International Labour Organization

ILO Curriculum on Building Modern and Effective Labour Inspection Systems

Module 13

Labour inspection and non-discrimination

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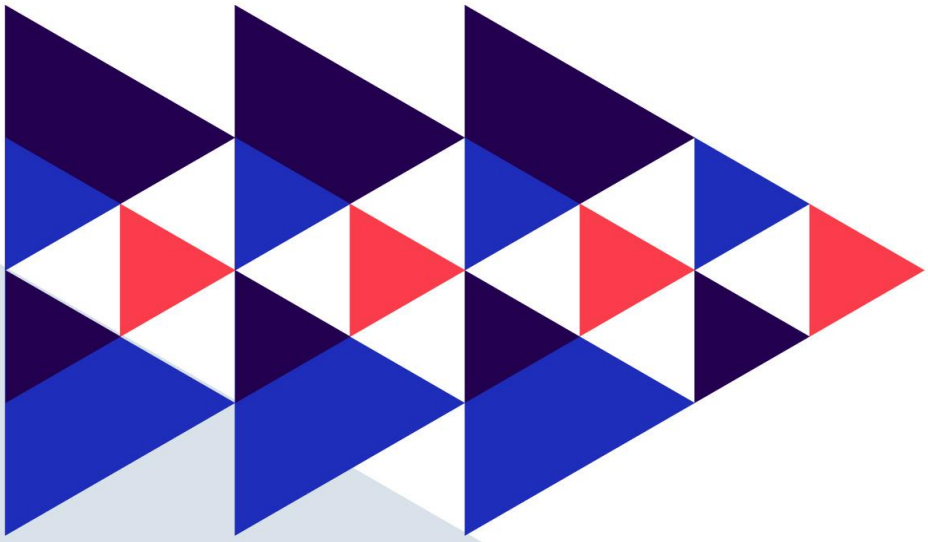

► What this module is about

This module addresses discrimination at work, defining it comprehensively in accordance with the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111). It also deals with the issue of gender equality as covered by the Equal Remuneration Convention, 1951 (No. 100).

► Objectives

At the end of this module, participants will:

- be able to identify discriminatory labour in employment situations;
- dispose of an intervention methodology;
- have access to specific tools to promote gender equality.

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Labour inspection and non-discrimination

▶ Introduction

The principle of non-discrimination and equality is based on the Universal Declaration of Human Rights, 1948, the fundamental Conventions on discrimination (the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)[1] and the Equal Remuneration Convention, 1951 (No. 100)),[2] various other international and regional instruments and, of course, national legislation, which should at least have transposed the fundamental standards. The labour inspectorate, when mandated, therefore has a solid legal basis for its interventions.

The fight against discrimination nonetheless raises certain difficulties: with regard to the scope of the criteria retained by each country, which may strictly apply the list of prohibited grounds cited in Convention No. 111 or extend it far beyond; and to the identification of violations, particularly when they are indirect, hidden or trivialized within a company, especially on the issue of gender equality. Few employers own up to discriminatory practices, except where they are permitted by law. Thus, the labour inspectorate will often have to conduct complex investigations to reveal a situation of inequality within a company. This guide will focus on explaining how to perform this essential work.

Indeed, the effective control and rigorous monitoring of the application of laws and policies relating to non-discrimination and equality in a country are important elements in ensuring the effective implementation of Convention Nos. 100 and 111. By the nature of their functions, labour inspectors should play a central role in this regard, since they have access to the companies they monitor and to detailed information relating to them that may have been collected over the long years of the department's operation. In addition, the labour inspection service is the direct repository of complaints from workers and their representatives regarding discrimination. The labour inspectorate therefore has a solid platform from which to observe a situation and act effectively.

On the other hand, the absence or low number of complaints concerning discrimination received by the labour inspection services indicates a dysfunction that may be explained by difficulties in identifying and classifying complex work situations, particularly in terms of compensation as discrimination, or by a lack of knowledge of legislation or fear of reprisals. To overcome and remedy this difficulty, it is necessary to establish appropriate training programmes, but also to include actions to combat discrimination and promote equality in the labour inspectorate's intervention agenda, in the form of both information and reminders of the law, and sanctions.

[1] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

[2] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100.

These interventions can be integrated into strategic planning targeting sectors identified as sensitive and defined territories.

This guide is fully in line with this logic of training and support for labour inspectors. It sets out the different meanings of discrimination to give a better understanding of the forms it takes, and proposes standardized intervention methodologies to ensure better compliance with standards.

Labour administrations, along with their labour inspectorates, play a vital role in the implementation and enforcement of legal provisions concerning equality of opportunity and treatment.[3] In so doing, they need to be equipped with the knowledge, attitudes and tools to address the issues of non-discrimination and gender equality. Labour administration can make a great contribution to the promotion of non-discrimination by developing equality indicators; regularly compiling, publishing and disseminating sex-disaggregated data on these indicators; and setting up systems to measure and monitor progress towards agreed targets. The role of labour inspectorates will be further illustrated in this module.

3 For more information, see Module 2, "An introduction to labour inspection", in the training package *Building modern and effective labour inspection systems*, ITCILO, Turin, 2009.

I. The principle of non-discrimination

I-I. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111)

The principle of non-discrimination is enshrined in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and its Recommendation (No. 111). These instruments define discrimination precisely and formulate the obligations of States in this area. They are general in scope.

Convention No. 111 refers to employment and professional activity and thus encompasses any activity in which people perform their trade or occupation. Its field of application explicitly covers training (for recruitment into employment or during working life), access to employment and work, the exercise of different professions, and working conditions.

The principle of non-discrimination applies upstream to vocational training, placement and employment promotion services, conditions of access to the professions, as well as the conditions governing the exercise of the various trades. The aim is to ensure equal access and treatment on the part of the services concerned, and non-discrimination in selection procedures.

In its general formulation, the rule of non-discrimination applies to all workers, nationals and foreigners, in all sectors of activity, whether public or private, in the formal or informal economy, regardless of their professional status: workers, craftsmen, members of the liberal professions, the self-employed, etc.

The right not to be discriminated against is nothing more than the right to be treated according to one's own merits and abilities, and not to be disadvantaged because of characteristics imposed by social stereotypes.

1. Definition of discrimination

The definition of discrimination (Convention No. 111, Art. 1(1)(a)) has three elements: an element of fact, a cause and an effect:

- **Fact:** “any distinction, exclusion or preference (...)”,
- **Cause:** “made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin (...)”,
- **Effect:** “which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

It is not necessary for the victim to complain of discrimination in order to materialize it; it is sufficient that the effect observed is related to ***the race or colour, sex (gender), religion, political opinion, national descent or social origin*** of the person or persons confronted with it. Discrimination may be manifested in the fact or act that generates it, for example a competition or job offer that is addressed to only one sex, to persons of a certain faith, or that excludes naturalized or migrant persons.

It is important to note that only the discriminatory act counts in materializing the fault, regardless of the perpetrator's intention. Similarly, the Convention applies to situations of inequality in which there is no clearly identifiable perpetrator, such as cases of indirect discrimination or occupational segregation based on sex or other prohibited grounds.

The definition of the causes of discrimination is also not restrictive (Art. 1b, Convention No. 111, 1958), since the Convention includes any other distinction, exclusion or preference having the effect of destroying or altering equality of opportunity or treatment in employment or occupation. Certain national legislations have transposed the principle of non-discrimination by adopting a list of causes of discrimination that are consistent only with those set out in the Convention in Article 1a of Convention (No. 111), while other countries have significantly expanded the causes of discrimination, as we shall illustrate.

2. Types of discrimination

Discrimination can be direct or indirect. Indirect discrimination refers to apparently neutral practices that in fact result in unequal treatment of people with certain characteristics. For instance, organizing training courses late in the day after work may exclude workers who are interested in attending but cannot do so because of family responsibilities. Workers who receive less training are likely to be disadvantaged in subsequent job assignments and in their promotion prospects.

a. Direct discrimination

Direct discrimination refers to a situation in which a person is treated, in terms of one of the prohibited criteria, less favorably than another person in a comparable (but not necessarily identical) situation. The comparison is made with workers doing the same work or work of the same value. In order to establish comparability, it is necessary to cross-reference several elements, such as the nature of the tasks performed, the skills involved, working conditions, the level of training required, qualification, experience, or classification in the same occupational category.

Examples:

- *A union delegate was assigned to replace a colleague. He kept his salary coefficient of 450, while his predecessor in the same position, having a seniority lower than his own, benefited from a*

coefficient of 685. As the employer did not establish that this significant disparity was justified by objective elements, the judge found that there was discrimination.[4]

- *European Court of Justice (ECJ): A woman was not graded in the year of her maternity leave because she had been absent for too long to be properly assessed in accordance with a company agreement. Because she did not receive a rating, she lost the benefit of a promotion that year. The ECJ considered that if this woman had not been pregnant and had not taken maternity leave, she would have been graded for that year and would have been eligible for promotion. The judges therefore concluded that this conventional provision constituted discrimination based on sex.*[5]

b. Indirect discrimination

Indirect discrimination occurs when a provision, criterion or practice that is neutral in appearance, results in fact in a particular disadvantage for persons who may be characterized by one of the prohibited criteria, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means to achieve that aim are necessary and appropriate.

Example:

- *European Court of Justice (ECJ): In Germany, it was found that part-time teachers who worked the same number of hours as full-time colleagues with overtime were paid less than full-time colleagues. Indeed, German law allows overtime to be paid at a lower hourly rate than that applied to hours worked within the contractual working time. This difference is clearly not based on any discrimination criterion, but it creates a disadvantage for part-time workers, whether men or women. It has been established that 88% of part-time teachers are women. Thus, there is an apparent indirect discrimination based on gender. It was then up to the German state to demonstrate that this measure affecting part-time workers was justified by objective factors, that it was necessary and appropriate. In the present case, the State could not justify this regulation. Indirect discrimination was therefore constituted.*[6]

The notion of indirect discrimination is fundamental because it has made it possible to introduce into the law the consideration of unintentional discriminatory “practices”, whether institutional or systemic, measured or revealed by their effect. Where indirect discrimination is concerned, it is not necessary to know the intention of the perpetrator. Proof of discrimination is established by focusing on the effect induced using an apparently neutral criterion, showing that the practice concerned affects or is likely to affect a group identified by a prohibited criterion (origin, sex, disability...), thus having the same effect as direct discrimination.

4 France, Nîmes Court of Appeal, Social Division, 1 June 2006, judgment No. 1092.

5 ECJ, 30 April 1998, and Cass. soc., 16 July 1998, n° 90-41.231 5.

6 ECJ, 6 December 2007, n° C-300/06 (EU /Germany).

In their mission, labour inspectors must pay attention to regulations or practices that appear to be neutral, but which lead to inequalities that disadvantage people with certain characteristics, including gender.

3. Grounds of discrimination

a. Discrimination on the grounds of race,[7] colour, national extraction[8] or social origin[9] (Convention No. 111, Art. 1(1)(a))

Some discrimination based on race, colour or national extraction may be explicit, particularly at the time of hiring:

Example:

- *A company asks a temporary work placement company to propose sales demonstrators for a commercial event. Alongside the official document providing the service, another unofficial document indicates that the workers recruited must not be of foreign origin. There is the subordination of a job to a discriminating criterion: origin or belonging, real or supposed, or to "a race".*
- *Following a complaint about a refusal to hire, a labour inspector visits the company and finds on the complainant's CV the annotation: "Presents well. Too bad has foreign origin". Refusal to hire because of the origin or membership, real or supposed, to an ethnic group will have to be recorded against the employer, against whom an infraction will be noted.*

Such discrimination may also be practised in a concealed manner.

Example:

- *A company makes a job offer conditional on the presentation of a candidate's voter card. The employer claims that this is a means of detecting possible criminal convictions. In fact, since the right to vote is only granted to nationals, the advertisement does make the job offer conditional on citizenship.[10]*

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7 "Under the Convention, race is often considered in a wide sense to include the ethnic characteristics that differentiate human beings, but also linguistic communities or minorities whose identity is based on religious or cultural characteristics, or even national extraction."

8 Comments (ilo.org).

9 **Social origin** includes social class, socio-occupational category and caste. Social origin may be used to deny certain groups of people access to various categories of jobs or limit them to certain types of activities. Discrimination based on social origin denies the victim the possibility of moving from one class or social category to another. For instance, in some parts of the world, certain "castes" are considered to be inferior and therefore restricted to the most menial jobs.

10 It should be noted that national extraction goes beyond citizenship or nationality. The Committee of Experts on the Application of Conventions and Recommendations (CEACR, 2010), recalls that discrimination based on national extraction means making distinctions on the basis of place of birth, ancestry or foreign origin and is not necessarily related to citizenship.

Discrimination may also be exercised during the performance of the employment contract and through harassment, when the employee is already employed. It is characterized by any behaviour related to one of the grounds for discrimination, including "race", origin or nationality, that constitutes an attack on his or her dignity or the creation of a hostile, degrading, humiliating or offensive environment.

Labour inspectors should report any such actions which they observe in an enterprise under their control and should immediately implement the most effective means at their disposal to put an end to such actions.

It should nevertheless be noted that there may be legitimate derogations from differences of treatment based on origin or belonging to an ethnic group, nation or race, or any other type of discrimination (Convention No. 111, Art. 1(2)). Such derogations are permissible when they respond to an essential and determining professional requirement, such as refusal to hire on the basis of nationality in application of statutory provisions relating to the civil service, for example, or to regalian missions. In addition, a foreign worker may be refused an employment if he or she does not have a legal work permit.

b. Discrimination on the basis of religious beliefs or political opinions (Convention No. 111, Art. 1(1)(a))

The employer should not take into consideration political, philosophical or religious convictions when concluding or executing an employment contract. This also includes discrimination against people who do not subscribe to a particular religious belief or are atheists.

Example:

- *Following a change of political majority in a city, some municipal canteen workers lost their attendance bonus without being absent. After an investigation by the labour inspectorate, it was found that they were the only ones who had not signed a petition in support of the new majority. The employer was ordered to pay the discriminated workers the full amount of the bonuses and was fined heavily for discrimination based on political opinion.*

Such discrimination may take the form of harassment.

Nevertheless:

1) It should be noted that there may be legitimate derogations from differences of treatment based on religion or political opinion where they meet an essential and determining occupational requirement, and provided the objective is legitimate and proportionate. Thus, it would be considered non-discriminatory to hire a theology

professor of a specified denomination when he is called upon to work in a religious association of the same obedience, since the employment then has an indisputable religious nature.[11]

2) Although discrimination on the basis of religious beliefs should not be permitted, there may be legitimate grounds for imposing requirements in the workplace that restrict a worker's freedom to practice a particular religion. For instance, a religion may prohibit work on a day different from the day of rest established by law or custom; a religion may require a special type of clothing which is not compatible with safety equipment; a religion may prescribe dietary restrictions or daily routines during work hours which are difficult for the establishment to fully accommodate; or an employment position may require an oath incompatible with a religious belief or practice. In these cases, the worker's right to fully practice his or her faith or belief in the workplace needs to be weighed against the need to meet genuine operational requirements inherent in the job.

c. Discrimination based on sex (Convention No. 111, Art. 1(1)(a))

Sex discrimination includes distinctions made on the basis of biological characteristics and functions that distinguish men and women, and on the basis of social differences between men and women. Physical distinctions include any job specifications which are not essential to carrying out the prescribed duties, for example minimum height or weight requirements which do not impact job performance. Social distinctions include civil status, marital status, family situation and maternity. Women are most commonly affected by discrimination based on sex, especially in the case of indirect discrimination (please refer to Part 2).

d. Discrimination based on sex includes sexual orientation

The Committee of Experts on the Application of Conventions and Recommendations (CEACR), in its comments on the implementation of C111 by ratifying Member States, considers discrimination based on sexual orientation under Article 1(1)(a) because discrimination based on sexual orientation amounts to discrimination based on sex.[12] [13]

No worker or job applicant should be discriminated against because they are homosexual, bisexual, heterosexual or transgender (LGBTQIA).[14]

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[11] The same criterion (religious belief) applied to the recruitment of a gardener or an IT specialist in the same religious association could be considered discriminatory since, in these cases, it would not be an essential and determining occupational requirement for the job to be performed.

[12] Information paper on protection against discrimination on the grounds of sexual orientation, gender identity and expression and sexual characteristics (SOGIESC), ILO.

[13] Directive 2000/78/EC of the Council of the European Union includes sexual orientation among the grounds of discrimination.

[14] The acronym LGBTQIA stands for "Lesbian, Gay, Bisexual, Transgender, Queer and/or Questioning, Intersex, and Asexual and/or Ally".

Discrimination based on sexual orientation is often said to be invisible. It is often based on assumptions and takes the form of harassment of co-workers, sometimes involving serious psychological or even physical violence. Victims may also be confined to specific functions and have difficulty obtaining transfers and promotions. Labour inspectors must remind employers of their obligations regarding non-discrimination, inform them, and even point out the relevant offences that could be reported.

Victims may tend not to report their mistreatment because they are afraid to disclose their sexual orientation and want to avoid exposing this aspect of their private life. At the same time, there is a danger that perpetrators may feel their behaviour is tolerated. As discussed below (II), confidentially about the information received by the labour inspectors, especially when it comes to such private and intimate matters should be strictly protected. This could, in certain circumstances and environments, be a question of life or death.

Example:

- *The CJEU decided — in P. / Cornwall County Council (U.K.) 1996 — that the discrimination suffered by transsexual people should be approached as discrimination based on sex, and not on the basis of sexual orientation. The Court of Justice also recalled that, having regard to its purpose and the nature of the rights it seeks to safeguard, the principle of equal treatment between men and women also applies to discrimination arising from a person's sex reassignment.*[15]

e. Other criteria of discrimination (Convention No. 111, Art. 1(1)(b))

In accordance with Convention No. 111, Art. 1(1)(b)) "**any other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation may be specified (...)**". Legislators can therefore integrate many other criteria into their national legality block from among the up to 25 grounds of discrimination that have been identified. Furthermore, certain criteria may already be covered in other conventions or instruments, including the three following examples.

f. Discrimination based on disability (UN Convention on the Rights of Persons with Disabilities, 2006)

The definition of discrimination based on disability has evolved thanks to international law (UN Convention of 2006),[16] recognizing that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others

[15] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0013.

[16] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

and that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."

The concept of disability should thus be understood as referring to any worker or candidate whose chances of obtaining or keeping a job are effectively reduced because of the impairment of one or more physical, sensory, mental or psychological functions.

In some countries, the law requires companies to employ a minimum number of workers with disabilities, or else pay a tax proportionate to the failure to hire. To enforce this obligation, the labour inspectorate will be required to monitor compliance with the law.

In the absence of binding legislation, the role of the labour inspectorate will be to advise and inform the employer regarding the possibility of employing disabled workers by reasonably adapting workstations or taking into account the design and layout of workplaces, with a view to giving disabled persons access to employment and, above all, ensuring the retention of those who may have developed a disability during their working life, including due to illness. It should be remembered that a disability may result from an accident at work or an occupational disease, in which case the employer should reclassify the worker's job and adapt the workplace to meet his or her new needs. Worker representatives and enterprise health and safety committees should be very involved in this return-to-work policy after a work-related injury. The labour inspector should be able to inform and advise all stakeholders in this regard.

Finally, workers with disabilities, even those who have been with the company for a long time, may be subject to cross-discrimination in their work environment due to their physical appearance or mental or physical abilities, or may be subject to humiliation or insults that constitute discriminatory harassment. The labour inspectorate should report such misbehaviour or remarks to the employer and mobilize the coercive tools at their disposal.

g. Discrimination based on union membership or activity (Convention No. 98, Art. 1)

Under the Fundamental Convention on the Right to Organise and Collective Bargaining, 1949 (No. 98),[17] workers should be afforded appropriate protection against discrimination that interferes with freedom of association, and workers' and employers' organisations should be adequately protected against any acts of interference by one another. The Convention also provides for the right to bargain collectively.

Employers must not take into consideration union membership or union activities in making decisions regarding, among other things, hiring, conduct and allocation of work, vocational training, promotion, compensation and benefits, discipline and dismissal.

Similarly, heads of companies or their representatives should not exert any pressure in favour of or against any trade-union organization.

[17] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.

Example:

- *In Spain, the director of a company and the manager of a consulting firm were convicted of trade-union discrimination for having solicited and carried out a mission aimed at reducing the influence of one trade union in favour of another trade union in the company. This constituted a means of pressure against a trade-union organization.*

The labour inspectorate must be vigilant with regard to the existence of trade-union discrimination because it impairs social dialogue within the company, with serious consequences for working conditions and safety and health at work. The absence of social dialogue is also detrimental to the fight against all forms of discrimination.

Certain grounds of discrimination are not covered by ILO Conventions, but there are Recommendations covering the two following categories:

h. Discrimination based on age (Recommendation No. 162 II-5)[18]

Discrimination based on age can take various forms, at the time of hiring, during a professional career and even when a person is dismissed. Older workers often encounter difficulties in employment and occupation because of prejudices about their capacities and willingness to learn; a tendency to discount their experience; and market pressures to hire younger workers, who are often cheaper to employ.

Younger workers under the age of 25 may also face discrimination. Biased treatment of younger workers can take many forms, including over-representation in casual jobs with more restricted benefits, training opportunities and career prospects; payment of lower entry wages, even in low-skilled jobs where such a wage differential is difficult to justify on grounds of lower productivity; longer probationary periods; and much greater reliance on flexible forms of contract.

Example:

- *The collective agreement of an airline fixed the retirement age for female cabin-crew members at 45 years of age and at 50 for their male counterparts. Female employees who had been retired instituted legal proceedings to have the relevant article of the collective agreement cancelled. In order to assess whether the clause was discriminatory, the Supreme Court of Madagascar relied on the Preamble to the Constitution and also on the international instruments concerning discrimination in employment and occupation, which Madagascar had incorporated into domestic law. Relying primarily on ILO Convention No. 111 and other international instruments, the Supreme Court of Madagascar ruled that the clause in the collective agreement relating to retirement age was discriminatory.*[19]

[18] https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312500,en:NO.

[19] https://compendium.itcilo.org/en/compendium-decisions/supreme-court-of-madagascar-dugain-and-others-c.-compagnie-air-madagascar-5-september-2003-judgment-no.-231.

However, there are exceptions when being of a certain age is an essential occupational requirement, and the objective is legitimate and proportionate. For example, in France, the maximum age for recruitment of a military firefighter is 25 because of the exceptional athletic qualities required for this mission.

The labour inspectorate should therefore check for the existence of discrimination by verifying the age of newly hired[20] workers, the age of workers who have been laid off, and the age of workers registered on the training plan. Deliberate failure to train workers — especially older workers — may result in inaptitude for the tasks they have to perform. Such failure on the part of an employer may constitute discriminatory harassment.

i. Discrimination related to physical appearance

Discrimination on the basis of physical appearance, such as a person's height, weight or aestheticism, should not be tolerated. Refusal to employ a candidate on the grounds of obesity should therefore be considered discriminatory.

Example:

- *A labour inspector was notified of a refusal to hire a waitress in a discotheque. The applicant explained to the inspector that the employer told her she was "too fat for the job, expressing the reason for his decision, in terms devoid of any ambiguity, without having first sought to know whether the applicant nevertheless had the required skills". The attitude he adopted was indeed the result of a desire to discriminate among the people he intended to hire, choosing those who seemed to him to meet criteria that were not compatible, if not contradictory, with the requirements of the law.*

Similarly, we speak of intersectional discrimination, when a person is more vulnerable or exposed to discrimination on several grounds (for example, a black women with disabilities is more likely to be discriminated against than a woman or a person of colour without disabilities, or a white person with disabilities, because she has several "intersectional" disadvantages.[21]

Example:

- *A métis candidate had applied for a job as a clothing store manager. When her application was rejected, the candidate applied a second time, substituting a photo of a non-métis friend for her own photo and removing her name in favour of her mother's name. This second application was accepted and a prior declaration of employment for a permanent contract was drawn up, subject to confirmation of employment by the company's regional director. After an interview with the latter, the candidate was finally offered a fixed-term contract. The court ruled that the*

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20 Discrimination based on age can also be implicit and hidden, as when a company does not publish discriminatory job vacancy notices but systematically rejects candidates of a certain age (despite their qualifications and suitability for the job). This is harder to detect and requires *a posteriori* monitoring.

21 www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-paris/documents/publication/wcms_548772.pdf, www.ilo.org%2Fwcmsp5%2Fgroups%2Fpublic%2F---europe%2F---ro-geneva%2F---ilo-paris%2Fdocuments%2Fpublication%2Fwcms_548772.pdf&usg=AOvVaw1JEYlmW8W1sgRexr_cwvMB.

> *candidate had been the victim of "characterized discrimination in hiring on two levels, when her first application letter was rejected and when the permanent contract was transformed into a fixed-term contract due to her physical appearance (her ethnic origin) and her foreign surname". This is still intersectional discrimination.*[22]

There may nevertheless be exceptions with regard to physical appearance when an essential and determining occupational requirement is concerned, and as long as the objective is legitimate and the requirement is proportionate. This may, for instance, be permissible in the entertainment industry, where a certain physiognomy may be sought without this discrimination being reprehensible.

The labour inspectorate will therefore have to make a precise analysis of a worker's situation upon hiring, and the type of position he/she is applying for, but also be aware that discrimination due to physical appearance can occur at any time during the work relationship. It may then lead to a situation of psychological (discriminatory) harassment, resulting in the worker resigning, suffering burnout or even more serious consequences.

[22] France, 2006, Court of Appeal of Paris.

I-II. The work of the labour inspectorate in the fight against discrimination

The issue of gender equality will be mostly addressed in the second part of this module.

As in all other areas, and in accordance with Convention No. 81[23] as noted above, the labour inspectorate's interventions in the field of discrimination and inequality can be carried out in different ways: prevention and advice, collection and processing of complaints, and monitoring in the workplace. The prevention of discrimination can also be carried out in the context of inspectors' examinations of internal regulations, company agreements, collective redundancy procedures and so on. Inspection teams can also be involved in the prevention of discrimination in the workplace.

Let us therefore considering the various tools labour inspectors can use to systematically fight against discrimination as part of the labour inspectorate's intervention plans.

This type of supervision is clearly not always easy to exercise because direct discrimination, which is easier to identify, is not always the rule. In fact, establishing the existence of discrimination requires proof that the perpetrator, in the exercise of his or her power of direction against a worker or a candidate for employment, has taken into consideration a selection or assessment criterion prohibited by law.

1. Information, prevention and consultation with companies

In accordance with Convention No. 81, Article 3b, the labour inspection system is responsible for providing information and technical advice to employers and workers on the most effective means of complying with legal provisions. Within this framework, labour inspectors inform employers of their obligations regarding equality and non-discrimination. At the same time, inspectors will remind employers that they remain responsible for any discriminatory behaviour that one or more workers may adopt towards one or more other workers, in that employers have the disciplinary right and duty to resolve any discriminatory deviations among their staff.

The labour inspectorate should conduct awareness-raising exercises in all companies, including informal ones, leading to the drafting of a charter or the inclusion in the company's internal regulations of all rights and obligations in terms of equality and non-discrimination. On this occasion, the prohibition of sexual and moral harassment should also be mentioned (cf. Convention No. 190, 2019).[24]

[23] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081.

[24] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.

Workers' representatives have an important role to play in improving working conditions and safety and health at work, including the fight against discrimination. The labour inspectorate should aim to make them more sensitive to this issue.

2. Complaints to the labour inspection service regarding discrimination

The labour inspectorate's institutional role

In the labour inspector, the worker is faced with a custodian of public authority who represents an institution. It is therefore necessary to explain to this person the aims, powers, ethics and operating rules of the labour inspectorate, specifying its modalities of intervention, in particular:

- the duty of confidentiality regarding his/her complaint (and how to act despite this difficulty) and professional discretion regarding the elements gathered during the investigation;
- the powers of investigation within the company (right of entry into the establishment, access to certain documents, possibility of taking testimonies);
- the possibility of intervention and sanctions.

It is not a question of giving a course on the powers of labour inspectors, but of saying what can/cannot be done in the current state of the case.

Intervention and confidentiality of the complaint: Article 15 of ILO Convention No. 81 stipulates: "Subject to such exceptions as may be provided for in national legislation, labour inspectors (...) shall treat as absolutely confidential the source of any complaint alleging a defect in the installation or a breach of the law and shall refrain from disclosing to the employer or his representative that an inspection visit has been made because of a complaint."

To be legally released from this confidentiality requirement the worker must inform his/her employer that he/she has informed the inspectorate. In concrete terms, he/she sends a letter to his/her employer explaining his/her situation and copies in the labour inspectorate. By doing so, the worker facilitates the intervention of the labour inspector, but this is not always possible because it can also put the worker in difficulty. If the worker wants his/her complaint to be kept confidential, the inspection will have to develop an intervention strategy by circumvention to achieve the objective of controlling the discriminatory situation.

Receiving the complaint

A complaint about discrimination can be made by mail, e-mail or during a visit to the office, in a planned or unannounced manner (a worker shows up at the office…), on behalf of the victim or a third party (family, other worker of the company, staff representatives…), or within the framework of collaboration with external partners (associations, other public services…).

Welcoming the complainant

Regardless of these circumstances, an interview with the victim will always be required. This interview should take place in a quiet setting, in a place that makes for trust and confidence, without time constraints. If sufficient time is not available, it is better to offer to postpone the interview by making an appointment within a time frame compatible with the urgency of the situation as expressed and perceived.

If the labour inspectorate cannot immediately take up the victim's complaint, and his/her situation seems to require it (discrimination can constitute a serious attack on the dignity of a person and put them in danger), it may be useful to refer him/her to a specialized association which listens to and assists victims, or to a service specialized in professional psychopathology. The victim may be accompanied, but it is important that the entourage (family, professional or social counsellors) does not take his or her place.

Listening to the complainant

Interviewing a victim of harassment or discrimination, often in acute pain, can be a real ordeal. It is usually a difficult, emotional time. You may find yourself facing a person who speaks disjointedly and cries. You must listen with empathy, while keeping a certain distance: neither question the speaker's words, nor support what he or she says (it is only after the interview that you will evaluate his or her story). It should be a semi-directive interview: you ask questions that need to be answered, but you also accept digressions.

You must avoid applying your own subjectivity and morals to what you hear (everyone is different). Reactions to situations of discrimination can also be very diverse (you should not underestimate the experience of each person). This listening should be accompanied by note-taking recording the terms used, as well as the avenues considered (see below).

Gathering the facts

This preliminary phase can take place in several stages and conditions the continuation and quality of the eventual investigation. Putting oneself in possession of the facts serves to objectify the situation, allowing the inspector to return to his usual work of investigation and finding evidence. This approach is also liberating for the victim. It may be useful to ask the victim to follow a chronological order from the first deterioration in working conditions. This often provides a better understanding of the situation and helps the victim to structure his or her story. A few elements need to be gathered and recorded accurately:

Work environment of the worker	Company activity, number of workers, organization chart, service organization, working hours, individual and social relations of the company, etc.
Work status of the worker	Qualification, position held, seniority in the company and in the position, etc.
Chronology of events	Actions, writings, consequences, persons implicated, possible witnesses, other workers concerned, etc.
Prior facts of a similar nature	Other cases of discrimination
Steps already taken by the worker	...

The facts must be as precise as possible (dates, actions, writings, words). To understand the story, you must also know the names of the protagonists (make it clear who is "he" is; who "the management" is, and so on). Finally, in the event of an investigation, it is necessary to know the names of possible witnesses, other victims, and the networks of influence within the company of the person(s) designated as the perpetrator(s).

Identification of the complainant's request

It is important for the worker to express himself/herself on his/her request and on what he/she wishes to obtain as part of the process. It is rare that the worker knows from the outset what he/she wishes and what he/she can hope for (to stay in the company, leave it or obtain a transfer; to obtain an apology, compensation, a sanction or even the departure of the person who has discriminated against him/her; to re-establish a normal work relationship; etc.). The identification of this request is thus generally not fixed from the first interview. And, of course, it evolves as the case progresses.

In addition, the worker can express a request for the inspectorate's services: information, intervention, investigation, penal action and so on. It is necessary to explain to the worker what can be done by virtue of the applicable legislation.

The wishes expressed are sometimes very contradictory, which should encourage caution. It is necessary to have a strong conviction that the worker wants action from the labour inspectorate before effecting any intervention. It is preferable that the worker's wishes are manifested by an unequivocal act: a written request or better, but only if it is possible, a letter that he/she will send to his/her employer with the wording "copy to the labour inspectorate". In any case, it is important to respect the wishes of the worker and not to act beyond what is requested.

If the worker does not want the inspectorate to intervene or does not want to do anything himself/herself, the posture to adopt will not be easy for the labour inspector, with the risk of his being reproached or even having his competence/integrity questioned. In this case, it may be best to send the worker a letter setting out the terms of the interview and expressing the worker's request or absence thereof.

Keeping the complainant informed

Depending on the elements collected, it may be possible to proceed to a first legal qualification of the facts reported. This means explaining to the worker that, according to his or her story, what he or she has experienced could — or could not — be legally qualified as discrimination, unfair execution of the work contract, violence, sexual or moral harassment, sexual assault,[25] etc. The precise references of the applicable texts must then be given. This affirms to the worker that these actions are prohibited by law, and that the employer has a duty to prevent and protect workers from them.

Depending on the legal qualification chosen, the worker will have some form of legal recourse that must be explained to him/her, including the possible intervention of the labour inspection services and other relevant public services.

a. Giving guidance and direction to the complainant

Inviting the worker to compile a file

The worker should be asked to put in writing the facts he or she has reported, and make a note of any new facts that he or she becomes aware of, and gather all the documents likely to support his or her story (letters, e-mails, memos, photos, complaints, records and medical certificates). The worker should also identify his/her allies and those from whom he/she can solicit testimonials (colleagues, clients). If this has not already been done, he or she may be advised to write to his or her employer setting out the facts (without qualifying them) and to urge that the discrimination stop, whether or not the employer is involved.

Referring the worker to other stakeholders

Whenever possible, the labour inspectorate will also look for allies, because some situations are particularly heavy and serious, and can therefore prove difficult to manage for the inspectorate alone; not all the stakeholders have the same means of action and it will be effective to combine them. Moreover, certain situations may require immediate intervention to which the labour inspectorate is unable to respond (great distress on the part of the victim that requires medical support, or a serious crime that must be referred to a prosecutor).

Depending on the case, it may therefore be useful to encourage the worker to contact the workers' representatives in their company or trade union, an association for the defence of victims, the occupational physician or a victim-support group, if they exist.

National and regional labour administrations should establish a network to ensure a coordinated and robust response to situations of discrimination and harassment. The labour inspectorate can use a network of this kind to manage the more complicated situations that arise within a company.

[25] If the mandate of the labour inspectorate allows it.

b. Analysing the complaint

The evidence-collection phase must be followed by an analysis phase to decide what action is to be taken. At this stage, it may be very useful to discuss the complaint and compare it with similar cases that have been dealt with in the past.

Writing to the worker to acknowledge the interview

This first letter should clearly explain to the complainant the significance of the labour inspectorate's intervention at this stage. The content will depend on the content of the interview, for example: “I met with you at my office on ... ; You explained your situation to me in the following manner ... ; According to the elements you provided me with, the facts could be qualified as ... ; I have noted that you do not currently wish me to intervene / Please find enclosed the letter that I am sending to your employer (to be completed) / I would inform you that I will have to carry out an investigation ...”.

Analysing the collected elements to define the appropriate strategy

It is now time to analyse the various elements of the case and decide whether an investigation is justified or necessary. If so, you will need to identify the additional elements to be collected: What further elements need to be materially established? What testimonies need to be elicited and from whom? And so on.

If an investigation is decided upon, you will need to establish, in advance, the list of interlocutors you wish to interview, the useful questions to be asked of them, and the desirable order of hearing, so that the investigation is channelled as it were “in a funnel”, revealing in detail the discriminatory facts whose materialization is sought.

It is also advisable to coordinate with other networks that may be contacted by the complainant, such as trade unions and associations that could take important initiatives for the future (e.g. "testing" operations set up to highlight discrimination).

Discussion with colleagues

In investigations of this kind, it is advisable to discuss matters with colleagues, so as to validate your strategy and not let yourself be influenced and carried away by emotions or presuppositions. In the case of an in-company investigation, it may be preferable to conduct the investigation with two inspectors, one of whom takes notes while the other conducts the interviews. This makes it easier to remember the various elements, and to keep in regular contact with the persons interviewed. If this type of investigation takes place in a hostile environment, it will be easier to manage with several people involved.

Bringing in one’s supervisors

Given the difficulty of this type of investigation in the most serious or systemic cases, and their possible repercussions at the local level, it may be useful to hold a discussion with the management (work directors), for an analysis of the ethics of the situation and possible follow-

up, or to make clear the prosecutor's position in the event of a strong probability of criminal proceedings.

If an on-site investigation is not possible (very late complaint, no witnesses, for example), it is advisable at the very least to leave a written trace of the facts gathered, by writing to the employer, citing the alleged facts and reminding them of their obligations to ensure prevention, non-discrimination and equality.

3. Initiating an investigation for discrimination

Referral to the labour inspectorate

In many cases, a labour inspector will be notified of discrimination directly by the victim, but there are many other actors who can provide initial information:

- Unions,
- Staff representatives,
- The health and safety committee,
- Associations or NGOs fighting for equality and against discrimination,
- Other administrations having noted the existence of discrimination in their own missions.

The labour inspectorate can also conduct a thorough investigation on its own initiative in response to converging indications of discrimination that it may have noted, or as part of a coordinated strategic plan across an entire sector targeting a particular criterion of discrimination, such as gender equality.

Managing the confidentiality of complaints

A distinction should be made between complaints and statements collected by a screening officer during his or her investigation.

Complaint	Collection of statements within a company
Article 15 c) of Convention No. 81: All complaints (relating to breaches of labour regulations) arriving at the labour inspectorate must be kept confidential. It is therefore appropriate: not to give the names of the complainants and, more generally, not to report the existence of a complaint. **This obligation is general and absolute and constitutes one of the cornerstones of labour inspection ethics.**	Article 12 of Convention No. 81: Labour inspectors are authorized to interview the employer or company personnel, either alone or in the presence of witnesses. **However, this collection of declarations must not result in difficulties for the declarants.**

Although the notion of the confidentiality of complaints is general, the statements of staff representatives of associations or public bodies, who are often better protected, can be used more easily than those produced by the victim alone.

Complaints can be made by mail, email or at a labour inspectorate office. Each situation will have to be clarified in terms of the action to be taken and the strategy to be developed. *A fortiori*, when the referral is written, it will be necessary to contact the complainant and ensure the exact nature of his or her request, especially if it is a request for intervention.

The absolute confidentiality of any complaint must be respected, even though the conduct and outcome of the investigation may be difficult to reconcile with this principle. In general, the labour inspectorate will carry out a classic inspection, during which the issue of discrimination will be addressed "by chance". The approach to be taken must be made explicit: we must explain to the victim the framework of the action, the possibilities, the limits of the action of the inspection services, and the way we will proceed. It is necessary to determine precisely what can be envisaged.

Reconciling the confidentiality of complaints and the effectiveness of the action

It is always desirable to move away from a complaint logic, so as not to be prevented from acting, given the obligation to keep complaints confidential. The existence of a letter from the complainant, addressed to the screening officer (inspector) "authorizing" him or her to intervene and report the complaint, would not be sufficient.

As we have already seen, the best solution — not always possible because it depends on the level of victim protection afforded by the country's legislation — is to invite the complainant to report in writing to his or her employer the facts at the origin of the discrimination, sending a copy of this letter to the labour inspectorate. It is essential that the words "copy to the labour inspectorate" appear on the letter from the victim. In this case, there is no longer any obligation to keep the complaint confidential. The person has initiated the procedure and the inspector can directly question the employer. The investigation can be starting without difficulty. Obviously, this approach must not be allowed to make the worker's situation more difficult.

An additional advantage of this process is that it makes the victim of discrimination aware of his or her responsibilities, and encourages him or her to reflect on his/her situation and formalize the facts at the origin of the discrimination. If the complainant has difficulty in writing (due to poor writing skills, for example), it is advisable to refer him/her to an anti-discrimination association or workers' organization.

Finally, the employer's response to the complainant's letter will be helpful in guiding the investigation:

- In the event of employer action, what written response was given, what action was taken?
- In the event of inaction, what does this mean?

It is also possible to invite the victim (or his or her trade union organization or an association acting on his or her behalf) to file a complaint, after ensuring that the discriminatory facts are consistent and sufficiently serious.

If, due to the circumstances of the case, none of the solutions specified above appears possible, in particular because of the complainant's state of extreme distress, the screening officer may, for the purposes of implementing a procedure for the protection of the victim, report the complaint. In exceptional cases of this kind, the agreement of the complainant will in any case be necessary.

Finally, in situations where the discrimination is collective and therefore does not concern only one person (failure to respect equality between men and women, systematic practice of refusing to hire on discriminatory grounds, etc.), it is possible to start an investigation without reporting the existence of a complaint.

Necessary information before going into the company

In the case of a complaint, all the elements necessary for the investigation, the strategy and possible follow-up will already have been discussed. In other cases, further information gathering will be necessary.

It is advisable to collect precise elements concerning the nature of the discrimination, if necessary, by asking the alleged victim to send a complaint to the labour inspectorate office, providing this information:

- Date and nature of the facts (refusal to hire, internship, dismissal, racism...);
- Action already taken by the complainant (complaint to the hierarchy, mail, contact with staff representatives...);
- The persons concerned (employer, management, workers...);
- The actions or comments made, indicating them as precisely as possible, and possible witnesses;
- Previous facts of the same nature and their precise circumstances (author, date, witnesses...);
- Analogous situations concerning other people (collective discrimination);
- The professional situation of the worker at the time of hiring: date of entry, qualification, job position, initial training;
- The professional situation of the worker on the day of the investigation: qualification, work position, working conditions, possible sanctions, access to training;
- The state of social relations: functioning of staff representative institutions, conflicts, etc.

Particular attention should be paid to the content of complaints. The claimant(s) may have very high expectations and overestimate the means of action of the labour inspectorate. To avoid any misunderstanding and frustration, it is essential to discuss with the alleged victim the

consequences of the report and, more precisely, the possibility of action by the labour inspectorate under the legislation and its limits; the possibility and the interest of taking action in the civil and/or penal field; the procedures envisaged in the particular situation, and so on.

4. The course of the investigation

Where discrimination is concerned, labour inspectors can proceed as follows, depending on the case:

- make an unannounced inspection visit, which has the advantage of preventing possible concealments or the development of a strategy for contesting the facts;
- make an investigation visit, of which the employer is notified, to enable preparation of the elements necessary for the investigation;
- in certain exceptional cases, issue a summons to the head of the company to report to the premises of the inspectorate if, for example, the situation is tense in the company;
- conduct a documentary investigation before, after or independently of any control, the only limits being the national regulations on the communication of documents.

Listening to the people in the company

It may be necessary to interview company workers who have witnessed the discriminatory actions. Article 12 of Convention No. 81 allows labour inspectors to interview, either alone or in the presence of witnesses, the employer or employees of the enterprise. However, care must be taken to ensure that the collection of statements does not result in difficulties for the declarants.

Moreover, the screening officer must clearly inform a worker of the use that may later be made of his or her testimony, so that the worker agrees to testify in full knowledge of the facts.[26]

Of those who can be interviewed, some should be interviewed systematically:

Staff representatives: It is advisable to question worker representatives on the existence of discrimination, including those who sit on the health and safety committee.

The defendant: The defendant must be questioned in respect of the evidence provided by the complainant. It is necessary to establish a difference in treatment, and the existence of prohibited discrimination, either directly or through the accumulation of evidence.

The defendant must present justifications for his or her decisions and must back them up with objective, concrete and materially verifiable elements. If the person in question is not the employer, it is nevertheless necessary to question the employer concerning the situation.

[26] HSE can compel workers to provide information in accordance with Section 20 (2) (j) HSW Act Health and Safety at Work etc. Act 1974 (legislation.gov.uk).

The employer: Depending on the elements collected, the investigator should at least summarize the findings with the employer. The employer should also to be questioned on the evidence obtained and give his or her own view of the events.

If there is sufficient evidence of discrimination, the employer's explanations will have to be recorded. It may be useful to remind the employer of the regulations prohibiting discrimination. The consequences envisaged may be discussed.

Consulting documents to prove discrimination

In accordance with Article 12 of Convention No. 81, labour inspectors are empowered to require access to any books, registers and documents whose maintenance is prescribed by the legislation on working conditions, to verify compliance with legal provisions and to copy or extract them. The list of documents accessible to inspectors depends on the legislation of the country concerned and may be limited or extensive.

The following table presents examples of documents that may be useful in a discrimination investigation, subject to their legal accessibility.

Control possibilities:	**Screening officers may obtain evidence from:**
	▶ any document ▶ or any information, ▶ whatever the medium, ▶ useful for the establishment of facts likely to prove the existence of discrimination.
Discrimination in hiring:	▶ job offers ▶ detailed information sheets on the positions concerned ▶ all internal documents prior to the active recruitment procedure (selection criteria) ▶ e-mails ▶ computer files and applications ▶ specifications established for recruitment agencies ▶ correspondence with the recruitment agency ▶ blank or completed hiring questionnaires ▶ applications received ▶ documents on interviewed candidates ▶ application files of persons not hired; the CVs received ▶ evaluation sheets of applications received ▶ maintenance reports ▶ reports from recruitment agencies
Discrimination in employment:	▶ employment contracts ▶ job descriptions ▶ organization charts

- schedules
- pay slips
- workers' individual files
- evaluation interview reports
- rating or assessment forms
- computer applications containing worker ratings
- disciplinary sanctions
- training requests and follow-up
- all documents relating to an assessment of workers (mail, e-mail, notes, etc.)
- notes setting out the criteria for awarding bonuses
- notices of suitability issued by the occupational physician
- social balance sheets

5. Follow-up of the investigation

What to do if discrimination is proven

As soon as an infringement is found to exist, a report or proposal for a penalty can be drawn up in accordance with the criminal law texts. Some legislation also allows for administrative financial penalties or prohibitions on obtaining public procurement contracts.

Where possible, the employer may be asked to regularize the situation. If the employer refuses to remedy a violation, this may constitute an aggravating factor to be considered by the inspector in the decision as to the follow-up procedure.

When the labour inspector finds discrimination that is not a criminal offence, he or she may submit observations to the employer, asking him or her to take all appropriate measures to put an end to it.

What to do if there are significant indications of discrimination, without it being proven

If the situation involves discrimination that is punishable under criminal law, it is sometimes possible to refer the matter to a magistrate, who may order further investigation by the police, who have other means of investigation at their disposal (searches, interviews under caution, etc.).

What to do if discrimination cannot be proven or is not proven

It may be useful in a situation of this kind to draw up a letter to the employer recalling the principle of non-discrimination, the prohibited grounds for discrimination and the penalties likely to be incurred. This is a reminder of the law and may constitute the intentional element in the event of a repetition of the facts.

6. Information for the victim

It is essential to inform the complainant that an investigation has been conducted in pursuance of his or her complaint.

Nevertheless, the requirements of professional secrecy and discretion should prompt agents to exercise extreme caution in transmitting information. A copy of a letter to an employer should not be forwarded to the complainant. It is preferable to draft a specific letter containing the elements of direct interest to the complainant.

The data transmitted must be sufficiently precise to be usable, but must not include personal data concerning other employees or confidential data belonging to the company.

Example:

- *in the event of wage discrimination, it is not possible to give personal information about other employees. However, the composition of the panel and the position of the complainant in relation to the panel may be communicated.*

II. Gender discrimination

Introduction

It is universally recognized that equality for women and men in the world of work is a core value of the international community and a fundamental human right.

Progress has been made in recent decades to advance gender equality in the world of work and, in many countries, national policy and legislative frameworks, as well as law enforcement, have improved considerably. In some countries, labour administration and labour inspection systems have become better at monitoring and/or enforcing application of the laws and regulations on gender equality. At the same time, gender equality has been taken up and promoted by employers, employers' organizations, and trade unions and their organizations. Many employers and employers' organizations have even promoted gender equality beyond legal requirements. Awareness of workers' rights to equal treatment and opportunities has increased. Many governments have adopted active labour market policies addressing gender inequality within the larger objectives of job-rich growth, as well as aiming for full employment, decent work and sustainable enterprises. Gender equality is now globally accepted as a necessity for sustainable development and poverty reduction for women and men, improving living standards for all.

However, major challenges remain. Women are a diverse grouping that includes workers in the informal economy and rural, migrant, indigenous, minority and young women, each category having specific needs. Poverty has been increasingly feminized; the gender pay gap persists; and there is a lack of work in all its forms, including full-time work. There is still discrimination in relation to pregnancy and maternity, and horizontal and vertical segregation persists in the labour market. Women predominate in involuntary part-time work. During a woman's life, transition phases also tend to create specific challenges. Despite advances in educational levels, women are over-represented in low-paying jobs, but under-represented in executive, management, and technical positions. Many women suffer poor working conditions and gender-based violence occurs at all stages of women's lives. In some situations, paid domestic labour is still one of the few options for women, including migrants. HIV/AIDS increasingly affects young, poor females. More women than men work in the informal economy, where decent work deficits are the most serious. Lack of social security, the gender pay gap, low pay in general, inadequate working conditions, exploitation and abuse including sexual harassment, and the absence of voice and representation are exacerbated for women by the additional responsibilities of their reproductive role and lack of access to resources and affordable services.[27]

Globalization has brought about major changes that are impacting the lives of all men and women, ushering in rapid growth and transformation in some countries, including new technologies. On the one hand, this progress has reduced barriers for women, creating more

[27] ILO, Resolution concerning gender equality at the heart of decent work, Geneva, June 2009 (ILC98-PR\3-2009-06-0323-1).

employment opportunities. On the other, some of the new jobs are in precarious and informal employment, which are not decent work, and are characterized by low pay and little or no access to social security, social protection and social dialogue, as well as by an absence of the full enjoyment of workers' rights. As globalization affects men and women differently, their different needs deserve further reflection, requiring gender analysis in both policy development and impact assessment.[28]

Those promoting gender equality at work should take into account the context of the country concerned. An obvious element to be considered is the socio-cultural context, including the existence or otherwise of a culture of gender equality. The existence of such a culture can be deduced from the equal presence of both men and women at all levels of society; the existence of policies, legislation and institutions dedicated to this issue; the non-discriminating use of communication and media in all their applications (information, education, and business); and the fact that women's rights are included in the common acquired heritage of human rights.

[28] Ibid.

II-I. The international legal framework

International labour standards are a primary means of promoting equality in the world of work for all workers. The two main pillars for promoting gender equality are the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Both Conventions are part of the set of ILO Fundamental Principles and Rights at Work, and feature among the core principles of the UN Global Compact.

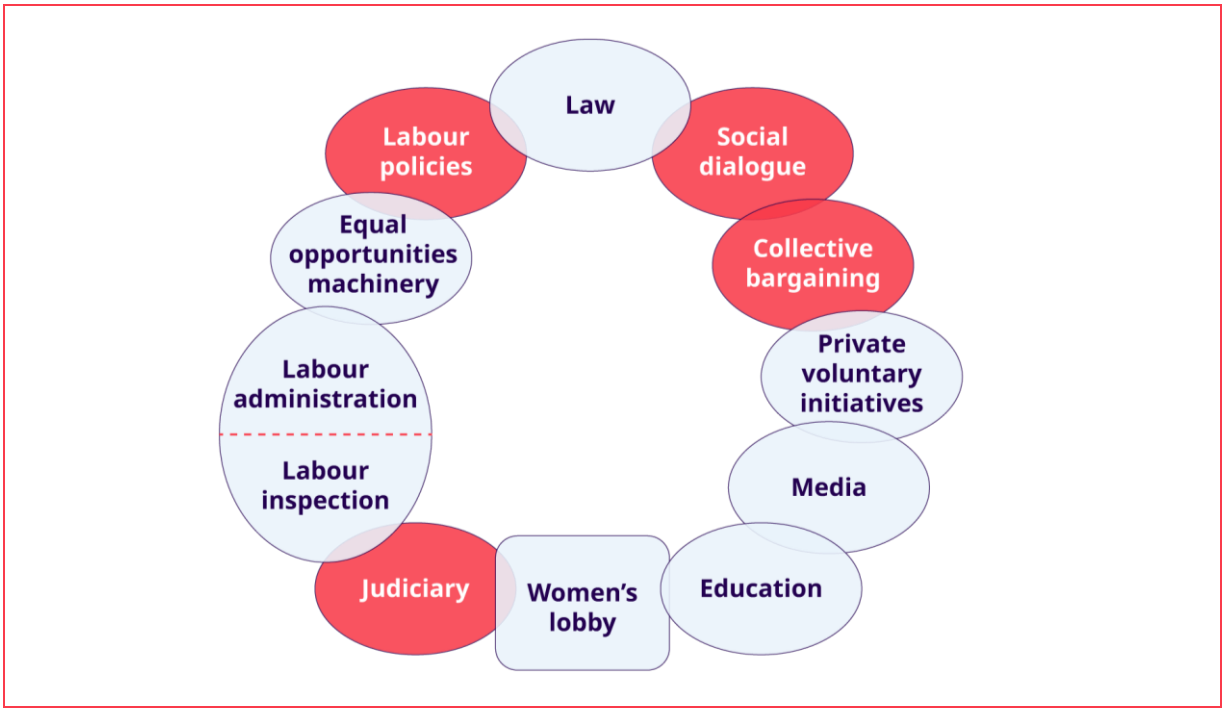
The Workers with Family Responsibilities Convention, 1981 (No. 156), and the Maternity Protection Convention, 2000 (No. 183), provide guidance for reconciling work and family responsibilities, and for protecting pregnant women workers. It is important to note that Convention No. 156 applies to both men and women workers with responsibilities for their dependants. The Part-Time Work Convention, 1994 (No. 175), and the Homework Convention, 1996 (No. 177), provide international standards for decent, flexible work arrangements that can improve gender equality.

Taken together, these instruments constitute the international frame of reference for Member States in designing their national legislative frameworks.

Within this context, the structure of the labour market and the situation of women within the labour market are of special importance as regards their effects on gender equality, in particular the levels of employment, unemployment and underemployment; job segregation; wage differentials; women's impact on atypical and temporary work; and the size of the informal and agricultural economies.

II-II. A systemic approach to addressing gender issues

A systematic approach is needed to transform "de jure" rights (rights in law) into "de facto" rights (rights in fact). The following graphic provides a reference for some key and interrelated elements of a rights enforcement strategy:



Law

Many countries have adopted legislation to counter sex-based discrimination. Affirmative action has also proved to be successful in many cases in redressing past and continuing sex-based inequalities in the labour market. The transposition of international standards into national law is a key step in building rights. If a national law on issues related to gender equality and women's rights at work is in place, the other mechanisms will tend to reinforce its implementation. In addition to laws addressing specific gender-related issues, existing and new legislation on any topic needs to be approached bearing in mind the potential for discrimination (based on sex, age, ethnicity, religion, family status, etc.), to ensure that laws do not have an adverse effect.

Social dialogue

The involvement of the social partners ensures that decisions reflect the socio-economic realities and concerns of employers and workers, and contribute to the sustainability of their enforcement. Social dialogue and tripartism are therefore essential policy tools for advancing gender equality in the world of work at international, regional, national, community and enterprise levels. When governments, and employers' and workers' organizations engage in dialogue and consensus-

building, real progress on gender equality can be achieved. For social dialogue to be effective and inclusive of different stakeholders' interests, a critical mass of women should be represented in leadership positions within governments and employers' and workers' organizations.

Bipartite social dialogue at the enterprise level plays a vital role in promoting gender equality in the workplace. In many businesses, gender-equality and affirmative-action plans are designed and implemented jointly by management and staff representatives.

Collective bargaining

There are three possible types of relationship between collective bargaining and legislation: i) mirroring the legislation in force and picking up on legal requirements; ii) filling gaps where there is no legal regulation in particular areas; and iii) going beyond legal provisions, using the law simply as the foundation upon which to build collective-bargaining agreements.

Where there are issues that have not been dealt with by the legislation, collective bargaining can play an even more important role, in that it opens new avenues that may, with time and consolidation, be taken up in the general labour law of a country concerned.[29]

Policymaking

Governments, together with the social partners, are called upon to develop concrete gender-equality policies, programmes and measures to translate the legal provisions into effective changes in behaviour. Adequate resources need to be made available for the implementation of these policies and programmes.

National equal-opportunities institutions

Experience shows that rights are better implemented when they are supported by credible, properly functioning and well-funded institutions, such as equal-opportunities bodies or other specialized institutions mandated to promote equality.

The judiciary

The application of national law depends largely on the judiciary. Efficient and adequately resourced courts with competent and gender-sensitized labour judges, combined with effective labour inspection, are the key pillars of a law-enforcement strategy.

Private voluntary initiatives (PVI)

Issues related to gender equality, non-discrimination, affirmative action and women workers' rights are often included in so-called "private voluntary initiatives" in the wider context of corporate social responsibility (CSR). There are codes of conduct or actions plans elaborated by enterprises (including MNEs) that incorporate measures and provisions that go well beyond the

[29] This was the case, for example, in Argentina, concerning parental leave for parents who adopt a child, or the issue of sexual harassment at work, initially dealt with at the industrial relations level.

prescriptions of national law in this field. Human resources management should be gender-inclusive and should adopt gender-sensitive workplace policies and measures.

Media and social networks

These play a key role in influencing public opinion, values and principles. Media and social networks may progressively become a point of reference for society. Strategic use of these media can contribute to creating a shared culture of gender equality based on full respect and recognition of women's identity, needs, dignity and rights.

Education

A culture of gender equality needs time to become rooted before it begins to influence behaviour. Education, starting from primary school, can induce in the younger generation a "natural" attitude of non-discrimination.

The women's lobby

The above system would not be effective without one key element: the capacity of women to organize and mobilize themselves through the many different forms of representation which we have become familiar with in recent years. These include women's groups; NGOs; professional associations; national, local, and international networks of women; institutions; and elected bodies. Gender policies are not sustainable without the attentive, vigilant, and organized presence of women. Gender mainstreaming, to be sustainable and effective, must be supported, oriented and monitored by a strategy of strengthening women's representation — the so-called "women's empowerment" strategy.

▶ II-III. Gender and labour inspection

1. Women in the labour inspectorate

The full inclusion of women in the labour inspectorate has been an important principle since the founding of the ILO. Article 8 of Labour Inspection Convention No. 81, (1947) and Article 10 of the Labour Inspection (Agriculture) Convention No. 129, (1969) require that both men and women be eligible for appointment as inspection staff.

According to the findings of the 2006 General Survey on Labour Inspection (Chapter V), based on information provided by governments, there is generally no legal impediment to women working as labour inspectors. Many countries indicate that their legislation gives women equal opportunity when it comes to such employment. The Government of Denmark even reports that, in recruitment, the principle of equal numbers of men and women in labour inspection teams is observed. Nevertheless, in many countries labour inspection staff are still mostly male or the number of female staff does not reflect the proportion of women in the workforce. Furthermore, the proportion of women in the inspectorate is not always easy to interpret.

The General Survey states that: "In view of the important role for women in the labour inspection system, it is to be hoped that more steps will be taken to encourage the recruitment, training and promotion of women inspectors and to ensure that there is greater gender awareness throughout the inspection system."

2. Gender issues covered by labour inspection

The gender-related issues covered by the labour inspectorate are linked to the different systems in place, their focus (labour, OSH) and their coverage.

According to the 2006 General Survey, provisions relating to the protection of women as regards pregnancy and maternity are covered by most systems of labour inspection. There is also evidence of an emerging role for labour inspectors in monitoring workplace equality and diversity. The focus of most reports is first and foremost on issues of hygiene, welfare, and occupational safety and health.

Some limitations to the action of labour inspection affect vulnerable working women. This arises, for example, from the difficulty in allowing labour inspectors to visit private homes. Many national provisions authorizing workplace visits exclude people who carry out domestic work or homework (the majority of whom are women) from protection under labour law.

Most national laws and regulations authorize labour inspectors to visit workplaces and enterprises for the purpose of inspecting working conditions. In several countries, only those workplaces that are formally liable to inspection may be visited. However, this does not necessarily mean that all other premises are exempt. In countries where it is not the status of the establishment that makes it liable to inspection, but the existence of paid employment, all

workplaces are liable to inspection; this is the case in Belgium, under a very broad definition of the term “workplace”. In many countries, inspectors are also allowed to enter premises other than workplaces liable to inspection when they have reason to believe that paid employment covered by their remit occurs. In the case of a private home, the consent of the employer, the occupant, or a judicial authority is generally required. The Committee stresses that, in view of the broad definition of premises liable to inspection, labour inspectors must strictly respect privacy.

II-IV. The ILO Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951 (No. 100)

The Convention aims to promote equal opportunities for men and women to obtain decent work, i.e. work that is productive, adequately remunerated and carried out in conditions of freedom, equity, security and human dignity.

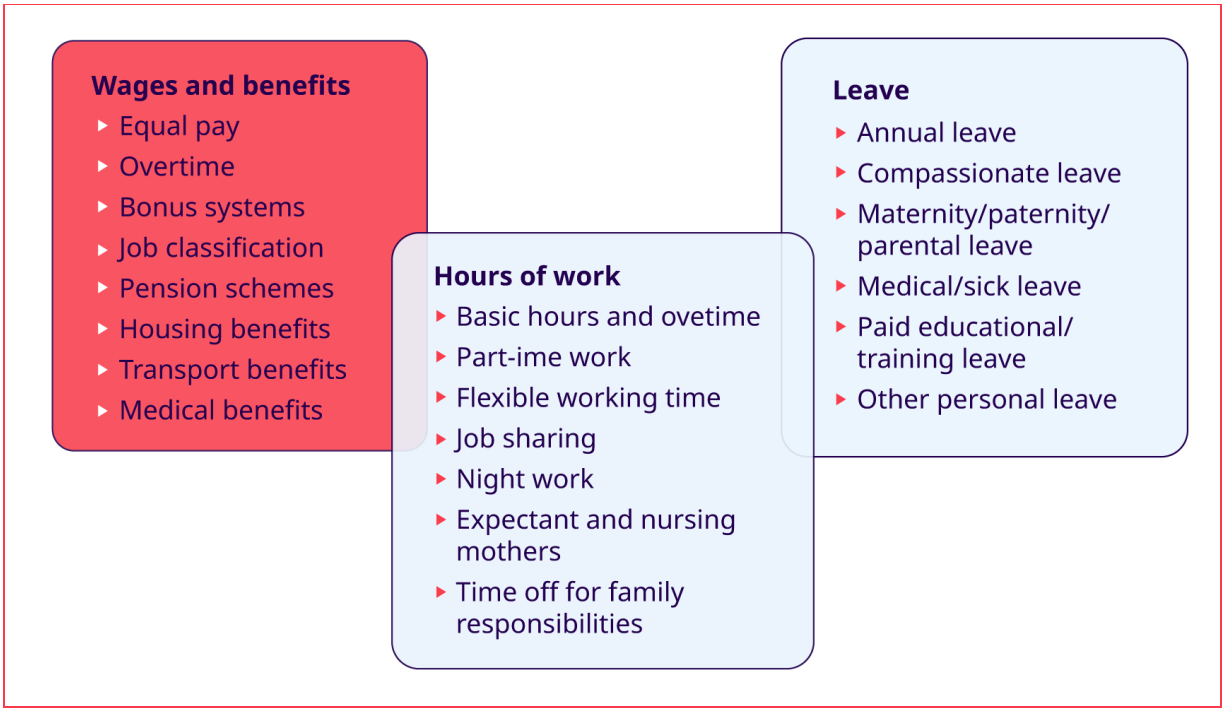
1. Definition and typology of gender discrimination

Gender discrimination is rooted in the values, beliefs and stereotypes that people have about gender roles. Stereotyping means attributing to each sex certain qualities that determine what is expected of them, as well as what are deemed to be correct or incorrect behaviours and attitudes. This serves to maintain inequalities and influences people's choice of careers and occupations, as well as participation in domestic and family tasks, and promotion to decision-making positions. In the context of paid employment, the resulting division of labour determines the way in which men and women are channelled into a highly identified typology of work, with men concentrated in the highest and best-paid positions. It is essential to start from the existence of this form of "segregation", as it shows the hold that gender stereotyping has as a socio-cultural determinant in business and labour.

Gender discrimination will occur when these stereotypes override or are applied in preference to the legal system.

All employees of a company should be given equal opportunities in employment, irrespective of their sex. Some women workers face discrimination merely because they are women, or because of their marital status or family responsibilities.

a. Working conditions[30]



Equal remuneration for work of equal value

Significant gender disparities in remuneration are among the most stubborn features of labour markets. Even though the gender pay gap has narrowed in some places, on average women workers continue to earn less overall than men (combining pay and other non-wage benefits). This gender pay gap has many causes, and sex discrimination is one of them. The principle of equal remuneration for work of equal value applies not only to cases where men and women undertake the same or similar work, but also to jobs undertaken primarily by women that are undervalued if the actual requirements of such jobs are compared with those of jobs undertaken mainly by men.

The Equal Remuneration Convention, 1951 (No.100), with its Recommendation (No.90), is the most important international instrument for addressing this issue. It is one of the core Conventions included in the Fundamental Principles and Rights at Work and contributes to the 10 principles of the UN Global Compact.

[30] See also Module 6, "Inspection of Working Conditions", ILO/ITC training package on "Building modern and effective labour inspection systems".

Bonus Systems

Since bonus systems apply mainly to fixed-term and full-time employment, women are often at a disadvantage. The focus should be more on basic pay increases, which are of greater benefit to women. Alternatively, bonus systems could be expanded to include all workers regardless of status (including non-permanent workers) or extended to include grades of jobs which have not traditionally attracted bonus payments. It is important to ensure that bonuses are paid without discrimination, either direct or indirect.

Job classification

Jobs can be classified by categories or hierarchies. Women are often in the bottom categories.

For an objective and fair assessment of jobs, evaluation methods must be free from gender bias.

Promoting equity: Gender-neutral job evaluation for equal pay. A step-by-step ILO Guide[31]

In 2009, the ILO developed a step-by-step guide which sets out the various methodological components of the process and explains the criteria that should be met to avoid discriminatory practices. It can be adapted to different economic and organizational contexts and to large and small enterprises. The guide is aimed at workers' and employers' organizations, officers of equal opportunity bodies, human resource managers, gender specialists and pay-equity practitioners responsible for implementing pay-equity programmes.

Consideration should also be given to special training for women to enable them to upgrade their qualifications and thus improve their access to higher-graded jobs.

Pension schemes

Most women are in lower-paid employment and pension schemes that reflect salary levels, a situation that leaves women with lower pensions than men. More women than men may have interrupted work histories, as women often need to take career breaks or extended periods of leave to fulfil their family responsibilities. Alternatively, women may enter the workforce later, having had children. Workers with an interrupted employment history or who have delayed entry into the workforce will probably not have sufficient funds in their pension schemes to receive adequate pension benefits upon retirement.

Many women work on a part-time basis and therefore may not have the same pension rights as full-time employees, or they may be excluded completely from employers' pension schemes.

[31] Promoting equity: Gender-neutral job evaluation for equal pay. A step-by-step guide, Marie-Thérèse Chicha, ILO, 2009, ISBN 978-92-2-121538-7.

Housing benefits

In some countries, married women are denied housing allowances on the basis that such benefits are available for men only. Housing allowances should be made available to women and men workers on an equal basis.

Transport benefits

Organizing transport can be stressful for women because of their family responsibilities or because it exposes them to potentially dangerous situations. Employers would do well to arrange transport for men and women workers to overcome lengthy travel times or dangerous situations, or at times when public transport is not reliable, such as at night. This is particularly important for women who may be subject to harassment and violence.

Medical benefits

Health insurance should be available to all workers, even those in non-permanent positions, most of whom are women. Wherever possible, healthcare provisions should be extended to cover workers' children. Benefits should include provision for a certain number of paid sick days each year, leave for medical check-ups or hospitalization and so on.

Basic hours and overtime

Hours of work for both men and women should be calculated to avoid differentiation and possible gender discrimination or unpaid overtime at the request of the employer.

In some cases, women's ability to work overtime is limited due to their family responsibilities or prohibitions on women performing night work. One point of view is that women should have access to overtime and be paid for it. On the other hand, it may be more equitable to find ways to reduce the need for overtime and distribute working hours better.

Part-time work

More and more part-time jobs are being created, and most of these jobs are held by women. Part-time work is a necessity for many women due to their domestic responsibilities and the lack of child-care facilities. Part-time workers may be at a disadvantage in comparison with colleagues who do equivalent full-time work. This may be due to lower hourly rates of pay (contrary to the principle of equal remuneration for work of equal value); the impact on pension and other benefit schemes; ineligibility for various forms of leave; limited opportunities for training and promotion; and the perception that a part-time worker is a less committed worker.

Part-time employees should receive the same benefits and enjoy the same conditions as full-time employees.

Ensuring that part-time workers have rights in respect of redundancy is also important. If part-timers are automatically chosen for redundancy before full-timers, women are likely to be disproportionately disadvantaged. This constitutes indirect discrimination and should be prevented by collectively negotiated redundancy schemes. Part-time workers should also have access to redundancy pay.

The Part-Time Work Convention, 1994 (No. 175) and its Recommendation, 1994 (No.182) could be used as guidance by labour inspectors in addressing this issue.

Flexible working time

Women may have difficulty in keeping to fixed schedules because of family responsibilities. Company managements could be persuaded to be flexible on working hours, for example by establishing core working hours of six hours per day and flexible working hours before and after, as long as a certain number of hours are worked per week. In other cases, there could be an averaging of annual hours.

Care should be taken when introducing flexible working time schemes for improving productivity to ensure that these do not have a disproportionally negative effect on women.

Night work

The removal of restrictions on women working at night could, in some contexts, be a way of reducing discrimination against women in the workplace because it opens up more employment possibilities, often at higher rates of pay than day-time rates.

An alternative view is that special protection for women is necessary to keep them from excessively arduous working conditions and to protect their reproductive role. It may be the case in some circumstances that women working at night are not as safe as their male colleagues in travelling to and from work. Women working at night would also have overly long working days as they are likely to also bear more of the domestic burden during the day, sometimes in conjunction with other paid work.

In 1990, the International Labour Conference adopted a protocol to the 1948 Night Work (Women) (Revised) Convention which provides that the prohibition on night work for women can be lifted where employers' organizations and unions reach a suitable agreement in this regard. In the same year, the Conference also adopted the Night Work Convention (No.171) to protect night workers in general.

Annual leave

Many women with precarious contracts (i.e. temporary, part-time and pieceworkers) are not entitled to any leave, and therefore work throughout the year without a break. These workers should have at least the same pro-rata entitlement to leave as their full-time colleagues.

Medical and sick leave

In some countries, days off each month are granted in consideration of a woman's special health needs during menstruation. This may consist of one or two days' paid leave per month and is included in collective agreements as leave days additional to annual leave or normal sick leave.

Paid educational leave and training leave

Women, including those working part time, should have access to the same training opportunities as men, for instance training related to technological change. Training should be used to redress existing biases in employment hierarchies.

> The Paid Educational Leave Convention, 1974 (No. 140), recommends granting paid educational leave to workers for educational purposes for a specific period during working hours, with adequate financial entitlements.

b. Maternity and family responsibilities

In many countries, maternity protection and benefits have featured in legislation and collective agreements for many years. Most countries provide for a minimum level of maternity protection under the law, although there are still some countries where there is no legal protection, making collective agreements the only source of such rights. Collective agreements often serve to improve upon the protection and benefits provided by law.

> The importance of maternity protection and benefits is underscored in international instruments such as the ILO Conventions on maternity protection: the Maternity Protection Convention, 2000 (No. 183); the Maternity Protection (Revised) Convention, 1952 (No. 103); and the Maternity Protection Convention, 1919 (No.3). The issue of maternity protection was on the agenda of the first International Labour Conference of the International Labour Organization in 1919.

Maternity leave and benefits

Maternity leave is important in ensuring that women have sufficient time off work to let their bodies recover, to adapt emotionally to the changes resulting from childbirth, and to properly nurture their children. Maternity is not an illness, therefore maternity leave should be clearly distinguished from sick leave.

Maternity leave prior to birth allows the mother to rest during the latter stages of pregnancy when she might otherwise be too uncomfortable to work. Consequently, Convention No. 103 advocates a flexible approach to the duration of maternity leave prior to birth.

In most countries where social security systems are developed, maternity cash benefits are paid by the State. In others, the employer pays for maternity leave or supplements state-provided maternity benefits. Maternity cash benefits should be at a high enough level to sustain the mother's income during her leave.

Miscarriage and stillbirth

Stillbirth is the term used for a foetal death in late pregnancy. Miscarriage is the term used for foetal death in earlier pregnancy. The point in pregnancy at which a miscarriage becomes a stillbirth is determined by the laws and policies of each State. In a few countries, a stillbirth is considered as a birth, entitling a woman to the same benefits as a live birth. This is not the case for a miscarriage. The ILO recommends that appropriate leave and health care be available for cases of both miscarriage and stillbirth, especially considering the emotional stress suffered by the woman and family members in such circumstances.

Adoption

A period of leave should be provided to ensure that the adopted child and parent(s) have adequate opportunity to bond as a family. The period could be similar to that provided in law for post-natal maternity leave. All the negotiated benefits in respect of family responsibilities should be available to the parents of adopted children.

Rights of pregnant and nursing women

Laws and/or collective agreements include provisions to ensure that pregnant and nursing women can continue to work and cope with their pregnancies, and meet their family responsibilities. These provisions cover such things as flexible or shorter working hours; additional rest breaks; lighter and safe work; shift from night work to day work; and nursing breaks, which should be frequent and long enough to enable mothers to continue to breastfeed their children.

Pregnant women and nursing mothers should be permitted to avoid heavy physical labour and choose to work in the positions that suit them best, for instance alternating between sitting and standing.

Working with hazardous materials and chemicals may harm an unborn child; lifting heavy weights and working with vibrating machines should also be avoided.

Job security

Care should be taken to ensure that maternity does not result in reduced job security. Women should have the right to return to the same or a similar job after maternity leave without interruption in seniority and with no loss of annual or sick leave. They should have the option of returning to part-time work, if they so request, and/or to full-time work after a period of part-time work. They should not be victimized or lose their jobs due to pregnancy, and should be reassigned to non-hazardous tasks.

Pregnancy testing at the time of recruitment or while on the job should be prohibited.

In addition to the Maternity Protection Convention, the following international instruments provide guidance for addressing this issue: Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and Recommendation (No. 111); the Termination of Employment Convention, 1982 (No. 158) and Recommendation (No. 166).

Dignity at work and the vulnerable

Please refer to Module 15 for "Sexual harassment, violence and psycho-social risks at work" and Module 9 for "Vulnerable groups of workers".

The right not to be discriminated against is nothing more than the right to be treated according to one's merits and abilities, and not to be disadvantaged because of the social stereotypes imposed on a gender, group or community. All persons should enjoy equality of opportunity and treatment in respect of employment and occupation, as stipulated by Convention (No. 111, 1958) and Recommendation (No. 111, 1958).

The labour inspectorate will be able to intervene in case of gender discrimination in the same way as for all other forms of discrimination and using the same methods.

However, Convention No. 100, (1951) goes beyond the mere proscription of discrimination and raises the issue of equal pay. This requires the labour inspectorate to adopt a more global control and monitoring strategy leading to the promotion of equality between men and women in the workplace.

2. Intervention by the labour inspectorate in respect of gender equality

a. The process of analysis

Interventions by the labour inspectorate are required to detect and combat all types of gender-based discrimination.

Monitoring a company's compliance with gender equality legislation will involve analysis of certain specific points, in particular access to employment; job classification (categories); promotion and training; remuneration; organization of working time; reconciliation of professional, personal, and family life; and the prevention of sexual and psychological harassment. It will also be necessary to analyse the causes of termination of employment (dismissals and resignations), as well as the typology of holders of precarious contracts (part-time and fixed-term).

The choice of points to be analysed, which will have to be determined beforehand, will depend on the type of company, the field of activity, the sector, and the scope and depth of the diagnosis to be carried out.

The Context

This initial approach will allow for a summary mapping of the company's personnel structure and the beginning of a general diagnosis of the way jobs are allocated, without reaching any definitive conclusions.

The second step is to obtain data that will make for an understanding of the gender composition of the company's workforce, in particular:

- the characteristics of the company (whether or not it is newly created, its size, growth prospects and so on) and the distribution of its staff by category, disaggregated by sex;
- the sector and field of activity of the company, the composition and degree of qualification of the required personnel and any identifiable factors suggesting segregation;
- the socio-economic situation of the employment catchment area, rural or urban, the availability of qualified labour of both sexes for the jobs on offer, and how things are changing.

Quantitative data

Any person seeking to prove the existence of discrimination, and indeed anyone accused of discrimination and wishing to defend him or herself, is required to conduct a statistical analysis of labour relations: access to employment, wage-setting, promotion, leave and so on.

If the statistics provide data indicating equality, the analysis will go no further, and the diagnosis will be favourable.

> The judgment of the European Court of Justice of 9 February 1999 (EDJ 1999/99) states that when a measure or decision has a disparate effect on a group and/or that this effect is proven by reliable and significant statistics, the measure or decision may be qualified as discriminatory, unless it can be shown that this measure is based on objectively justified factors unrelated to gender.

According to this ruling, statistics must meet the following requirements; they must:

- form a relevant basis of comparison to achieve the desired objective;
- be meaningful; the results must show significant imbalances;
- be persistent (lasting); imbalances must cover a significant period.

Qualitative Data

Qualitative data consists of the procedures, criteria, practices and actions implemented by the company, the study of which is important.

If the quantitative results show a significant distortion of equality, the next step will be to analyse the extent to which the company's management is implicated in the factors amounting to discrimination.

To complete this step, it is necessary to have previously resolved three important issues:

Procedures, criteria, practices and actions to be analysed

The following procedures, criteria and practices will need to be reviewed:

- Access to Employment: recruitment, contracting and training processes;
- Job category determination: the formal or informal systems of job evaluation and wage determination for each position;
- Remuneration: wage policy as a whole and non-statutory remuneration (payments not determined by an agreement);
- Promotion: promotion procedures and access to lifelong learning;
- The impact of temporary contracts: hiring practices related to the activity and type of employment, and the impact of part-time work.

How to acquaint oneself with the procedures, criteria and practices

In some cases, this will be simple because the procedures and criteria are regulated and transparent; in other cases, it will be more complex. Where recruitment and professional development practices and criteria are concerned, to obtain complete and reliable information, the person conducting the analysis will have to supplement the information provided by the company with staff questionnaires, if this is possible, using the representative bodies present in the company as intermediaries.

Staff should be asked:

- how equal opportunities are ensured within the company;
- whether men and women have the same access to opportunities in staff selection and promotion;.
- whether there is equal access to training;
- whether colleagues have a perception of wage inequality;
- how reconciliation of family, personal and professional life is ensured;
- how the company implements policy and/or procedures to prevent and address workplace violence and harassment;
- if no such measures exist, whether they think an equality plan is needed.

Each worker must have the opportunity to answer open questions and freely make suggestions regarding the promotion of equal opportunities within the company.

How to evaluate them

To assess a company's procedures, criteria, practices and actions, the inspector(s) must refer to the legal definitions contained in national legislation, in particular the definitions of direct discrimination, indirect discrimination and positive action, as we have seen for discrimination in general.

Direct discrimination on the basis of sex occurs when unequal treatment of women and men results directly from laws, rules or practices that explicitly differentiate between the two sexes (for example, some laws do not allow women to sign a contract).

Indirect gender discrimination occurs when rules and practices that appear to be gender-neutral result in disadvantages that are suffered primarily by persons of one sex, often women.

A criterion, practice or act based on a person's sex (or on circumstances closely related to sex, such as maternity or breastfeeding, or to family responsibilities or marital status) must be considered as part of the diagnostic process as a practice likely to constitute direct discrimination. Gender and family obligations should not be considered by the company in its decisions regarding personnel management, except as regards the recognition of the rights to which female workers are entitled under labour law. Any obstacle to the exercise of these rights would also be discriminatory.

If the quantitative results reveal a significant disparity, and this disparity is caused or provoked by a practice, a criterion or a rule (even if it is not based on gender), this practice will be highlighted as potentially discriminatory in terms of impact, i.e. as constituting indirect discrimination.

Finally, procedures, practices, criteria, rules and measures that do not affect quantitative outcomes — in other words, that do not encourage or provoke segregation but remain truly neutral — will not be considered discriminatory. However, some national laws stipulate that where an imbalance is observed, legal measures may be taken to reduce it.

b. Affirmative action

Affirmative action measures reverse the general principle of equality by granting more favourable treatment to a group that is in a situation of manifest inequality. Such measures should be transitional, applicable only if such situations exist, reasonable and in each case proportionate to the objective pursued. Where employment is concerned, it is recommended that positive action measures should be decided on a bipartite basis between company and worker representatives.

c. The discrimination test and measures to be adopted

Once negative elements have been quantitatively identified and there are found to be gender-based practices, criteria, rules or actions, or gender-related or apparently neutral situations that appear to be harmful, one more step is required to determine the existence of discrimination.

This step is necessary because the principle of equality does not prohibit all forms of inequality of treatment, but only artificial or unjustified inequalities not based on objective criteria that are sufficiently reasonable in the light of generally accepted criteria or value judgments.

It is therefore the duty of the labour inspectorate to judge whether those practices, criteria, rules or actions adopted by the management of a company that result in a difference in treatment can be justified or are discriminatory. This judgment is sometimes referred to as a **discrimination test** or **equality test** and includes the following criteria and factors:

1 **Necessity**: There is a legitimate reason for unequal treatment in the company;

2 **Adequacy**: There is a correspondence between the inequality of treatment, the factual hypothesis that justifies it and the goal pursued;

3 **Proportionality**: There is proportionality between the above factors.

Thus, even if national legislation stipulates that there must be no discrimination in access to employment, if a difference in treatment is based on a characteristic related to gender, that characteristic must constitute an essential and determining occupational requirement, the objective must be legitimate, and the requirement proportionate.

In the world of entertainment, for example, discriminatory treatment is permissible when a company recruits an actor for an identified role of woman or man. The equality test is performed by applying the three criteria: the legitimate objective of the unequal treatment is the operation of the business; the nature or context of the activity justifies the consideration of gender: the alternative of employing a person of the opposite sex is not possible; and the requirement of belonging to one or the other sex is proportionate to the objective, i.e. it is necessary for the operation of the business.

Where indirect discrimination is concerned, in various national legislations quantitatively measured breaches of equality caused or provoked by apparently neutral practices, criteria, rules or actions will generally not be considered discriminatory if they are justified by a legitimate corporate objective, and the means implemented to achieve this objective are necessary and appropriate.

The equality test is more difficult to apply in such cases.

The legitimate objective must be understood as a practice that responds to a clear and justified production need of the company and is developed within the legal framework. Practices that are merely timely, convenient, arbitrary or illegal will be considered discriminatory. The practice must be necessary to meet the needs of the organization, without there being any possible alternative that would achieve an equivalent result. Failing this, discrimination will be deemed to exist.

The practice must also be proportionate, i.e. its negative effect must be assessed in terms of the value that the practice in question has for the company.

The discrimination test (or equality test) will produce one of the following results:

- Quantitatively measured negative effects;
- Quantitatively measured negative effects caused or brought about by company practices that take into consideration the sex of persons, situations related to sex or the assumption of family obligations, or caused or brought about by apparently neutral practices. N.B. Such practices have nevertheless passed the equality test;
- Quantitatively measured negative effects caused or brought about by company practices that take into consideration the sex of persons, situations related to sex or the assumption of family obligations, or apparently neutral practices that have not passed the equality test. In other words, where there is discrimination on the grounds of sex.

Considering these results, preventive measures should be designed as follows:

- In the first and second cases, measures to promote equality must be proposed to company and worker representatives. These measures may be included in a company equality plan.
- In the third case, the company must take immediate corrective action to eliminate the discriminatory practice and prevent its recurrence.

Then, and only then, can the measures described in the section above be discussed and negotiated with employee representatives (e.g. as part of an equality plan).

II-V. Categories of analysis

A series of categories will be analysed below: access to employment; job categories; career promotion; wages; higher incidence of temporary and part-time contracts; and reconciliation of personal, family and professional life. Each category will be examined as follows: (i) quantitative data (situation of lack of equality); (ii) qualitative data (procedures, actions, criteria, company practices and literature review); (iii) acceptable and unacceptable justifications (results of the equality test); (iv) corrective measures to be adopted.

1. Access to employment

a. Quantitative data

Examination of the quantitative data leads to an analysis, using gender-disaggregated data, of the number and percentage of workers hired and having access to training.

b. Qualitative data: Procedures, actions, criteria, company practices

The selection and training processes include a series of preliminary operations, generally opaque, which must be examined by the inspector:

- by discovering the recruitment channels, the places where candidates are selected (schools, universities, vocational or technical training centres, etc.);
- by investigating the systems used by the company to collect and obtain information from job seekers, including job application forms, job offers (internet or press), interviews and examinations.
- by clarifying the profiles the company requires of its employees.

Conducting a survey using a questionnaire is very useful way of discovering the company's practices in terms of access to employment. The results of a survey of workers of both sexes who have joined the company in recent years can usefully illustrate the process of integration into the company and the qualifications and skills required.

It would be an obvious case of direct discrimination if job offers solicited applications from men and not women. However, the issue is more complicated if companies recruit through temporary employment agencies or labour-loan subcontractors. In the latter case, the user firm may be practising indirect discrimination in access to employment if the labour loan is illegal and the loaned workers are of the sex that is under-represented and work under less favourable conditions.

Similarly, there are occupations that are designated by male or female nouns and adjectives, or that are generally associated with male or female characteristics. A job offer that describes a position in this way discourages the other sex from participating in the selection process and is therefore considered discriminatory.

The general rule to follow is that the company may not ask those involved in the selection process for information about their family obligations or marital or family status. Job application forms, questionnaires or interviews should avoid questions that are directly or indirectly related to them.

Finally, it is necessary to examine the job profile as part of the selection process, i.e. the requirements at the time of recruitment, even if they are not related to gender. In the male-oriented industrial sector, it is particularly interesting to analyse the training requirements sought for recruitment.

The Fasa—Renault case. The defendant company required recruits for a specific production line to have a university degree or vocational training in technical subjects, but the union proved that for almost a whole year no women had been hired, while 120 men had been taken on, and that in the geographical area where the company was based there were practically no women with the required qualification. In the end, the company, faced with the discriminatory situation described above, was unable to prove the need to require this professional qualification on the grounds of the content of the work to be carried out.

c. Acceptable and unacceptable justifications

Inequality may be due to a socio-economic or socio-professional context in which men or women are under-represented. Logically, the absence of equality is justified if there are no male or female candidates for certain jobs.

Discrimination will then exist only if job offers discourage men or women or people with family responsibilities from applying by using gendered definitions of categories and jobs. These definitions would therefore have to be changed, or jobs would have to be clearly indicated as open to both men and women.

Exception: Considering the gender of a candidate may be justified in the entertainment sector or when image is important: models, actors, and actresses, etc. It does not appear that gender is a real and determining requirement in safety-related activities.

A "comfort" measure for the firm, such as the exclusion of a candidate who does not have training that is not necessary to perform a job, cannot be justified by the argument that the firm needs staff that can be promoted to other jobs later. The objective is legitimate, but the requirement is not necessary to perform the work.

d. Corrective measures

The first corrective measure to consider is financial compensation. However, it is difficult to financially compensate a person who has not been hired.

Next, it is necessary to eliminate procedures and forms in which the gender of applicants or employees is or has been taken into consideration; to review job-profile elements; and to clarify the company's current non-discrimination policy in future job offers.

ADECCO (France). The courts have ruled in two cases that ADECCO's management accepted discriminatory demands from their corporate clients, particularly for "young, white French women". Following these cases of discrimination, ADECCO set up a hotline for workers alleging discriminatory treatment in access to employment. At the same time, it provided training to HR managers on "diversity management" and prohibited staff from accepting discriminatory requests under penalty of sanctions, including dismissal.

One of the most controversial but effective affirmative action measures is the establishment of quotas. Not all national legislations permit this type of action. In general, legislation that permits the adoption of quota systems applies to the establishment of preferences in recruitment, so that when two candidates are equally qualified, preference is given to the candidate of the sex that is under-represented in the job or occupational category in question.

The European Court of Justice, in the case of Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist (July 6, 2000), established that the preference of a woman over a man is possible only if she has equivalent or substantially equivalent merits.[32]

Setting a numerical or percentage target to be achieved over a certain period of time does not necessarily imply the establishment of a quota. This objective can be achieved through other types of measures that are not specifically classified as positive actions, such as changing the employment profile in job advertisements or seeking male or female candidates in places that have not been explored to date.

[32] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61998CJ0407.

2. Occupational categories (occupational classification)

a. Quantitative data

The quantitative examination of categories consists in comparing the number of women and men in each occupational category or job according to the job requirements, and determining whether these requirements are traditionally associated with men or women according to social definitions of gender (stereotypes, values, etc.).

Sample matrices for quantitative examinations:

Category (variable according to country)	Men		Women		Requirements	Category salary
	No.	%	No.	%		
Category 1						
Category 2						
Category 3						

Employment	Men		Women		Requirements	Category salary
	No.	%	No.	%		
Employment 1						
Employment 2						
Employment 3						

b. Qualitative data: Company procedures, actions, criteria and practices

It is essential to examine whether the highest-paid occupational categories prioritize factors commonly attributed to men because of their connection with gender stereotypes. However, from that point on, the verification procedure becomes more difficult.

Some national legislation (as in Spain[33]) stipulates that common criterion for job classification and promotion must be defined for both male and female workers. But the fact that these criteria are

[33] Articles 22.4 and 24.2 of the Consolidated Workers Statute (TRET).

common is not enough, since they may be common but have a particular impact on one group or another. In addition to being common, they must also be gender-neutral.

Discrimination will in fact occur if these criteria give preference to factors that are usually “masculinized” or “feminized”, with the consequence that the wage paid does not correspond to the value that this specific quality represents for the firm.

> A paradigmatic hypothesis in European jurisprudence and in various national legislations is the suspicious nature of "physical strength" as the only factor in the attribution of a higher salary, since it is a male-dominated quality. This means that it is not a sex-neutral evaluation factor but offers an unjustified advantage to men.

This masculinized approach will intentionally ignore other characteristics of the work concerned: attention, care, diligence, regularity, responsibility, as they are more gender-neutral.

The method of verification will differ depending on whether there is a job-evaluation system in place within the company. If there is one, it is necessary to examine this system and identify the various criteria to see which are the most and least relevant, and why. If an evaluation system does not exist, the analysis should be based on occupational categories and actual jobs, from which a list can be drawn up of the criteria that are favoured in different categories, and whether they sexualize the job.

c. Acceptable and unacceptable justifications

ILO Convention No. 100 and the legislation of the countries that have ratified it clearly stipulates that the company must pay equal remuneration for work of equal value, directly or indirectly, and regardless of whether such remuneration is salaried or non-salaried, without discrimination on the basis of sex in any of its elements or conditions.

We can therefore deduce the following:

- The salary for the category must relate to a value or valuation.
- Any job evaluation must specify the legitimate objective pursued by the company in valuing and therefore remunerating one job more than another within the framework of the company's normal operations. For example, a job as a cook in a three-star restaurant does not have the same value as in a company restaurant. The justification for differentiated wages is then based on aptitude.
- The judgment of necessity consists in determining whether the set wage does indeed reflect the importance that the specific job has for the firm in relation to its activities, considering the various factors involved in the job.
- Finally, if preference is given to a masculinized factor, the proportionality of the resulting wage difference must be justified and in line with existing parameters or grades.

d. Corrective measures

The first remedy is to invalidate any provision that discriminates on the basis of sex. Remember that wages by category or by job are generally determined by a collective agreement or an agreement between the company and its workers' representatives.

The other corrective measure, as mentioned above, is the introduction of a gender-neutral job evaluation system. In Spain, at the request of the "Instituto de la Mujer", an ISO system has been developed, incorporating many factors that can be applied to calculate the gender wage gap.

3. Career promotion

a. Quantitative data

There is inequality when the percentage of women promoted internally to higher professional categories is significantly lower than the percentage of men. A relevant statistic is the percentage of men and women promoted in recent promotion cycles (for example, in the last five years).

For this purpose, data could be collected using a table such as the following:

	CATEGORIES	WOMEN	%	MEN	%	TOTAL
1.						
2.						
3...						
TOTAL						

A similar table could also be used to determine the number of women and men who have received promotion-related training in recent years.

b. Qualitative data: Procedures, actions, criteria, company practices

It is advisable to review the company's existing promotion process and related practices. The application of the rules relating to promotions (laid down by law or set out in the collective agreement) should be examined first. It is essential to determine whether the process is transparent, in other words:

- whether the vacancies are made known to all the company's workers before the promotion process begins, and whether, therefore, there is equal opportunity for access to the positions concerned;
- whether the evaluation criteria and rating system are published and known to all employees;
- whether scores or results are published after the promotion process is completed.

It is also recommended that inspectors analyse the working conditions applied to managerial positions, particularly those not held by women. Are they different from those of lower categories, particularly in terms of working hours and days; are they legal?

A questionnaire could be a useful tool for elucidating workers' perceptions of promotions within the company and the obstacles they may encounter.

c. Acceptable and unacceptable justifications

A situation of vertical segregation is justified if it can be conclusively proven that women do not wish to participate in the promotion process, i.e. vacancies are advertised but they do not apply for them.

Judgment of the Spanish Supreme Court, 1 June 1999

The Court found that indirect discrimination was being practised within a company when more men than women applied for the position of branch manager on the grounds that applications were mainly submitted by persons trained for this role by the company and who were men. Although the selection of men and women was proportional to the number of applications, the Court found that the fact that more applications were submitted by men was discriminatory since the company had contributed to creating this difference.

Judgment of the High Court of Justice of Navarra, 30 May 2006

Women in the sewing section of a company who were classified in Group 1 were not promoted to Group 2, whereas men were. The company had set up a different system for the promotion of women by requiring conditions that were not required of men. The courts ruled that this behaviour was downright discriminatory and ruled that the company must establish a promotion system with equal conditions for men and women.

It is not possible to justify the promotion of more men than women — in significant numbers — when vacancies are not offered to all staff as part of the promotion process, and when the criteria

required for promotion are not clear, not justified or different for one sex or the other. In such cases, women are deprived of their right to career advancement.

Exception: Giving preference to men or women according to the criterion of **particular trust** may be acceptable in exceptional and very specific cases: if **the objective is legitimate** because the functioning of the company requires it; if the preference is **necessary** because of a specific proximity to the most internal core management and there is no possible alternative; if it is **proportionate** insofar as it is not exactly a promotion, but rather an appointment and does not infringe the right of women to career advancement.

But it will not pass the equality test and will therefore not be acceptable if it is a question of filling ordinary positions necessary for the normal exercise of the company's activities.

Nor can a situation be justified in which the working conditions and hours imposed on senior staff are such that they manifestly hinder the reconciliation of family and personal life and are not justified by the nature of the work or activity. Concepts such as the **availability** and **flexibility of working time** required of middle managers, which may conceal an obligation to work illegal overtime, should be examined in this context.

The consideration of greater availability to work overtime may be legitimate in a promotion process (a judgment of aptitude), but it cannot be a necessary condition since overtime is voluntary, and by its nature not mandatory for the execution of a task, and there is an obvious alternative, i.e. to assign more people to the execution of the said task. Nor would it satisfy the criterion of proportionality, since depriving workers of their right to career advancement is not compensated for by the merits of the company's claim. The power to manage a business is not an absolute power and is subject to limitations, including those related to fundamental rights such as equality of opportunity and treatment, and non-discrimination.

d. Corrective measures

The main measure is to put in place a system for advertising vacancies for promotion that is public and clear as to the evaluation criteria and requirements. In addition, the criteria or conditions must be common and neutral for workers of both sexes. It is also important to guarantee opportunities for reconciling work and family life (flexible working hours, continuous working days, shorter days, teleworking, etc.) for all grades, including those with higher responsibilities, for both men and women.

One possible measure is to establish quotas and/or percentage targets over a certain period. The objective might be to achieve the same percentage of women and men in the upper and lower categories.

4. Wages

a. Quantitative data

The section on occupational categories analysed the compensation received according to classifications and jobs. In this chapter, we look at how to measure differences in wages between men and women outside of the regulated wage-by-category, i.e. differences that are not determined by a collective agreement (or by law) and that exclude performance bonuses and overtime.

The Labour and Social Security Inspectorate's Guide to Equality Policies in Spain proposes the following tables for data-collection and comparison: unregulated components or components based on unmeasured performance.

			Men			Women	
Category (variable according to country)	**Employment**	**No.**	**%**	**Median components (euros)**	**No.**	**%**	**Median components (euros)**
Category 1	Job 1						
	Employment 2						
	Employment 3						
Category 2	Job 1						
	Employment 2						
	Employment 3						
...							

Category	**Men**		**Total average of unregulated components or components based on unmeasured performance**	**Women**		**Total average of unregulated components or components based on unmeasured performance**
	No.	**%**		***No.***	***%***	
Category 1						
Category 2						
...						

Category	Men		Total average of unregulated components or components based on unmeasured performance	Women		Total average of unregulated components or components based on unmeasured performance
	No.	%		No.	%	
Job 1						
Employment 2						
...						

b. Qualitative data: Procedures, actions, criteria, company practices

An analysis is made of the tools and methods the company uses to set wages. Normally firms pay wages based on a category or job, as governed by a collective agreement. The criteria for equality in setting wages by category (classification) or job have already been discussed in the section on occupational categories.

This section will therefore look at the criteria for payment of voluntary bonuses, non-wage supplements and so on. Here again, it is necessary to refer to the principle of equal pay for work of equal value (ILO Convention No. 100). The difference is that these components are generally set by middle management; it is therefore important to examine the degree of formalization of the procedure, the margin of subjective or personal appreciation and the consideration of real and variable factors.

Although overtime is not included in the comparison, the inspection will examine whether the conditions of access to overtime and other elements such as bonuses or gratuities, or anything that generates more advantageous remuneration, are the same for workers of both sexes. For example, any wage conditions that are not applied — or that are applied under inferior conditions — to part-time workers will be regarded as indirect discrimination if women are the group most engaged in part-time work.

Again, it might be interesting to supplement the quantitative data with a questionnaire in which workers of both sexes are asked to specify the criteria for the payment of pay supplements, as well as sharing their perception of the application of the principle of equal pay.

c. Acceptable and unacceptable justifications

The granting of higher unregulated bonuses to men rather than to women, or viceversa, constitutes discrimination, if it is not justified by, for example, higher performance.

d. Corrective measures

Discrimination can be remedied by paying arrears to bridge the observed wage differences and level the playing field. In addition, the following measures can be taken:

- Introducing maximum transparency in payment systems, replacing voluntary bonuses with regulated systems for integrated wage calculation;
- Training those responsible to evaluate the work of subordinates with a view to awarding bonuses;
- Establishing narrow mandatory salary bands for each category of workers, to be applied to workers subject to similar conditions with regard to working days and hours.

5. Higher incidence of temporary and part-time contracts

a. Quantitative data

In order to determine whether there is a large majority of women hired on temporary contracts (of all types) relative to men, data can be collected — in general and by category and job — using the following two tables. The breakdown by job and category is made to facilitate comparison.

Temporary contracts by category and employment

Categories (variable according to country)	Employment	Women	%	Men	%	Total
1	Job 1					
	Employment 2					
	Employment 3					
2	Job 1					
	Employment 2					
	Employment 3					
TOTAL						

Breakdown of workforce by type of contract

Type of contract	Women	%	Men	%	Total
Temporary full-time					
Temporary part-time					
Permanent full-time					
Permanent part-time					
TOTAL					

b. Qualitative data: Procedures, actions, criteria, company practices

Temporary contracts will need to be reviewed and inspectors should consider why an employer has used them and whether their use is justified and legal according to national legislation. It will then be necessary to determine whether any abuse primarily and significantly affects women. Temporary contracts have an impact on recognized seniority and therefore discrimination in relation to temporary contracts will result in wage discrimination.

c. Acceptable and unacceptable justifications

Temporary contracts are acceptable only if they comply with the grounds set out in national legislation. Consequently, greater use of temporary contracts for one sex or the other would be totally unjustified as it would not pass the aptitude test. The purpose pursued by the business in issuing temporary contracts would not be legitimate: the likelihood is that the owner of the business wants to be able to facilitate the termination of women's contracts in the event of, for example, marriage or maternity.

Unjustified temporary contracts will be considered (indirectly) discriminatory if they affect women significantly more than men.

d. Corrective measures

Discrimination of this kind should be remedied by immediate requalification of the contracts concerned as open-ended contracts. It is also essential to strengthen guarantees regarding procedures for terminating contracts, notice periods, dismissals and so on.

6. Reconciliation of personal, family and professional life

a. Quantitative data

Statistical analyses need to be carried out to find out whether there is discrimination based on the assumption of family responsibilities. They would first aim to find out the percentage of workers who take advantage of measures to reconcile work and family life.

Leave in the year: __

Description of the situation	Number of Women	%	Number of Men	%	TOTAL
Parental Leave					
Adoption					
Shorter day to take care of children					
Shorter day for family reasons					
Leave to care for children					
Leave to care for family members					
Other					
TOTAL					

b. Qualitative data: Procedures, actions, criteria, company practices

ILO Convention Nos. 111, 156 and 183 establish that the principle of equality of treatment for women and men requires that there be no direct or indirect sex-based discrimination, or discrimination arising from maternity, the assumption of family responsibilities and marital status.

Likewise, the jurisprudence of the Spanish Constitutional Court and the European Court of Justice recognizes as direct discrimination any pejorative treatment caused by circumstances related to sex, such as maternity and breastfeeding.

Inspectors' reviews should also consider seemingly neutral practices that have an impact on people with family responsibilities. These practices may involve indirect gender-related discrimination, since it is women who, by and large, continue to care for children. Indirect discrimination would occur, for example, if an annual bonus were not paid to part-time workers (and the majority of these are women who have to reconcile their work with family life).

In addition, any practice or action by the company intended to prevent or hinder female workers in the exercise of their rights to maternity leave and job retention, absence for breastfeeding, or reduction of days of care for family members in their various forms must be considered sex-based discrimination, on the grounds that the assumption of family responsibilities has a greater impact on women than on men. Similarly, any practice or action by the company intended to prevent or hinder men from exercising their right to reconcile family and working life also constitutes discrimination if it can be proven that the practice is based on gender, and if the company considers that the duty to reconcile work and family life (and thus to exercise the right to reconcile both) falls to women.

There are numerous unjust practices relating to the assumption of family responsibilities. They include dismissal, substantial changes in working conditions before or after leave, failure to respect leave periods by calling the worker while he/she is on paternity or maternity leave and so on.

c. Corrective measures

Depending on the statistical data, a company policy must be introduced to promote the reconciliation of family and working life, offering, for example, opportunities for flexible working, concentrated working hours and distance-working.

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