

Chapter Seven Discrimination, harassment, and discipline at work

7.1 Introduction

Discrimination

Despite a global economy that increasingly is driven by international agreements, labor laws tend to remain locally enforced. That means that even where international conventions have been ratified, governments—and employers—do not necessarily observe the obligations. Our experience also demonstrates that the passage of national laws and regulations by no means ensures enforcement. Many notorious labor practices remain a problem. Such practices often include discrimination and harassment, especially against women and minority groups. Because a substantial proportion of low wage workers in the global economy is female—more than three-fourths of workers in export processing factories around the world—many of these workers are at particular risk of abuse at work. NGOs, in turn, need to have an enhanced understanding of the workplace problems that affect women and minority groups.

Discrimination protections for workers are usually thought of as “negative” rules that forbid certain kinds of behavior or job actions. Employers are told by laws and regulations: “Don’t Do That!” For example, employers are generally prohibited from actions such as disciplining, underpaying, failing to promote, or firing workers for reasons not related to production criteria. Most governments also adopt “positive” provisions: they tell employers, “Do this!” On the “positive” side, an employer must usually offer benefits to pregnant and nursing women. Many governments also allow employers to use preferences in hiring groups that have previously suffered discrimination. Violations of the positive and negative provisions protecting women, minorities, the disabled and others are dealt with under the heading of “discrimination.” NGOs should note that discrimination is one of the “fundamental” rights provisions of the International Labor Organization, meaning that by virtue of membership alone, governments have been required since 1998 to “respect, promote and realize” the principles of the two primary ILO discrimination conventions, No. 111 (Discrimination in Employment and Occupation) and No. 100 (Equal Remuneration). Still, as history has vividly shown, such language as “promote and realize” does not necessarily mean that compliance with the laws follows.

Though we have suggested that women in the global economy are the largest group at risk of discrimination, they are by no means the only group, and international conventions reflect that reality. ILO conventions cover all individuals and groups whose rights are violated. In the U.S., many Muslims have alleged that they have faced discrimination since the 9/11 terrorist attacks; black workers historically have faced discrimination due to race. In Germany, the Turkish minority has alleged frequent discrimination. Phillipino migrant workers allege discrimination in various countries that import these workers for service economy jobs. And the list goes on. It is essential that monitors gain a thorough understanding of the workplace, including production and supervisory job responsibilities, in order to distinguish permissible work-related actions from the many possible forms of discrimination—gender, race, nationality, disability etc. Because gender discrimination is the most universal form of discrimination, we recommend that NGOs give particular emphasis to this aspect of their work.

Harassment

A particularly abusive form of discrimination is called “harassment.” Many governments have been slow to recognize a specific legal category of workplace harassment, often considering the problem as a matter for workers and managers to sort out themselves. Some governments propose to address harassment under other legal frameworks outside of labor laws. We strongly disagree with the view that harassment can be addressed solely within the workplace or by traditional criminal or civil law. Due to the extraordinarily destructive impact on the workplace experience, NGOs should take special note of workplace harassment and use international conventions

and codes of conduct (and national laws where they exist) to document and report such abuse. A typical instance of sexual harassment includes sexual demands placed on workers by supervisory personnel, in exchange for workplace advancement or under threat of adverse action. Another form of harassment involves the creation or allowance of a workplace atmosphere that is hostile to a particular group. For example, some employers traditionally have permitted men to speak in demeaning language about women workers or to post sexually provocative photographs of women, which can lead to a feeling of debasement among the workforce. Usually harassment occurs over the course of more than one incident, although one particularly blatant or severe incident may also meet the definition of harassment. Often, the evidence of harassment is deeply suppressed, and only comes to light after the victim has been fired or denied promised benefits. As in the case of discrimination, harassment is not at all limited to women. Monitors need to be sensitive to the many potential forms of harassment.

Abuse and workplace discipline

Problems of basic workplace verbal and physical abuse at the workplace are somewhat easier to identify than harassment and discrimination, given the public nature of such actions. Workers have reported with some frequency, no matter where on the globe, that supervisors sometimes slap workers or make threatening statements or gestures when they are displeased with individual or group production. Workers have literally died from extreme forms of abuse, as reported in a recent publication by Human Rights First, a publication that we urge NGOs to review when they undertake monitoring. (See www.humanrightsfirst.org worker rights links). Often the global economy itself can lead to cultural clashes, in which supervisors act in aggressive or offending ways to local and indigenous peoples with different traditions. In 1997, the legal counsel to one of the foreign embassies in an apparel-producing country explained to us in a monitoring visit that foreign supervisors sometimes used discipline that was tolerated in their home country but is considered unacceptable elsewhere. We expressed our disagreement that the abuse would have been acceptable even in their own countries. In any case, NGOs need not specify any particular culture or nationality to state that problems of abuse are ongoing, widespread, and must be stopped. Proper workplace discipline should be limited to progressive warnings and possible dismissal for legitimate reasons—and must exclude physical threats or abuse.

7.2 International standards, national treatment, and codes of conduct

A. ILO Standards

Discrimination

Under ILO Convention No. 111 (Discrimination in Employment) gender-based discrimination, as well as racial and other discrimination, must be prohibited by national laws. This is one of the ILO's most universally approved conventions, with more than 129 countries having ratified it. As noted above, discrimination may affect far more groups than just women. The Convention defines discrimination as

any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation... “ The only exception to that list regards “Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements ...”

Like much legal language, this sentence is easier to understand when it is broken down into its parts.

According to the ILO, discrimination includes:

- a single extreme action by a member of management that unfairly limits the rights of a worker as a result of non-workplace related status.

- a pattern of negative actions, like those above, that unfairly limit the rights of workers
- subtle but continuous actions whose negative impacts on a particular group are only clear over a prolonged period (for example, hiring of women for lower paid positions, or men receiving pay or bonuses at a higher value than women despite equal work).
- discrimination as described above affecting any aspect of the work experience, from hire to wage payment to promotion to basic protection of health and safety.
- Only in very limited circumstance can an “inherent requirement of a job” allow discrimination. For example, a female fashion model who models women’s clothing might be a good example of an “inherent requirement.” In some limited circumstances, health issues might also limit access to work, such as jobs that include toxic substances that could harm the reproductive system of pregnant women.
- Special protections of certain groups, including women and the elderly are allowed under the convention.

ILO members must take measures to promote equality of opportunity and treatment with a view to eliminating discrimination, including through legislation and education programs.

The ILO has taken particular notice of unfair treatment of women (and other groups) with respect to pay. Convention No. 100 (Equal Remuneration) requires governments to pay workers equally for the same work. In addition, the convention requires governments to compare the value of different kinds of jobs to ensure that one kind of job does not become a low wage sector designated to certain groups, such as women and minorities, who might have less power to represent their interests. Like the ILO’s Discrimination Convention, the Equal Remuneration Convention has among the highest degree of national ratifications (more than 135 countries), giving strong justification for the convention’s obligations to be considered minimum core rights for all workers. (And, for an NGO’s purposes, this means that you very likely will need to study and master the contents of these two conventions, on discrimination generally and equal pay in particular.)

Most NGOs that deal with labor conditions have probably encountered workplaces where women tend to be assigned to menial and low paid jobs while men carry out better paid work. In fact, it is not an exaggeration to point out that certain work in many cultures is still called “men’s work” and some work is called “women’s work.” In addition, in many cultures, men are presumed to be the heads of their households and receive pay consistent with that status. (In fact, it took until the 1990s—and repeated criticisms from the ILO supervisory bodies assessing the government’s laws under Convention No. 111—for one Central American government to repeal a law that gave men veto power over women who wished to work.)

The ILO’s Equal Remuneration Convention No. 100 requires governments to:

- Promote, as well as enforce, the application of the principle of equal remuneration for equal work.
- Ensure that “equal remuneration” applies to all wage and benefit issues, not to wages alone.
- Encourage application of the convention both through law and collective bargaining between employers’ and workers’ representatives.
- Undertake objective measurements of various kinds of work to determine whether the comparable jobs are paid at comparable rates of pay.

Harassment

International protections against harassment are derived from the same ILO discrimination convention, No. 111, as described above. It should be noted that the word “harassment” does not appear in the discrimination convention, but that the ILO Committee of Experts has interpreted the convention to include sexual harassment. Among other ILO conventions, the convention on the rights of indigenous workers (Convention No. 169, Article 20 (3)(d)), states that indigenous workers must “enjoy ... protection from sexual harassment.” The ILO has also made a general condemnation of sexual harassment in a 1985 Resolution of the International Labor Conference,

stating that “sexual harassment in the workplace is detrimental to an employee’s working conditions and to employment and promotion prospects.”

NGOs should keep in mind that, when reviewing a country’s ratifications of ILO conventions in all aspects of this manual, they may well find that other protective conventions have been ratified. Regarding discrimination, such conventions include, for example, ILO Convention No. 103 (Maternity Protection), and the ILO’s Convention No. 169, protecting indigenous peoples, which provides that governments must “do everything possible” to prevent discrimination in employment, including the recruitment of indigenous workers. When a government has ratified other conventions, it is essential that the NGO consider the details of such conventions in their reviews both of government performance and application of the Conventions. Moreover, monitors should recall that when a government has ratified a convention, the ILO reviews that country’s performance in periodic reports by the Committee of Experts, which are published according to Convention number and country on the ILO web page, www.ilo.org. A specific country review of these reports is essential to good monitoring, both of government and employer performance.

Moreover, NGOs should recall from above that discrimination has been identified as one of the ILO’s “core” rights of the Declaration on Fundamental Principles and Rights and Work, along with freedom of association, child labor, and forced labor. Governments must report on their observance of these principles every two years, and NGOs can encourage unions to include NGO reports in their information to the ILO regarding the practical response of governments to these obligations. Unfortunately, the ILO did not provide a direct mechanism for formal NGO reporting regarding the Declaration, although that should not deter NGOs from sending their reports to the ILO as a matter of information.

NGOs might note that the ILO conventions deal primarily with the worst cases of abuse, such as discrimination and harassment, leaving daily workplace disciplinary systems primarily to national legal systems.

B. International Covenant on Economic, Social, and Cultural Rights

In earlier chapters, we provided a description of the role that NGOs can play in pressing for labor rights compliance by governments through provisions of the International Covenant on Economic, Social and Cultural Rights (See Chapter 2 and related comments in the chapters on freedom of association and other substantive standards). Because the UN’s Covenant Committee is particularly friendly to participating NGOs, such as by inviting their detailed participation and by integrating NGO reports into the Committee’s labor rights reviews, your organization should strongly consider using this process as a means of refining your research and disseminating your work.

The Covenant establishes several provisions against workplace discrimination:

Article 2

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Because the right to work is later established among the “rights enunciated in the ... Covenant,” Article 2 covers essentially the same ground as ILO Convention No. 111 on discrimination. Moreover, with respect to equal pay for equal work, the Covenant states:

Article 7:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

Perhaps the only criticism that has been leveled against the Covenant with regard to this “equal pay for equal work” provision is its outmoded reference to women enjoying workplace conditions “not inferior to those enjoyed by men.” However, nothing in the Covenant interpretations suggest that affirmative or promotional action for women and minority groups would violate the Covenant.

To assist governments in interpreting the Covenant and to gather information, the UN’s Covenant Committee periodically sends out inquiries to governments regarding the enforcement of these provisions. NGOs may benefit by reviewing these questions and integrating them into their own contextual work as they seek to understand issues of discrimination, harassment, and abuse in their own areas of attention. The basic list of questions includes the following:

- Please indicate whether there exist in your country any distinctions, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, color, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation. What steps are taken to eliminate such discrimination?
- Please indicate the main cases in which a distinction, exclusion or preference based on any of the above-named conditions is not considered in your country as discrimination, owing to the inherent requirements of a particular job. Please indicate any difficulties in application, disputes or controversies which have arisen in relation to such conditions.
- Please indicate whether there exists in your country any inequality in remuneration for work of equal value, infringements of the principle of equal pay for equal work, or conditions of work for women which are inferior to those enjoyed by men.

What steps are taken to eliminate such discrimination? Please describe the successes and failures of these steps with regard to the various groups that are discriminated against.

Please indicate what methods, if any, have been adopted to promote an objective appraisal of jobs on the basis of the work to be performed.

- Please supply information on the actual realization in your country of the principle of equal opportunity for promotion.

(a) Which groups of workers are currently deprived of such equal opportunity? In particular, what is the situation of women in this respect? (b) What steps are taken to eliminate such inequality? Please describe the successes and failures of these steps with regard to the various disadvantaged groups.

(Derived from: Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights : 17/06/91. E/C.12/1991/1. (Basic Reference Document)

As we have pointed out in other chapters, the most effective use of the Covenant for NGOs is to offer formal feedback to the UN regarding a government’s violations of standards. Violations occur when a government systematically (and actively) violates the right or when a government fails to protect the core right. NGO reports to the Covenant Committee about government actions or inactions can ensure that NGO findings receive wide distribution, are formally communicated to governments, and receive due UN consideration. NGOs may use all or any of the above elements of the ILO standards, as well as the CAVAR methodology below, to gather and report their concerns. NGOs must also recall from Chapter 2 that the Covenant Committee has rules about what NGO reports must seek to include: For example, NGOs communications to the Covenant Committee must be “relevant,” “based on documentary sources and properly referenced,” “concise and succinct,” and “reliable and not abusive.”

NGOs can choose from among the following reports that are received by the Covenant Committee:

- information may be submitted directly to the member of the Covenant Committee responsible for drafting the “list of issues” that will be directed to the signatory government;
- NGOs can author “shadow” reports that cover the same topics as the government’s report;
- NGOs may submit written statements or reports, or oral presentations in official “NGO hearings” at the time of a government review. NGOs may also attend the actual country reviews.
- Finally, NGOs may submit information to the Covenant Committee regarding implementation of any or all of the Committee’s concluding statements.

In sum, NGO participation in the Covenant Committee can help give voice to workers’ concerns about the implementation and enforcement of hours of work in the relevant country.

C. How governments regulate discrimination, harassment and abuse

Most governments establish laws that grant the right to fair treatment in employment to all persons—fulfilling at least in part (and on paper) the ILO Conventions’ and UN Covenant’s requirements that governments declare national policies that promote antidiscrimination efforts. Such laws usually extend protection to training and vocational programs in order to avoid a cycle of discrimination in which individuals and groups are kept out of certain kinds of employment.

Many governments have special “equal opportunities” divisions, including specialized administrative judges, that deal with discrimination claims. Cases may be proved by direct evidence of actions against an individual or a group of workers; or discrimination may be found by the ongoing impact of policies that have the effect of limiting opportunities for particular individuals or groups.

As to harassment, the ILO has set forth descriptions of behaviors that many national laws or practices may sanction, depending on the severity of the incident, such as: insults, remarks, jokes, insinuations and inappropriate comments on a person’s attire, physique, age, family situation, etc; a condescending or paternalistic attitude undermining dignity; unwelcome invitations or requests; lascivious looks or other gestures; unnecessary physical contact.

In order to be considered harassing behavior, the action must be carried out as a condition of employment (that is, the behavior calls into question the worker’s ability to obtain or maintain employment or achieve promotion) and must damage the worker’s ability to work.

(See the ILO publication, Equality in Employment and Occupation, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, 75th Session, at 43–45 (1988).

D. Codes of Conduct on Discrimination, Harassment and Abuse

Discrimination

The Fair Labor Association workplace code of conduct, similar to other codes, echoes the ILO’s language with respect to discrimination: “No person shall be subject to any discrimination in employment, including hiring, salary, benefits, advancement, discipline, termination or retirement, on the basis of gender, race, religion, age, disability, sexual orientation, nationality, political opinion, or social or ethnic origin.” (See www.fairlabor.org.) In practice, the FLA, unlike other code of conduct associations, has created and published to the public a series of benchmarks that will assist an NGO in monitoring these standards. (NGOs will find less detailed but otherwise useful references to particular standards at such sites as the Worker Rights Consortium at www.workersrights.org, Social Accountability International at www.cep.org, the Ethical Trading Initiative, www.ethicaltrade.org, and the Clean Clothes Campaign, www.cleanclothes.org. We have also pointed out that for the more technically advanced NGO, a very useful site that creates links to monitoring reports is housed at www.humanrightsfirst.org under the workers’ rights link.) NGOs will note that many of the FLA benchmarks are more specific and sometimes more

stringent than the core ILO standards regarding women. It has been the view of the FLA board—which includes representatives of companies as well as human rights NGOs and universities—that one of the most serious global problems is the mistreatment of women workers.

Although most of the benchmarks below were written for a particular code of conduct, NGOs may find the provisions useful in whatever monitoring of discrimination they may conduct:

- Education, training, and demonstrated skills or abilities should be the sole basis for hiring, assignment, wage and promotion decisions.
- There shall be no differences in compensation and benefits attributable to gender.
- Employers will not prohibit the employment of married women.
- Employers will not use pregnancy tests or use of contraception as a condition of hiring or employment.
- Employers will not require pregnancy testing except as required by law.
- Employers will ensure that pregnant women are not engaged in work that creates substantial risk to the health of the pregnant woman.
- Reasonable accommodation will be made in the event of pregnancy, in a manner that will not unreasonably disadvantage the pregnant woman.

Harassment and Abuse

The FLA code of conduct definition of harassment is somewhat less formal and less technical than most legal definitions:

“Every employee will be treated with respect and dignity. No employee will be subject to any physical, sexual, psychological or verbal harassment or abuse.”

To start with, the FLA expressly adds the concept of “abuse” to its prohibitions, meaning that a number of actions short of harassment, such as shouting and hitting, regardless of gender issues, are considered violations of this code element. As stated in the FLA harassment code element, “dignity” and “respect” are the starting points for the relationships management must have with workers. The code holds out the goal that a person’s work experience should be a means to life advancement and not merely a day without abuse. Under the FLA definition, abuse or harassment can occur through many kinds of actions, including those of a physical, sexual, psychological or verbal nature.

FLA Benchmarks regarding harassment include:

- Employers shall not offer preferential work assignments or other preferential treatment of any kind in actual or implied exchange for a sexual relationship, nor subject employees to prejudicial treatment of any kind in retaliation for refused sexual advances.
- Management will discipline... anyone who engages in any physical, sexual, psychological or verbal harassment or abuse.
- Employers will prohibit screaming, threats, or demeaning verbal language — Security practices will be gender-appropriate and non-intrusive.

Other benchmarks provide guidance regarding disciplinary action against workers:

- Employers will utilize progressive discipline, [such as] ... using verbal warnings, written warnings, suspension, and termination.
- Employers will not use physical discipline, including slaps, pushes or other forms of physical contact or threat of physical discipline.
- Employers will provide training to managers and supervisors in appropriate disciplinary practices.
- Employers will maintain written records of disciplinary actions.

- Access to food, water, toilets, medical care or health clinics or other basic necessities will not be used as either reward or punishment.
- Employers will not unreasonably restrain freedom of movement of workers, including movement in canteens, during breaks, using toilets, accessing water or to access necessary medical attention.
- Employers will not use monetary fines and penalties for poor performance.

7.3 CAVAR: “Digging” for information regarding workplace discrimination

A. “Context”

- NGOs may find it useful to begin their review of the context of discrimination, harassment and abuse by carrying out the following steps (while endeavoring to create and supplement their own case-specific list of priorities):
- Inquire into what laws your government has passed restricting discrimination, harassment, and abuse and/or promoting “positive” rights for protected groups.
- Has the government ratified international conventions that create binding obligations to review and enforce those laws? (A review of our earlier description of the ILO and Covenant Committee provisions regarding discrimination should give NGOs some perspective on what to look for).
- Is there a union, a union contract and/or individual contracts at the workplace(s) that you are reviewing? (Any and all of these would contain workplace rules that are binding on the employer.)
- Review the codes of conduct, if any, that apply to relevant companies and industries in the area or at the workplace that you are reviewing.
- “Localize” your context inquiry by interviewing grassroots organizations that are familiar with the particular industry/regions/groups of workers that you may be asked to assist or monitor regarding discrimination, harassment and abuse issues.
- Inquire in particular into the background of industries, the stability of such industries, and whether the industries are known broadly (such as in the apparel industry) for discrimination and abuse, including inappropriate discipline, harassment or abuse.
- Seek to determine which groups, if any, are most likely to be subject to discrimination.
- Determine whether workers at the local level are able to use governmental mechanisms to gain investigation and enforcement of such issues.
- Identify particular issues that grassroots groups and workers believe are most important regarding discrimination, harassment, and abuse; for example, is there a community, cultural or religious stigma attached to women undertaking wage work?
- Identify culturally appropriate interview techniques and ideas for questions that can be posed in the Visit and Interviews section of the CAVAR methodology.
- Become familiar with basic workplace record- keeping practices regarding discipline.
- Monitors should also examine worker promotion and mobility within the workplace. For example, if a worker or groups of workers have worked at the same job and for the same base wage for a matter of years, the monitor may wish to determine whether there may be discriminatory management decision-making involved.

B. “Archivos”: Records review

Although workplace discipline should be recorded by managers and should be available for review by monitors, discrimination and harassment are often unreported and unrecorded. Gaining the trust of workers and developing a careful and open-ended interviewing technique is most likely to yield relevant information. The following examples of written records are most likely to help monitors understand employer behavior in the area of discrimination, harassment, abuse and workplace discipline:

Discrimination and harassment

- Written policies on discrimination, harassment, abuse or routine discipline.
- Records of prior discipline of workers and supervisors, both, regarding discrimination, harassment, abuse and workplace discipline. (If women workers have complained about harassment by fellow workers or supervisors but there is no record of any communications or discipline, then the employer clearly has not responded adequately to the problem.)
- Has the employer used employee health care information in its hiring, firing and promotion decisions—for example, might records show whether pregnancy testing or other aspects of the reproductive status of women are used in employment decisions?
- Whom has the employer declined to hire and why?

Workplace discipline

Monitors should select samples of employer records regarding discipline and dismissals. Such records at the very least will give a picture of the degree of turnover of employees, as well as the reasons that employees leave or are disciplined. Such information in itself may not speak to the fairness of a dismissal or a disciplinary event. But in combination with interviews and contextual background work, monitors should begin to get a picture of the way workplace discipline operates.

C. “Visite”: Site visit and interviews

A visit to the employer will enable the monitor to see the workforce and get an initial sense, with the help of the monitor’s contextual briefing, whether certain groups or individuals may be more likely than others to be subject to mistreatment.

1. Management interviews (discrimination, harassment, abuse, and discipline combined)

- Review disciplinary practices, processes and policies with the appropriate management personnel (And note in particular whether the materials are familiar to the manager who reviews them with the monitor).
- Ask managers to explain how they train supervisors and implement factory policies on discipline. Request some examples of such implementation and/or violations.
- Meet with line supervisors to gain an understanding of how to address disciplinary practices. When disciplinary incidents are described, ask for documentation of the incidents. (This step will help a monitor verify whether a disciplinary system with appropriate record keeping exists.)
- Ask supervisors how they are trained by their managers in factory disciplinary policies.
- Suggest some scenarios or create case examples of worker behavior that might call for discipline and ask what the supervisors/managers would do.

- Ask supervisors to describe what constitutes inappropriate and appropriate behavior by managers as well as by employees.
- Examine security personnel policies and on-site housing policies for potential issues of discrimination or harassment.
- Determine whether guidelines exist and have been communicated to security personnel regarding appropriate and inappropriate treatment, including searches, of workers.
- Ask management personnel for examples of prohibited forms of discipline.
- Ask management what the employer policy is regarding presence of police or military authorities inside company premises.
- Ask managers how hiring, assignment, promotion and compensation decisions are made.
- Ask for the criteria by which new employees are hired and how prospective employees are recruited. (See also, records review)
- Ask management what processes exist to address the needs of pregnant women.
- Ask management whether pregnancy tests are used for any purposes, and, if so, for what purpose?

2. Worker interviews

Given the special sensitivity of discrimination issues, the reader should again review the interviewing section methodology described in the first “CAVAR” briefing in chapter 3. It is very important for NGOs to keep in mind that their questions could unintentionally suggest “appropriate” answers to workers. In such cases, a monitor’s data would be counterproductive. Instead, questions should be written to give workers an open-ended opportunity to express and describe their experiences at the workplace. Monitors should also be prepared to develop additional questions, based upon how workers respond to their initial questions. NGOs might also keep in mind that one of the biggest problems faced by monitors is that workers often perceive that they are speaking to management, not independent reviewers. Thus, off-site interviews, especially on sensitive issues, are certainly more likely to solicit the most earnest answers to questions.

Answers to questions such as the following may offer a monitor some introduction to a typical worker’s experiences:

Discrimination/harassment

- What does the worker like or enjoy most and least about his/her job?
- What happens if a worker needs to use the bathroom during a work shift? Are workers granted unrestricted access?
- Ask workers what kinds of complaints they have had, if any (or complaints they have heard about from others) with respect to how workers are treated at the workplace?
- How are women/other groups treated at the workplace? Do workers raise complaints with managers/supervisors? What are some examples of how managers respond?
- Is there a grievance procedure at the workplace? How is it used? — Has the worker ever used any of these mechanisms?
- Is the worker aware of any kind of prohibited forms of discipline?
- Ask workers how they learned about their job and if they know how new employees are hired. What kinds of job announcements are used? What kinds of questions are asked during interviews? Such information may assist monitors in determining whether management has a policy of hiring and/or excluding certain groups of workers.
- Ask workers how job assignments, promotions, and compensation decisions are made. The monitor should listen closely for discriminatory practices, but not necessarily use the terms “discrimination” or “harassment” unless prompted to do so by the worker. These questions will also help determine

whether management is adequately informing workers, in general, about their rights at the workplace.

- Ask workers what, if any, steps are taken to address the needs of pregnant women. If workers cannot name any, it may indicate bias based on pregnancy status.
- Does the factory offer maternity leave and nursing time? A monitor should already know the basic national law and regulations at the time this question is posed.

Disciplinary actions/abuse

- Are workers aware of factory policy regarding discipline? Can they offer examples of when and how workers are disciplined and for what types of infractions?
- Have workers ever had wages deducted due to alleged poor work performance (rather than lateness or absence)?
- If there is a grievance procedure, how is it used?

D. “Analysis”: Analysis and synthesis of data

Analyzing data and interviews regarding discrimination allegations is different from other possible workplace violations. It is difficult to get reliable information, and it is difficult to be a good and non-biased judge of sources. In particular, monitors need to be able to distinguish between an employer’s legitimate explanation for treatment of a group or person, and an illegitimate explanation, sometimes called a “pretext” for discrimination. For example, consider a worker’s allegations that an employer has singled her out for inferior pay, benefits or conditions. A monitor would need to interview workers and managers, examine payroll documents, and make some credibility judgments.

Or consider the plight of pregnant workers. They are entitled in many countries to leave time and reduced hours. Yet, such workers are sometimes reassigned to lower paid jobs, face reduced wages, or are fired. A relatively common discriminatory practice that is often not dealt with in national laws is the requirement of pregnancy tests as a part of prehire interviews, and refusal to hire if the worker is pregnant. In general, employers will not acknowledge discriminatory behavior, so the determination of whether an employee’s allegation of discrimination is valid or invalid will depend on solid and sensitive research and interviewing by a monitor.

Monitors should use each level of “CAVAR” and be comfortable in returning to a different level in order to verify and analyze information. Often a worker interview will require a new look at documents that had already been reviewed; documents may lead to a second or third interview, even with workers who have already been contacted. Eventually, to analyze the problem, there may be no substitute for sitting quietly and alone at a desk with the interviews, ILO Conventions and interpretations, national law, codes of conduct, factory records and simply making the best judgment possible. In many respects, a monitor will find it easier to evaluate the state of national law and policies on such issues, than to evaluate individual workplaces.

Monitors must recognize that investigating harassment is quite complicated, and may be limited both by management’s refusal to cooperate and by workers’ unwillingness to complain. The most likely means for monitors to become effective verifiers of harassment allegations is to earn the long-term trust of workers—and respect of management—by being scrupulously independent in all matters. Only under such conditions of trust are workers likely to report, for example, a state of fear or uncertainty about an instance of harassment. Monitors must avoid becoming the sources of rumors or stories about workers or management.

It is essential for monitors to understand that harassment often involves an action or a demand by someone in management and, generally, a benefit in return. Where the allegations come from someone other than the victim, monitors should be vigilant in evaluating the sources before pursuing an investigation. When harassment appears as a pattern, as alleged by one or more persons independently over a period of some time, monitors may find investigations easier to conduct and allegations easier to verify. Moreover, monitors should be careful to credit only specific verifiable allegations, as opposed to general ones. Caution must be exercised not to invade the

privacy of workers' lives. Relationships that are otherwise fair and do not involve workplace discipline or benefits as a result of the relationship may be agreed upon between consenting adults, depending upon the employer's policies.

With respect to workplace discipline, monitors must assess all the relevant sources of authority in order to evaluate the respective rights of management and workers. Without a union, it is a worldwide fact of life for workers that they may have little defense against an employer's decision to discipline or terminate an employee. At the same time, by their very presence, monitors can play an important role in ensuring that national law and regulations are followed and that workers are aware of their rights.

An NGO's analysis of discrimination, harassment, abuse, and workplace discipline may not always offer a complete conclusion, but a monitor can offer credibility assessments of the statements or claims of the different positions asserted by workers and managers.

An NGO's interactive participation in labor rights assessments can also add to the overall NGO community's knowledge about how to analyze and measure a right. Access to the NGO websites can be helpful, including, in particular, www.fairlabor.org, www.humanrightsfirst.org and www.workersrights.org.

E. *“Reporte”*

Perhaps more than any other topic, a monitor's report on discrimination, harassment, abuse, and workplace discipline is a sensitive matter. We have already pointed out how important it is that a monitor use careful judgment in creating impartial questions. Now the monitor's selection of publishable materials must be equally as careful. For example, when Coverco in Guatemala reported on a worker's stillbirth of a child after the worker was refused medical attention at the workplace, the monitoring organization openly stated that it needed to protect the identity of that worker. When a monitor's conclusions are not definitive, it is all the more important that a report state its own limitations. Confidentiality may also be important in order to avoid retaliation against a worker.

A few general rules apply to discrimination reports, as they apply to other rights topics:

Most likely, an NGO undertakes its investigation already aware of the audience, its readers. For example, if you are preparing your report for a UN agency in order to comment on a government's overall treatment of discrimination and harassment, then certainly you will be reporting on the government's response (or lack of response) to the many categories of rights listed above, and perhaps also to data and incidents from many workplaces. The specific ingredients of your report may be determined by questions that are determined by the agency, such as those asked by the Covenant Committee on Economic, Social and Cultural Rights. Such reports are sometimes called “shadow” reports because the NGO is answering the same questions in their own way as the government is answering, and submitting them for review and publication by the UN.

Frequently, NGOs are asked to investigate complaints by workers, which means that a report will focus on specific allegations. It may be useful, then, for the NGO to review previous reports that have been produced on such subjects. The most complete (that is, complete reports, rather than summaries) appear at www.coverco.org and at www.workersrights.org. These are investigations at local factories by the NGO, Coverco, and by the monitoring group, the Workers Rights Consortium (developed, in part, by university students). A summary of reports that is useful but less complete is also available in the “public reports” section of the Fair Labor Association web site, www.fairlabor.org.

NGOs should:

- Seek to create a standard format that easily identifies the subject matter and conclusions over a period of time. A standard format allows report topics to be measured and compared. When a monitor performs audits or interviews, it is essential to record and report the dates of visits, interviews, and record reviews.

- Note that some monitoring associations -such as the FLA or the SA International-will describe a preferred or required format for reporting for “certified” monitors.
- A report should include a description of the NGO’s methodology, including the criteria, time and personnel necessary to gather data, so that the reader can fully understand how data was gathered and conclusions were reached. In that way, monitoring reports promote transparency, the lack of which is one of the reasons that sweatshops exist in the first place. A clear methodology also allows for discovery of errors that can help improve future reports.
- A report should include findings of compliance and noncompliance, as determined by the analysis of the monitors. Such findings should seek to identify the degree of noncompliance, emphasizing urgent issues in a special section.
- Many monitors will propose the appropriate remediation of a matter, while recognizing that employer or brands may propose alternative means of remediation.
- Some reports are written so that employers will have the opportunity to remediate and present their remediation in the final draft. However, monitors should not withhold reports when the passage of time may make remediation more difficult (indeed, when workers are in danger of losing their jobs, rapid reporting may be essential.)
- Reports must not compromise promises of confidentiality granted to workers or employer when it is necessary to make such promises in order to avoid a risk of retaliation.
- When retaliation against workers occurs as a result of a monitor’s work, reports should make special mention of such retaliation because protection of workers’ rights to report conditions is an essential part of any monitoring mission. If workers suffer due to monitoring, they may be less likely to participate.

7.4 Common problems in discrimination

- Employees often do not report discriminatory practices because they fear being fired -indeed, one researcher states that many workers “don’t know they have the right to be treated as human beings at work.” In addition, often workers simply don’t know they have rights under codes of conduct or law.
- Women may be paid less than men for the same work, and women are often not given the opportunities to work in the same higher paid jobs as men.
- Indigenous or migrant workers, as well as racial minorities may be targeted for unjust treatment by supervisors due to their precarious economic, educational or citizenship status.
- Factories often refuse to hire older or married women.
- Employers often interview applicants with questions that may be used in a discriminatory fashion, such as “Are you pregnant, married, or planning to have a child?”
- Employers force women to take pregnancy tests, and these tests are used to avoid hiring or to fire women. More informally, employers may bring female supervisors into a meeting room to scrutinize the employee or prospective employee for signs that she is pregnant.
- Nursing mothers are often pressured to work overtime, even though laws often provide special protection to these women.
- According to the ILO, developing countries are almost uniformly under equipped to respond to the needs of disabled workers. Discrimination is constant. Monitors will likely need to make special notice of the lack of opportunities for disabled workers in such settings, and press governments to make progress in the provision of opportunities.

7.5 Measuring progress in discrimination

We have already reviewed earlier in this chapter the requirements of governments to “respect, promote and recognize” the principles of ILO antidiscrimination conventions, even if they have not ratified the Conventions. We also know that, under the International Covenant on Economic, Social and Cultural Rights, governments must progressively achieve the full realization of the rights stated in the Covenant. NGOs will no doubt discover in the monitoring of discrimination issues that while governments gradually make progress, workers individually may face misery. Thus, NGOs face a dilemma. Should they focus primarily on monitoring violations of discrimination provisions at the government level, and press for progress by reforming laws and inspection systems; or should they seek to enhance progress by documenting and reporting on workplace violations? Our answer is to hope that NGOs can engage in varying degrees in both efforts to spur progress.

Among the very important measures of progress that NGOs should monitor is the inequality of income and benefits of different groups in society, notably women and minorities as compared to majority groups. For example, in the U.S., many women’s groups speak of a “glass ceiling” in which women simply do not achieve the higher wages and better jobs that men receive. The ceiling is thought of as “glass” because employers operate almost invisibly (perhaps sometimes even unaware of cultural biases) to create barriers to income and achievement. NGOs should seek ever more precise measurement tools and documentation methods to explore and explain income inequalities—and insist upon progress in ridding the workplace of unfair restrictions. NGOs should encourage studies that focus on the conditions of groups that traditionally have faced discrimination and use such studies to push standards higher.

Moreover, NGOs would be well-advised to examine the legal system that is applied to discrimination claims in order to determine whether laws create adequate standards, and measure as well whether claims are processed in a timely and thorough way. Only by establishing a baseline of knowledge can groups demand and measure progress.

At the level of the workplace, NGOs should consider the benchmarks described in the code of conduct section primarily as minimum “negative” standards—aids to identifying violations—and seek to measure progress in remediation of such violations and promotion of better treatment. For example, when one global apparel maker in Guatemala was subjected to the attention of consumers and NGOs, it established for the first time a child care facility for the children of its mostly female workforce. Guatemalan laws had for years required such facilities at large workplaces, but nonenforcement was the norm. NGOs insisted on progress, and, slowly, it began to occur. Similarly, NGOs can monitor the types and pay rates of specific employers in which women and minority groups prevail, and seek to demand progress in the distribution of better jobs and higher pay scales. In that way, employers that refuse such progress may begin to be called to account.