



Issue Analysis

U.S. Ratification of ILO Core Labor Standards

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Whether or not U.S. law and practice conforms to the labor standards developed by the International Labor Organization (ILO) remains the subject of considerable debate, due in part to confusion about the standards themselves. This paper describes what are commonly referred to as the ILO core labor standards and explains the difference between the standards and the ILO Declaration on Fundamental Principles and Rights at Work. It also provides examples of the significant ways in which U.S. law and practice conflict with many of the requirements of the ILO standards, preventing U.S. ratification of some of the core labor standards.

Core Labor Standards

Of the 187 labor conventions adopted by the ILO since its founding in 1919, the Organization has identified eight that it terms “core labor standards”, meaning that they contain fundamental labor rights that should be respected by all member countries regardless of their level of development. The eight core conventions are:

- 87) Freedom of Association and Protection of the Right to Organize (1948)
- 98) Right to Organize and Collective Bargaining (1949)
- 29) Forced Labor (1930)
- 105) Abolition of Forced Labor (1959)
- 138) Minimum Age (1973)
- 182) Worst Forms of Child Labor (1999)
- 100) Equal Remuneration (1951)
- 111) Discrimination (1958)

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The ILO has two supervisory bodies – the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards – that regularly examine the application of all ILO conventions in member States. The ILO has a third special procedure – the Committee on Freedom of Association – to review complaints concerning violations of freedom of association, whether or not a member State has ratified the relevant conventions.

A key principle embodied in the ILO constitution is that member countries should undertake ratification of ILO conventions freely and should not be forced to adopt them. However, the core conventions address rights that are enshrined in the ILO Constitution, rights that all ILO members are therefore constitutionally obliged to respect and promote, regardless of whether they have ratified them or not.

ILO Declaration on Fundamental Principles and Rights at Work

In order to address this potential contradiction and to promote these fundamental rights, in 1998 the ILO adopted a political statement, the Declaration on Fundamental Principles and Rights at Work (the Declaration), which sets out the four constitutional principles:

- 1) Freedom of association and the effective recognition of the right to collective bargaining;
- 2) Elimination of all forms of forced or compulsory labor;
- 3) Effective elimination of child labor; and
- 4) Elimination of discrimination in respect of employment and occupation.

The Declaration is supported by a follow-up procedure that requires member States that have not ratified one or more of the core conventions to submit an annual report on the status of the relevant rights and principles in their countries to the ILO Committee of Independent Expert Advisers. The Declaration is a political statement and thus distinct from the core conventions, yet this distinction is blurred by the ILO practice of measuring progress on the Declaration against the requirements of the core conventions. Thus, an assessment of whether a country is fulfilling its obligation to realize the principles in the Declaration could be measured against the conventions themselves unless action is taken to limit such an assessment.

Importantly, the ILO Declaration is very clear in stating that “labor standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes.”

U.S. Obligations

As a member of the ILO, the U.S. is obliged “to respect, to promote and to realize” the principles contained in the 1998 Declaration, as distinct from the specific legal details of the eight conventions themselves. As with any international treaty, the U.S. is only obligated to comply with the letter of those conventions that it has ratified. Of the eight core conventions, the U.S. has ratified two (105 on forced labor and 182 on the worst forms of child labor) and one has been submitted to the Senate for consent (111 on discrimination).¹ The remaining five conventions have not been ratified by the U.S. – for reasons detailed below – and thus the U.S. is not obliged to comply with their technical requirements.

¹ By comparison, Peru has ratified all eight core conventions and Colombia and Panama have each ratified seven.

Impact of U.S. Ratification

U.S. ratification of an ILO convention would necessitate implementing legislation that would incorporate it into domestic law, superceding any prior federal or state statutes that might have conflicting legal requirements. Thus, ratification of any ILO convention that conflicts with U.S. law and practice would mandate changes to U.S. state and federal labor law so that they conform to the ILO standards.

Complicating matters is the fact that a treaty with more general provisions, such as those found in many ILO conventions, may not necessarily override more specific requirements in existing U.S. federal and state law. Consequently, U.S. courts could potentially find that the more specific requirements of existing laws take precedence over the more general but contradictory obligations contained in the ILO conventions. For these reasons, it is essential for the U.S. to determine the legal and practical consequences that ratification of a convention would have on federal and state law and practice.

U.S. Process to Review ILO Conventions

When the U.S. rejoined the ILO in 1980, it established a consultative process to oversee ILO issues: the President's Committee on the ILO, which includes the Secretaries of State and Commerce, the President's National Security Advisor, the Assistant to the President for Economic Policy, and the Presidents of the AFL-CIO and the United States Council for International Business (USCIB).

The President's Committee on the ILO adopted three ground rules concerning US ratification of ILO conventions that were incorporated into a 1988 US Senate resolution, which stated that:

“There is agreement by the U. S. Government agencies concerned, the AFL-CIO, and the U. S. Council for International Business, that each ILO convention will be examined on its merits on a tripartite basis; that if there are any differences between the convention and Federal law and practice, these will be dealt with in the normal legislative process; and that there is no intention to change State law and practice by Federal action through ratification of ILO conventions, and the examination will include possible conflicts between Federal and State law that would be caused by such ratification.”

In order to implement this agreement, the President's Committee on the ILO established a legal subcommittee, the Tripartite Advisory Panel on International Labor Standards (TAPILS), which is chaired by the Solicitor of Labor and includes the legal advisers of the Departments of State and Commerce and legal counsel for the AFL-CIO and the USCIB. TAPILS continues to operate under the 1988 agreement that no ILO convention will be forwarded to the U.S. Senate for ratification if ratification would require any change in U.S. federal or state laws.

Conflicts with U.S. Law and Practice:

Five of the ILO core conventions (87, 98, 29, 138 and 100) have been found to directly conflict with U.S. law and practice and would require significant and widespread changes to U.S. state and federal law if they were ratified. U.S. ratification of Conventions 87 and 98 would require particularly extensive revisions of longstanding principles of U.S. labor law to conform to their standards. Indeed, ratification of 87 and 98 would require such drastic changes to U.S. law (detailed in Appendix 1 and 2) that they have never even been submitted to TAPILS for a review. In the cases of Conventions 29, 138 and 100, TAPILS has found that each did in fact conflict with U.S. law and practice in important ways (detailed in Appendix 3).

Conclusion

As a member of the ILO, the U.S. is obliged to “respect, promote and realize” the principles of the ILO Declaration. However, the ILO supervisory bodies and the follow-up mechanism to the Declaration consistently look to the core conventions themselves to assess whether this obligation has been met, blurring the distinction between the political commitment of the Declaration and the legal obligations of the conventions.

The U.S. is legally obligated to comply with the ILO conventions that it has ratified. Under a tripartite agreement between the U.S. Government, the AFL-CIO and USCIB, no ILO convention will be forwarded to the U.S. Senate for ratification if such ratification would require any change in U.S. federal and state laws. Of the eight core ILO conventions, the U.S. has ratified two and a third is pending in the Senate. However, the remaining five conventions have been found to directly conflict with U.S. law and practice and thus have not been considered for ratification since ratification would require extensive revisions to U.S. state and federal labor laws.

Appendices:

1. *Legal Analysis of Convention 87*
2. *Legal Analysis of Convention 98*
3. *TAPILS Findings on Conventions 29, 238 and 100*

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Appendix 1: Legal Analysis of Convention 87 on Freedom of Association and Protection of the Right to Organize:

While TAPILS has never been asked to review C.87, the most exhaustive legal analysis of the convention² found that U.S. ratification of the convention would:

- 1) Alter a fundamental principle of U.S. labor law that makes union rights derivative from those of employees by subordinating employee rights to those of labor organizations. While U.S. law and practice, especially the National Labor Relations Act (NLRA) and the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), are based on the principle of individual employee rights to organize and bargain collectively, ILO conventions are directed at establishing institutional rights and privileges for organizations. Thus, in comparison to U.S. law, ILO Conventions 87 and 98 do not create express protections for the individual employee, but instead give paramount importance to organizational rights and individual rights are derivative of the rights of the organization.
- 2) Alter the manner of establishing union recognition in the U.S. and broaden the classes of employees covered under the NLRA. While certain classes of workers such as supervisors, public employees and independent contractors are excluded from coverage under the NLRA, Convention 87 can be construed as requiring NLRA-type coverage of these classes of workers and eliminating state and federal collective bargaining statutes for public employees.
- 3) Revoke or modify substantial parts of the Landrum-Griffin Act, particularly with respect to election procedures, and eliminate prohibitions against persons with criminal records from holding union office. The Landrum-Griffin Act's detailed regulation of union election procedures and comprehensive standards for union conduct clearly exceeds the non-interference standard set out in ILO in Convention 87.
- 4) Undermine the rights of the exclusive bargaining representative by permitting grieving employees to select minority or rival unions to represent them. The ILO Committee of Experts has found that Convention 87 requires that minority unions be allowed to function and at least be allowed to represent their members regarding individual grievances, which is directly contrary to Section 9(a) of the NLRA. Thus, ratification of Convention 87 would fundamentally undercut the rights of the exclusive bargaining representative under the NLRA and permit minority unions to represent members of grieving bargaining units who have selected them.
- 5) Repeal employer free speech provision under Section 8(c) of the NLRA and prohibit all acts of employer and union interference in organizing, which would eliminate employers' rights under the NLRA to oppose unions and would effectively force employers to be neutral to all union organizing efforts.
- 6) Limit restrictions on the right to strike, including in secondary boycotts, in both public and private sectors. Several aspects of the ILO's policies under Convention 87 with respect to the right to strike may be inconsistent with U.S. law and practice, including the many limitations and restrictions placed on the right to strike by the States and the federal government.
- 7) Prohibit Congress from restricting participation of Communist Party members or members of fascist, totalitarian or otherwise subversive group in labor organizations;

² Edward E. Potter, "Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 & No. 98", Labor Policy Association, Inc., 1984

- 8) Permit affiliation of plant guards with unions of non-guard employees; While the NLRA prohibits guards for direct or indirect affiliation with labor organizations that admit non-guards, Convention 87 creates an unrestricted right for workers (and employers) to join organizations of their choosing “without distinction whatsoever.”
- 9) Repeal Section 8(e) of the NLRA that prohibits “hot cargo” agreements, that is clauses in union contracts permitting employees to refuse to handle or work with goods shipped from a struck plant or to perform services benefiting an employer listed on a union unfair list.
- 10) Restrict the withdrawal of exclusive representation status by administrative authority and expand the scope of judicial review in such circumstances. Under U.S. law and practice, loss of recognition by a labor organization as the exclusive bargaining representative can occur as a result of a decision of administrative authority, which could be construed as violating Article 4 of Convention 87.
- 11) Revoke limitations on the use of union monies for political purposes. While Section 304 of the NLRA establishes restrictions on political contributions by both labor organizations and employers to federal elections, the ILO Committee of Experts considers that legislative provisions prohibiting all political activities are incompatible with Convention 87.
- 12) Remove limitations on the disaffiliation of local unions from international unions and the formation and dissolution of multiemployer units.

Appendix 2: Legal Analysis of Convention 98 on the Right to Organize and Collective Bargaining:

TAPILS has also never been asked to review C.98, but the same legal analysis found that U.S. ratification of the convention would:

- 1) Broaden the scope of existing collective bargaining statutes in the public and private sector to cover certain excluded classes of employees, including supervisors. Since Convention 98 applies to categories of employees who are not covered by the NLRA, U.S. ratification would remove these exclusions from the NLRA and other statutes.
- 2) Impose collective bargaining in some state and local jurisdictions and expand the scope of bargaining in the federal sector and other public sector jurisdictions. Because not all state and local employees are exempted under Convention 98, the substantial constraints on collective bargaining and the scope of negotiations under state and local jurisdictions would conflict with the Convention.
- 3) Restrict limitations on the right to strike in both the public and private sectors. Much as with Convention 87, Convention 98 prohibits nearly all restrictions on the right to strike and clearly prohibits the many limitations and restrictions placed on the right to strike by the States and the federal government.
- 4) Limit discretion in instituting wage-price controls. While the ILO's supervisory bodies have allowed wage and price controls if they are established for compelling national economic interests, Convention 98 would prevent Congress or the President from instituting wage-price controls for a prolonged period of time or over successive periods of time.
- 5) Preclude legislation restricting the scope of bargaining in the private sector. While the NLRA distinguishes between mandatory and non-mandatory subjects of bargaining, the ILO Committee on Freedom of Association has found that legislation that prohibits certain topics for bargaining was contrary to Convention 98 if the subject was included in previous agreements. This ILO finding could result in review of negotiability determinations of the NLRB affecting the provisions of agreements.
- 6) Eliminate the distinction made between the employer's obligation to bargain on mandatory and permissive subjects of bargaining;
- 7) Provide union officials with special employment protection during their tenure in office. As applied by the ILO, special protections for union officials is desirable in order to assure that then union officials are able to perform their trade union duties in full independence. The ILO has thus found that an appropriate protection would include provisions that union officials not be dismissed during their term of office.
- 8) Modify the burden of proof and remedies provided in Section 10(c) of the NLRA. The employer burden under U.S. law – demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union – is less rigorous than the burden of proof standard applied by the ILO supervisory bodies – that the employer prove that there is no union-related motive underlying the personnel action taken.
- 9) Result in evolving legal standards based on ILO conventions adopted later in time. The interpretations by the ILO Committee of Experts on Convention 98 incorporate the protections of other, later ILO conventions as they may relate to anti-union discrimination. Thus, it appears that ILO conventions adopted after 98 may have a bearing on its meaning and scope.
- 10) Infringe on the right of states to determine the terms and conditions of employment for their own employees. Because a substantial number of public employees working for state and local jurisdictions are covered by the convention, its ratification could infringe upon the reserved rights of the states under the Tenth Amendment to determine the terms and conditions of employment for the their own employees.

Appendix 3: TAPILS Findings on Convention 29, 138 and 100

The Tripartite Advisory Panel on International Labor Standards (TAPILS) is chaired by the Solicitor of Labor and includes the chief legal advisers of the Departments of State and Commerce and legal counsel for the AFL-CIO and the USCIB and its conclusions are reached by consensus. The TAPILS findings on conventions 29, 138 and 100 are set forth below:

Convention 29 on Forced Labor:

In the TAPILS report on C.29, it concluded that: "Convention 29 cannot be ratified without amending U.S. law and practice...[TAPILS] concluded that the trend of states to subcontract the operation of prison facilities to the private sector in the United States conflicted with the requirements of Convention 29 relating to circumstances under which the private sector may profit from prison labor." As a consequence, review of C.29 was suspended and has never been resumed.

Convention 138 on Minimum Age:

TAPILS spent two years reviewing Convention 138. The review process included a series of discussions with officials from the ILO Standards Department concerning the meaning and scope of the convention. TAPILS suspended its review of the convention after concluding in its 1991 report to the President's Committee on the ILO that:

"Panel members have unanimously reached the conclusion that differences, inconsistencies, and conflicts exist between the requirements of the Convention and current United States law and practice...Although United States law and practice is in conformity with the requirements of Convention 138 in many respects, it appears that conflicts are presented in those areas of youth employment that are exempt or excluded from the application of the [Fair Labor standards Act] FLSA. Moreover, the fact that compliance with the requirements of Convention 138 would depend in part on widely varied state laws and regulations and possibly on remedial state action further complicates the process of determining and resolving the status of U.S. law and practice with respect to the convention. Accordingly, it is clear from the Panel's examination and analysis that Convention 138 cannot be ratified without legislative and/or regulatory changes which will reconcile the differences between the requirements of the convention and existing law and practice."

Convention 100 on Equal Remuneration:

TAPILS has never considered Convention 100. However, in 1984, in the course of reviewing a draft U.S. Government submission to the ILO, TAPILS recognized that the language in Convention 100 concerning equal remuneration for work of equal value conflicts with the U.S. legal standard of equal pay for substantially equal work.

The standard in Convention 100 reflects what is known in the U.S. as "comparable worth," a concept that has been included in some U.S. laws and used in some judicial rulings, but has not been uniformly adopted in law or as a policy for public and private wage-setting purposes. For that reason, in considering Convention 111 on employment discrimination, TAPILS proposed an understanding designed to clarify that C.111 does not incorporate the principles of C.100, and that C.111 "does not require or establish the doctrine of comparable worth with respect to compensation as that term is understood in United States law and practice."