ways:

First, workers are being excluded from drafting laws and setting wages that affect their interests. Across countries, exporters and buyers have had a significant voice in pushing for desired changes, especially in Sri Lanka, where the United States has pushed heavily for reforms through USAID. Meanwhile, unions have organised mass strikes and protests. While unions have managed to register their discontent, it is unclear whether they can translate this power into changes to the laws being drafted.

Second, the proposed laws are not protecting wages. In India, Indonesia and Sri Lanka, new laws allow the minimum wages to be low.

Third, governments are making minimum wages universal. In Cambodia, India and Sri Lanka, minimum wages now cover all workers; in Cambodia, they cover all workers within the labour law. Only Indonesia has proposed maintaining its current system, which permits provinces to set minimum wages for “labour-intensive” industries separately.

Fourth, fixed-term employment has been fully integrated into employment and labour and employment law in India, Indonesia and Sri Lanka. In Cambodia, use of fixed-term employment, which was already permitted, has not been curtailed in practice.

Fifth, unions are under attack. In particular, in Cambodia and India, laws curtail workers’ power to strike and their ability to choose their leadership. In Cambodia, India, Indonesia and Sri Lanka, fixed-term employment being permitted will empower employers to retaliate against workers for union membership or organising in the workplace.

Sixth, social safety nets and workplace inspections for wage and hour as well as health and safety violations are stagnant. Changes under way have made precarious work legal, but have neglected to build in any additional protections for workers. Only Sri Lanka has expanded protection against discrimination in the workplace.

If allowed to move forward, these proposed and enacted changes to labour and employment law would benefit employers over low-income workers at a time when working families are suffering the brunt of the catastrophic economic and health shocks of COVID-19. Governments facing economic recessions must acknowledge that there is no evidence that enacting labour and employment law changes that have been proposed will serve to promote long-term economic development. Long-term growth is built on prosperity for the working class, including garment workers.

Garment-exporting countries must cancel the proposed and enacted changes proposed in this report, and transition to a new social contract that includes protection for low-income workers: fair wages, social safety nets and protections for organising and bargaining with employers.



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