

# The ILO Cites a Surprising Offender

By Paul Germanotta | November 5, 2003

In an unusual development, the Committee of Experts of the UN's International Labor Organization (ILO) has found the United States Government to be in violation of Convention 182. Convention 182, the newest "core" convention of the ILO, calls for the prohibition and elimination of the "worst forms" of child labor. The committee is an independent, quasi-judicial body that supervises government compliance with ratified ILO conventions and compiles its annual "comments"<sup>1</sup> in a report published in March.

The U.S. Government ratified Convention 182, its second ILO core convention, in December 1999.<sup>2</sup> It is only in ratifying a convention that a government triggers scrutiny of its national law and practice under the ILO's regular system of supervision.

The convention defines "child" as any person under the age of 18. It requires a ratifying government to take "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency." The "worst forms" of child labor are defined to include hazardous work.<sup>3</sup> Under article 4, the list of the types of work a government determines to be hazardous for children must be "periodically examined and revised as necessary."

In its 2001 compliance report to the ILO, its first under Convention 182, the Bush administration cited the Fair Labor Standards Act of 1938 (FLSA) as one of its "primary means of establishing," under article 3(d), the types of hazardous child labor in the United States. It also referred to a study commissioned by the Department of Labor (DOL) from the National Institute for Occupational Safety and Health (NIOSH), an agency of the Department of Health and Human Services, stating that the results would be used to at least partly meet its obligation to periodically review and revise its list of the types of work determined to be hazardous.

In keeping with the convention, the FLSA bans employment in hazardous occupations and work

activities for persons under 18 years old. However, it runs afoul of the convention, in part, with permissive rules that apply to child labor in hazardous *agricultural* occupations, including a *lower* minimum age of 16.

In implementing the FLSA, the Secretary of Labor has by regulation designated a list, now decades-old, of hazardous work activities and occupations, grouped into 28 "Hazardous Occupations Orders" (HOs), for which the use of child labor is banned.<sup>4</sup>

In its May 2002 report NIOSH not only "found justification for all of the existing HOs," but it recommended that only seven of the twenty-eight HOs be left unchanged, and that the other 75% be *revised* in order to *expand* the prohibitions or to redefine them more broadly.

It also recommended the development of several new HOs "to protect youth from especially hazardous work not adequately addressed in the existing regulations." These would, among other things, encompass work "associated with deaths and severe injuries of youth, work with especially high fatality rates, and work associated with disabling health conditions."

In a significant caveat, NIOSH referred to the FLSA exemptions for agricultural work, noting that its study "does not address statutory issues such as minimum age for work in HOs and exemptions from the FLSA ... Many deaths and serious injuries occur among youth not covered by the FLSA."



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The report states: “Thirty-five percent of the young workers killed over the 1992-1997 period lost their lives in agricultural production jobs ... Youth 15 to 17 years of age working in agriculture appeared to have over four times the risk for fatal injury of youth workers in other industries ... Changes to HOs could not be expected to impact these young worker injury deaths since they are exempt from the FLSA.”

In 2001, two legislative measures to amend the FLSA in order to toughen the regulation of child labor in hazardous employment were introduced in the 107th Congress: the Children’s Act for Responsible Employment (the CARE Act) and the Young American Workers’ Bill of Rights Act. The bills, which stalled in committee, would, among other things, increase from 16 to 18 the minimum age for hazardous agricultural work.

In its observation, the ILO Committee of Experts took note of the NIOSH report and made clear that a determination of compliance with the convention would depend, in part, on the government being able to report that “the Fair Labor Standards Act and its implementing orders and regulations ... will be amended in the light of the Government’s NIOSH ... recommendations.”<sup>5</sup> It also noted “with interest” the two congressional bills introduced in 2001, and it asked the government to report in 2003 on “steps it has taken to promote [them] ... with a view to bringing about their enactment by Congress.”

The U.S. Senate saw the problem coming from the outset and qualified its 1999 ratification with an “understanding” that, in its view, Convention 182 was not intended “to lead to a change in the agricultural employment provisions or any other provision of the Fair Labor Standards Act in the United States.” Since reservations to ILO conventions are inadmissible,<sup>6</sup> however, the Senate’s legal gimmick for securing a politically cost-free ratification failed to fend off the committee’s scrutiny.

The Bush administration, it seems, now intends to ignore the ILO’s determination of U.S. noncompliance with the convention, while keeping it out of the public discourse. Meanwhile, it will at most meet its obligation to *report* on the measures it is supposed to be taking to remedy the nonconformities of U.S. law

and practice. This cynical strategy can be gleaned from a visit to the public website of the DOL, where not a single reference to the committee’s U.S.-directed comments appears.<sup>7</sup>

Apart from the department’s politically filtered website content, a review of its policy track record also makes apparent the intention to leave the Committee of Experts’ comments unacknowledged—and unheeded.

In an intra-agency memo dated September 24, 2002 responding to internal recommendations on the domestic child labor program made by the DOL inspector general’s office (OIG), the Wage and Hour Division administrator specifically backpedaled on the NIOSH study. Her reply to the OIG recommendation to incorporate the NIOSH recommendations was framed in distinctly noncommittal terms.<sup>8</sup>

Indeed, the sole reference to plans for regulatory action on hazardous domestic child labor in the department’s online budget and policy documents is contained in the section of its Strategic Plan for FY 2003-2008 on Program Evaluation, as an entry in a chart on how programs under the department’s four strategic goals will be evaluated. It states: “Evaluation of the NIOSH recommendations for implementing new child labor hazardous occupations regulations: Wage and Hour Division will review recommendations from stakeholders on updating the regulatory child labor hazardous occupations orders.”

The entry makes no mention of the agricultural HOs or the FLSA exemptions for agricultural work. Nor does the notation for the methodology to be used make any reference to the NIOSH report or to the ILO comments under Convention 182, and it excludes even the generic methodologies listed for other DOL program evaluations. Instead, it designates as the sole methodology “Cost/benefit analysis”—a euphemism for the chopping block.

The FLSA hazardous occupations orders thus appear targeted, not for retention and expansion as NIOSH recommends, but for streamlining with a view to elimination. They are evidently among the intended casualties of the department’s new strategic goal of “A Competitive Workforce in the 21st Century,” which has as a central outcome goal “mini-

mizing regulatory burdens that can impede the productivity and competitiveness of the Nation's businesses."

In its blind, almost frenzied preoccupation with promoting U.S. business interests, the Bush administration appears intent on continuing to ride roughshod over protections for U.S. workers under federal law. It now plans to do so in the face of a formal, binding determination by well established, if non-coercive, supervisory mechanisms of the ILO that those protections must be reinforced, and that until the U.S. government takes steps in that direction it cannot be deemed a responsible observer of its international commitments under labor conventions it has ratified.

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## NOTES

- <sup>1</sup> The committee's comments, prepared during its annual November session, take two forms: "observations," which are formal findings of violations, and "direct requests" to governments for clarifying information to be provided in a subsequent compliance report, information that will likely lead to observations by the committee on further nonconformities in a later round of comments.
- <sup>2</sup> The other core convention ratified by the U.S. Government is number 105, on the abolition of forced labor, which it ratified in September 1991. See, by the same author, the October 31, 2002 commentary, "Forced Labor of Public Employees in the United States: A Note from the 2002 International Labor Conference," in FPIF OUTSIDE THE U.S. Commentaries: <http://www.fpif.org/indices/topics/labor/>.
- <sup>3</sup> More specifically, "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."
- <sup>4</sup> For example, the HOs for agriculture prohibit a child under age 16 from, among other things, operating or working with a power post-hole digger; operating or working with a fork lift or power-driven circular, band, or chain saw; and working from a ladder or scaffold at a height of over 20 feet.
- <sup>5</sup> The committee also considered two recent reports of the General Accounting Agency: "Child Labor in Agriculture: Changes Needed to Better Protect Health & Educational Opportunities," GAO/HEHS-98-193 (1998), and "Child labor: Labor can strengthen its efforts to protect children who work," GAO-02-880 (2002).
- <sup>6</sup> This is made clear in paragraph 24 of the ILO Handbook of procedures relating to international labor Conventions and Recommendations: <http://www.ilo.org/public/english/standards/norm/sources/handbook/>.
- <sup>7</sup> The only references to the ILO committee of experts on the DOL website are to be found on the pages of the department's Bureau of International Labor Affairs, to comments the committee has made against other governments. Most references to the convention itself appear only in DOL reports to Congress required under U.S. free trade legislation on the question of how well or poorly other governments are implementing their international commitments to eliminate the worst forms of child labor, or in descriptions of department activities to raise U.S. public awareness and understanding of international child labor issues.
- <sup>8</sup> See memorandum dated September 24, 2002 reproduced in Appendix D of Report 2E-04-420-0001 of the DOL Office of Inspector General: "Evaluation of the Domestic Child Labor Program": <http://www.oig.dol.gov/public/reports/oace/fy2002/2E044200001.PDF>

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