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QUESTIONNAIRE

Topic 3: **Occupational risks: social protection and employers' liability**

General Reporters:

Anne Numhauser-Henning (Sweden)
Aminata Cissé (Senegal)

Discussant:

Steve Adler (Israel)

INTRODUCTION

The question of the protection of workers vis a vis occupational risk is contemporary to the origins of the Labour and Social Security Law. Already in the last decades of XIX Century and the first two decades of the XX th Century many countries adopted laws on the duration of work, work of women and children and workmen's compensation¹. In 1921 the International Labour Organization adopted the Workmen's Compensation (Agriculture) Convention, 1921 (No.12), which was followed in 1925 by the Workmen's Compensation (Accidents) Convention, 1925 (No. 17) (revised in 1964 by the Employment Injury Benefits Convention, 1964 (No. 121)), and the Workmen's Compensation (Occupational Diseases) Convention (No. 18) (revised in 1934 by Convention No. 42 and in 1964 by Convention No. 121).

The first schemes of compensation for industrial and occupational diseases established from start the impossibility of dissociating the labour law and the social security law. In a majority of countries the first laws on industrial accidents set out the *business risk* principle in order to establishing the employers' objective responsibility for industrial accidents and occupational diseases arising out of subordinate work provided by an employee to an employer. This resulted in the law departing from the traditional civil law approach whereby the obligation to compensate for damages must arise out of the employer's fault or negligence.

¹ Sometimes, like in Germany, the employment injuries mandatory insurance came into being well before most labour laws.

Some time later the originally employer's responsibility to compensate for industrial accidents or occupational diseases was taken up by the Social Security system or by compulsory private insurance schemes, which to a large extent meant that employment injuries began to be considered a social risk rather than a business risk ².

Last but certainly not least, increasing stress was laid on prevention, which became an employer's obligation arising out of the contract of employment.

Within the framework of the European Union health and safety at work are precisely the two fields which have been addressed by the greatest number of legislative instruments relating to social and employment questions. The ILO is not less active in this field since the relevant instruments regarding safety and health at work and labour inspection include no less than 19 conventions, 2 protocols and 26 recommendations, to which one may add some 37 codes of practices and technical guidelines

This progress cannot however hide the survival of grey zones and dead angles in protection which raise new interrogations.

Grey zones

1. The use of new technologies and new products generate new health risks to the workers, which may appear long time after the end of their employment. It may therefore become very difficult to establish a link between the worker's previous occupation and his/her present state of health, which is further complicated by the fact that many illnesses (like some cancers) are often due to a combination of causes, some of which are work-related while some others are not.
2. The organization of work may involve effects on the worker's psychic health. Here again, the establishment of a causal link with the worker's occupation proves to be problematic.
3. More flexible and heterogeneous work careers throughout a worker's life-span result in many workers changing employers more frequently than they did in the past, or going from wage work to self-employment and back to wage work again. This may affect the establishment of a casual link between occupation and injury/health risk, thus having also some bearing on responsibility and compensation issues

Dead angles

Dead angles relate to the identification, (a) of the risks, (b) of the beneficiaries of protection, and (c) of the persons who may be made liable for damages arising out of occupational risks.

- a. Technical and technological progresses often involve the use of materials and products whose effects on health may be difficult to assess in advance. One thinks in particular of the replacement of asbestos by materials of which the harmlessness is still to be demonstrated.
- b. Many of the new forms of work organization, the externalization of tasks, recourse to precarious work, not to mention illegal or

² This is, however, not applicable to all countries, most notably where the social security system does not provide for compensation for employment injuries and occupational diseases.

clandestine work cause to make difficult the medical supervision of the workers whose insulation accentuates the risks of being exposed to health hazards. They also raise hurdles to the effective intervention of the workers' representatives in respect to occupational health and safety issues at the plant level.

- c. Lastly, the transformations of the companies and the increasing distance between the plant level and the decision-making centres cause to make delicate the identification of the persons who are responsible for the formulation and implementation of safework policies at both the upper and the lower level.

Interrogations

- (a) The first of the interrogations relates to the question of the full compensation of damages arising out of an occupational hazard. Certain voices are made today hear in favour of full compensation of such damages, which would result according to them in the abandonment of the special mode of social protection of the victims to the profit of a return to the civil law, or to a combination of both the special mode of protection and civil law protection.
- (b) A second interrogation arises out of the establishment of "special funds" which are meant to compensate for certain risks (e.g. the asbestos risk). These funds are financed on the basis of national solidarity rather than social security principles. One may argue that such an approach might have demobilizing effects with regard to prevention.
- (c) A third interrogation relates to the concept of prevention. Led to the extreme, the logic of prevention could result in increasing the risk of discrimination at the time of recruitment, which might be justified on the need for preventing pathologies. For example, pre-hiring genetic testing and HIV/AIDS testing are increasingly used; this does not fail to pose serious problems of ethics, without speaking about discrimination against job applicants whose state of health may become a major ground for social exclusion.
- (d) A last interrogation relates to the role of the workers and their representatives as regards the workers' health protection. Behind this question lies that of the role of the experts.

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QUESTIONNAIRE

1. General questions

1. Please give general information on your system of protection/compensation for employment injuries and occupational diseases. When was it created? Which modifications were introduced in the system since its creation?
2. How is the system organized? How it is financed?

3. What is the system's coverage³? What are the major exclusions from the system's scope (for example small enterprise, non industrial enterprises, home workers, domestic workers, casual workers)?
4. What are the contingencies covered by the system?
5. Are commuting accidents covered by the system? If they are, how is a *commuting accident* defined?
6. What links exist, if any, between the employment injuries and occupational diseases protection/compensation schemes and the general sick pay/sick benefits compensation schemes?
7. Can an employee be terminated because of absence from work due to an employment accident or an occupational disease? In case such is possible, please describe the procedure which must be followed.

2. Responsibilities for the employer

8. Has the employer a general obligation of prevention? How it is sanctioned? Can he/she be prosecuted before a criminal jurisdiction?
9. Which are the employer's obligations related to the protection of the workers' life and health? How are these implemented at the enterprise level and the plant level? What kind of control is made on their implementation?
10. Can the employer delegate his/her powers as regards occupation safety and health? To whom? With which effects?
11. Are there external bodies which can collaborate with the employer with a view to improving health and safety records at the enterprise or the plant level? If such bodies exist, please, explain their nature and competence.
12. Which are the employer's obligations as regards safety and health of workers of third parties, for example workers placed at his/her disposal by a temporary work agency, or employees of sub-contractors who perform work within the employer's premises?
13. How is the prevention of risks organized when two or several companies operate on the same worksite?

3. Particular problems

14. Are psychic risks taken into account in order to determine the employer's responsibility (for example as regards the prevention of stress at work)?
15. Is the employer required to take measures to guarantee that non smokers can work in a clean air environment?
16. Does your national law restrict the employment of certain categories of workers in particularly hazardous works (e.g. the employment of minors or pregnant women, or of temporary workers)?
17. Can the employer be made liable for health damages suffered by his/her workers because of the use of products or substances whose harmfulness was not demonstrated at the time of their use, or whose harmful effects can be appreciated only on the long term (for example, the use of asbestos)?

³ In many countries the coverage does not include all the workers. For example, under ILO Convention No. 121 the following categories of workers may be excluded: (a) persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business; (b) out-workers; (c) members of the employer's family living in his house, in respect of their work for him; (d) other categories of employees, which shall not exceed in number 10 per cent of all employees other than those excluded under clauses (a) to (c).

18. Can the employer require from job applicants that they undergo genetic tests or HIV/AIDS tests in order to determine the worker's aptitude to be exposed to risks for which they would be particularly vulnerable?
19. Can the worker withdraw from a situation of work in respect to which he/she has reasonable grounds to think it presents a danger for his/her life or health?

4. Compensation of employment injuries and diseases

20. Which are the benefits payables under your national system of employment injuries compensation? How are they managed? Can they be refused, and if they can, in which cases?
21. Is compensation limited in any form or the worker can be compensated in full for the damage he or she has suffered? Can the employee profit from an option between asking for limited compensation within the employment injuries system or for full compensation in accordance with civil law/common law?
22. Do you have any experience with regard to the establishment of special funds to compensate for damages to life or health arising out of the use of products or substances whose harmfulness was not demonstrated at the time of their use, or whose harmful effects can be appreciated only in the long term (for example asbestos)?

5. The role of the workers' representatives as regards protection of health.

23. How is the workers' participation organized in order to improve safety and health at work and to organize the prevention of accidents and occupational diseases at the enterprise level? Do you have ad-hoc committees established with a view to taking care of safety and health issues at the enterprise level or the plant level? How are they made up? What are their responsibilities and faculties? What rights and guarantees are granted to workers who are members of these committees? Do they receive training so as to better discharging their tasks? Can they be assisted by external experts?

6. Other questions

24. Please present any other question which in the law or practice of your country relates to this topic and which has not been addressed in the questionnaire above.

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