



FAIR LABOR
ASSOCIATION

**RETRENCHMENT:
GUIDANCE FOR FLA-AFFILIATED
COMPANIES**

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INTRODUCTION

In a free market economy, companies that procure goods domestically or internationally often shift sources of supply from one factory to another. These changes are generally driven by economic considerations, among them the ability of a factory to meet quantity and quality specifications, delivery schedules, and price. Sourcing shifts are an everyday occurrence: the structure of production and employment is constantly changing – regionally, nationally, and globally – as production and employment readjust after each shift.

Governments assist workers who are adversely affected by the loss of jobs associated with shifts in sourcing and production through different means, including employment services such as retraining, job search assistance, and relocation allowances.

Domestic legislation in many countries mandates that notice be given to workers when their plants, factories, or mines may be closed or employment severely reduced; that employers consult with workers and their representatives on potential changes; and that certain payments be made to workers when they become unemployed because of production shifts. Domestic legislation often also prohibits retrenchment based on discriminatory criteria, including membership in a trade union. There is also international labor jurisprudence on the subject, in the form of a convention adopted by the International Labor Organization in 1982 incorporating the main points of a Recommendation issued in 1963.¹

In a limited number of countries, unemployed workers are eligible to draw unemployment insurance benefits for a set period of time. It is more common, however, for benefits for unemployed workers to take the form of mandated severance payments from the employer, scaled in some way to the length of tenure of the worker in the enterprise. The fact that employers typically do not escrow to pay severance, and that such payments become due at the very moment when the enterprise is in financial difficulty -- because of loss of production orders, potential risk of bankruptcy, and impending downsizing or even closure -- raises serious concerns about the viability of severance payment schemes. Unemployment insurance systems, by contrast, are typically set up in the form of special funds through which multiple employers pool their contributions while the businesses operate and as such, the funds are available to workers if and when they are terminated.

International trade in textiles and clothing (T&C) was heavily managed until recently by a multilateral agreement (the Multi-Fibre Arrangement, MFA) that was first negotiated in 1974. During the over 30 years that it was in effect, the MFA and its system of country-specific quotas strongly determined – some would say skewed – patterns of trade and investment in T&C. It led to increased investment in countries that had little or no comparative advantage in T&C production, often by quota-seeking

¹ International Labor Organization, C.158, “Retrenchment of Employment Convention, 1982”; and R.119, “Retrenchment of Employment Recommendation, 1963.” The text of C.158 and R.119, together with texts of other relevant ILO instruments, are reproduced in an Annex.

enterprises from highly competitive countries that had exhausted their own quotas and were seeking new export platforms for T&C products.

The expiry of the MFA on January 1, 2005, and the elimination of the quota system that governed international trade in T&C, has been seen by many analysts as a watershed event that is likely to accelerate shifts in production and sourcing of T&C to China and other countries with low production costs. The fear among many is that these production shifts will severely impact the T&C industries of quota-dependent countries and create massive unemployment.

In 2004, as the expiry of the MFA drew close, the FLA began its own assessment of the implications of changes in international trade in T&C and highlighted the effect that geographic shifts in the structure of such production could have on employment and income of workers and communities. The FLA Board adopted a resolution in 2004 calling for company commitment to manage shifts in sourcing in a manner consistent with the FLA Charter, Code, and national law. The FLA also participated in the formation of the MFA Forum, which brings together retailers and brands, trade unions, NGOs, and national and multilateral public institutions to identify and promote collaborative strategies to support vulnerable national garment industries and greater respect for workers' rights in the post-MFA period.

This document provides guidance for FLA-affiliated companies whose suppliers or facilities may be involved in retrenchment and closures for operational reasons.² Particularly in the post-MFA environment, at a time when the T&C industries of many countries are in turmoil and tensions run high because of the fear of unemployment, observance by factories that supply FLA-affiliated companies of the guidance provided in this document would ensure they operate in a manner consistent with international labor standards, domestic law and the practices of company leaders in the labor compliance field.

² See also International Finance Corporation, *Good Practice Note: Managing Retrenchment*. Washington: World Bank Group, August 2005. http://www.ifc.org/ifcext/enviro.nsf/Content/Publications_GoodPractice

RETRENCHMENT: GUIDANCE FOR FLA-AFFILIATED COMPANIES

Retrenchment, also referred to as redundancy, downsizing, or closure based on operational requirements, occurs when the employer has bona fide economic, technological, structural or similar reasons to reduce the size of the workforce.

- Economic reasons derive from the financial status of the enterprise and can include external factors such as shifts in trade patterns and major changes in market conditions.
- Technological reasons stem from the introduction of new technology which makes existing jobs redundant or necessitates a restructuring of the workplace.
- Structural reasons refer to a restructuring of the enterprise for legitimate business reasons resulting in redundancies.

OBLIGATIONS OF THE EMPLOYER IN THE RETRENCHMENT PROCESS

The employment relationship in factories should be governed by a set of written policies and procedures backed by the necessary training, communication and appropriate controls. This means that factories should have in place a written policy on equality of opportunity and treatment and written procedures to implement those policies. A factory should have specific policies and procedures to guide any retrenchment process.

Retrenchments because of operational requirements are "no fault" terminations – in other words, the worker is not responsible for the termination of employment. The effective cause of the retrenchment is one or more external or internal factors related to the employer's business situation. Hence, the employer has the following obligations to the employee:

- In order to proceed with the retrenchment of workers, the employer must be able to provide sufficient documentation showing that redundancy was the real reason for retrenchment. If an employer fails to do so, the retrenchment is deemed unfair.
- When an employer intends to retrench, they may not initiate other processes of recruiting and hiring of personnel to work in the company in the same category or position as the workers who are being retrenched since it is understood that the retrenchment occurred for reasons for which the workers were not responsible. This should include hiring for all positions which the redundant workers may be capable of filling.
- If and when it becomes possible to proceed with the hiring of new workers, the jobs should be offered first to the worker(s) terminated from jobs in the same or similar categories before posting announcements for the job(s), since it is understood that the retrenchments occurred for reasons for which the workers were not responsible.

- The requirement of fairness places particular procedural and substantive obligations on the employer:
 - The employer should provide, at the earliest possible opportunity, written notice to the workers of the possibility of retrenchment and the reasons therefore.
 - The employer should consult with worker(s) or their representatives before a final decision to dismiss is taken.
 - The employer should ensure that all possible alternatives to retrenchment are explored and that those workers to be dismissed are treated fairly.
 - The employer should ensure that the worker(s) to be retrenched are selected objectively.
 - The employer should allow the worker(s) to be retrenched time off during the notice period to apply for other jobs.
- The employer should also ensure that severance pay and other benefits are paid according to law.

IMPLEMENTATION OF RETRENCHMENT

Criteria for Selecting Workers for Retrenchment

The general test for the fairness of selection criteria is that they be sufficiently objective to prevent abuse. Criteria that are generally accepted as fair in retrenchment situations include:

- length of service;
- skills and qualifications; and
- implementation of policies of affirmative action.

The most common principle for selecting who should be dismissed is known as LIFO (last in – first out), meaning that, as a rule, the workers with least time with the company should be the first to be dismissed on grounds of redundancy. This is the most common criteria used because it is entirely objective. If the criteria of skills and qualifications are used they have to be objectively determined and operationally justified.

Criteria which infringe international labor standards (ILO Conventions or Recommendations), national labor law, or the company's Code of Conduct, can never be

considered fair and cannot be used to select employees for retrenchment. Examples of unfair selection criteria include:

- union membership or activity
- race, sex, age, color, political opinion or affiliation, national and social origin or religion
- pregnancy
- HIV positive
- contractual status
- any other discriminatory ground dealt with in the Code of Conduct or national legislation.

Criteria that are apparently neutral should be carefully examined to ensure that when they are applied they do not have a discriminatory effect. LIFO, for example, may not be an objective criterion if discriminatory hiring practices had been practiced by the company.

Consultations

Consultations with representatives of the workers, or where a union exists, with union representatives, are recommended in all cases where retrenchments are necessary for operational reasons. It is critical to the fairness of any retrenchment that the consultation process precede the final decision. The consultations must include the causes of the redundancy, the alternatives considered or taken to avoid retrenchment, and why retrenchment is the only remaining option. If the decision has been taken before the consultations, the consultations are meaningless.

- The consultations should be a joint problem-solving exercise where the parties strive for solutions based on consensus.
- The consultations should commence as soon as it is clear that a reduction of the workforce is likely so that other alternatives can be explored.
- The employer should consult in good faith and seriously consider all proposals put forward. The disclosure of information by the employer on matters relevant to the retrenchment is essential to ensuring the objectivity of the process and avoiding conflict.
- The consultation process should allow worker representatives the opportunity to meet and report back to workers, to meet with the employer, and to request, receive and consider information about the situation at hand.

- Time off to seek work, social plans, etc. should be taken into consideration during the consultations and implemented to the degree possible.
- Employers should also consider other means to facilitate the transition of terminated workers, such as training or micro-credits.

The consultations, which should constitute a genuine effort to find alternative solutions, ought to cover at least the following themes:

1. The criteria for selection and the fair application of those criteria in the selection of workers to be dismissed:
 - When the LIFO principle is employed, the company should share with the workers' representatives a list of workers, including their starting date, to avoid any doubts as to the fairness of the selection of workers to be retrenched.
 - If the LIFO principle is used, but with some exceptions in order to retain workers with special skills necessary for the successful operation of the company, or due to policies of affirmative action, the reasons for retaining those particular qualifications and skills, and then the selection of the particular workers, should also be documented and shared with the workers' representatives.
 - When other principles for selection of the workers to be dismissed are used, the criteria for their selection must be agreed between the consulting parties. However, such criteria must never violate the principles set out in the Criteria for Selecting Workers above.
2. The payment of severance pay:
 - Workers are entitled to severance pay in accordance with national law. National labor legislation normally establishes a formula for the payment of severance pay upon retrenchment, generally stated as the sum of vacations due + unpaid Christmas bonus due + a determined number of weeks pay per year employed (the number of weeks per year entitlement varies from country to country). This, however, is a *minimum* established by the law, and where possible consensus should be reached through consultations as to other factors which could be included to calculate the severance pay.
 - A company having to retrench for economic reasons may not be in a position to pay severance pay at the level required by law, and the law does not require companies to maintain a severance pay fund. It is therefore recommended that companies maintain an escrow account in which severance funds are accumulated to cover any such eventuality.

3. Criteria for rehiring: Workers dismissed for operational requirements should be given preference if the employer re-hires workers with comparable skills and qualifications.

ROLE OF FLA-AFFILIATED COMPANIES IN SITUATIONS OF RETRENCHMENT

Regardless of whether retrenchment is envisaged, FLA-affiliated companies should ensure that factories they own, or from whom they source, have a written policy on equality of opportunity and treatment generally, and on retrenchment specifically.³ In situations where a high risk of retrenchment exists, they should also ensure that such factories comply with domestic law with regard to contributions to unemployment insurance funds, provident funds, or any other programs designed to assist workers at the time of loss of employment; and that they have the financial capacity to meet severance payments. FLA-affiliated companies should also maintain a dialogue with local stakeholders to keep abreast of local conditions and assess potential retrenchment plans of factory operators.

When the decision of an FLA-affiliated company may create a shift in sourcing that could contribute to factory downsizing or closure, the FLA-affiliated company should:

- As far as possible, provide sufficient notice to factories so that they can give advance notice to workers and prepare any final settlements in accordance with domestic law.
- If at all possible, phase out as slowly as possible in order to allow the factory to ensure that any retrenchment or closure meets domestic law regulations on retrenchment and severance.
- If a business relationship continues with the parent company or the factory after the withdrawal of orders, ensure that all pending compliance issues, such as retrenchment and severance, are resolved.

³ See FLA, *Guidelines of Good Practice on Hiring, Retrenchment, Disciplinary Measures, and Grievance Procedures*

Annex

C158 Termination of Employment Convention, 1982

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
 - (a) workers engaged under a contract of employment for a specified period of time or a specified task;
 - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
 - (c) workers engaged on a casual basis for a short period.
3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.
5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed

persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms termination and termination of employment mean termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, inter alia, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.
2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.
2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:
 - (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.
2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

R119 Termination of Employment Recommendation, 1963

I. Methods of Implementation

1. Effect may be given to this Recommendation through national laws or regulations, collective agreements, works rules, arbitration awards, or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

II. Standards of General Application

2.

(1) Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

(2) The definition or interpretation of such valid reason should be left to the methods of implementation set out in Paragraph 1.

3. The following, inter alia, should not constitute valid reasons for termination of employment:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; or

(d) race, colour, sex, marital status, religion, political opinion, national extraction or social origin.

4. A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body.

5.

(1) The bodies referred to in Paragraph 4 should be empowered to examine the reasons given for the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination.

(2) Subparagraph (1) should not be construed as implying that the neutral body should be empowered to intervene in the determination of the size of the work force of the undertaking, establishment or service.

6. The bodies referred to in Paragraph 4 should be empowered, if they find that the termination of employment was unjustified, to order that the worker concerned, unless reinstated, where appropriate with payment of unpaid wages, should be paid adequate compensation, or afforded such other relief as may be determined under the methods of implementation set out in Paragraph 1, or granted such compensation and other relief as may be so determined.

7.

(1) A worker whose employment is to be terminated should be entitled to a reasonable period of notice of compensation in lieu thereof.

(2) During the period of notice the worker should, as far as practicable, be entitled to a reasonable amount of time off without loss in pay in order to seek other employment.

8.

(1) The worker whose employment has been terminated should be entitled to receive, on request, at the time of the termination, a certificate from the employer specifying the dates of his engagement and termination and the type or types of work on which he was employed.

(2) Nothing unfavourable to the worker should be inserted in such certificate.

9. Some form of income protection should be provided for workers whose employment has been terminated; such protection may include unemployment insurance or other forms of social security, or severance allowance or other types of separation benefits paid for by the employer, or a combination of benefits, depending upon national laws or regulations, collective agreements and the personnel policy of the employer.

10. The question whether employers should consult with workers' representatives before a final decision is taken on individual cases of termination of employment should be left to the methods of implementation set out in Paragraph 1.

11.

(1) In case of dismissal for serious misconduct, a period of notice or compensation in lieu thereof need not be required, and the severance allowance or other types of separation benefits paid for by the employer, where applicable, may be withheld.

(2) Dismissal for serious misconduct should take place only in cases where the employer cannot in good faith be expected to take any other course.

(3) An employer should be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.

(4) A worker should be deemed to have waived his right to appeal against dismissal for serious misconduct if he has not appealed within a reasonable time after he has been notified of the dismissal.

(5) Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him.

(6) In the implementation of this Paragraph the definition or interpretation of "serious misconduct" as well as the determination of "reasonable time" should be left to the methods of implementation set out in Paragraph 1.

III. Supplementary Provisions concerning Reduction of the Work Force

12. Positive steps should be taken by all parties concerned to avert or minimise as far as possible reductions of the work force by the adoption of appropriate measures, without prejudice to the efficient operation of the undertaking, establishment or service.

13.

(1) When a reduction of the work force is contemplated, consultation with workers' representatives should take place as early as possible on all appropriate questions.

(2) The questions on which consultation should take place might include measures to avoid the reduction of the work force, restriction of overtime, training and retraining, transfers between departments, spreading termination of employment over a certain period, measures for minimising the effects of the reduction on the workers concerned, and the selection of workers to be affected by the reduction.

(3) As and when consultation takes place, both parties should bear in mind that there may be public authorities which might assist the parties in such consultation.

14. If a proposed reduction of the work force is on such a scale as to have a significant bearing on the manpower situation of a given area or branch of economic activity, the employer should notify the competent public authorities in advance of any such reduction.

15.

(1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria may include--

(a) need for the efficient operation of the undertaking, establishment or service;

(b) ability, experience, skill and occupational qualifications of individual workers;

(c) length of service;

(d) age;

(e) family situation; or

(f) such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to national customs and practice.

16.

(1) Workers whose employment has been terminated owing to a reduction of the work force should be given priority of re-engagement, to the extent possible, by the employer when he again engages workers.

(2) Such priority of re-engagement may be limited to a specified period of time; where appropriate, the question of the retention of seniority rights should be determined in accordance with national laws or regulations, collective agreements or other appropriate national practices.

(3) Re-engagement should be effected on the basis of the principles set out in Paragraph 15.

(4) The rate of wages of re-engaged workers should not be adversely affected as a result of the interruption of their employment, regard being had to differences between their previous occupation and the occupation in which they are re-engaged and to any intervening changes in the structure of wages in the undertaking, establishment or service.

17. There should be full utilisation of national employment agencies or other appropriate agencies to ensure, to the extent possible, that workers whose employment

has been terminated as a result of a reduction of the work force are placed in alternative employment without delay.

IV. Scope

18. This Recommendation applies to all branches of economic activity and all categories of workers: Provided that the following may be excluded from its scope:

- (a) workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration;
- (b) workers serving a period of probation determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period; and
- (d) public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of this Recommendation.

19. In accordance with the principle set forth in article 19, paragraph 8, of the Constitution of the International Labour Organisation, this Recommendation does not affect any provisions more favourable to the workers concerned than those contained herein.

20. This Recommendation should be considered as having been implemented in respect of workers whose conditions of employment are governed by special laws or regulations where those laws or regulations provide for such workers conditions which, in their entirety, are at least as favourable as the totality of those provided in this Recommendation.

C95 Protection of Wages Convention, 1949

Article 1

In this Convention, the term wages means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered.

Article 2

1. This Convention applies to all persons to whom wages are paid or payable.

2. The competent authority may, after consultation with the organisations of employers and employed persons directly concerned, if such exist, exclude from the application of all or any of the provisions of the Convention categories of persons whose circumstances and conditions of employment are such that the application to them of all or any of the said provisions would be inappropriate and who are not employed in manual labour or are employed in domestic service or work similar thereto.

3. Each Member shall indicate in its first annual report upon the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories of persons which it proposes to exclude from the application of all or any of the provisions of the Convention in accordance with the provisions of the preceding paragraph; no Member shall, after the date of its first annual report, make exclusions except in respect of categories of persons so indicated.

4. Each Member having indicated in its first annual report categories of persons which it proposes to exclude from the application of all or any of the provisions of the Convention shall indicate in subsequent annual reports any categories of persons in respect of which it renounces the right to have recourse to the provisions of paragraph 2 of this Article and any progress which may have been made with a view to the application of the Convention to such categories of persons.

Article 3

1. Wages payable in money shall be paid only in legal tender, and payment in the form of promissory notes, vouchers or coupons, or in any other form alleged to represent legal tender, shall be prohibited.

2. The competent authority may permit or prescribe the payment of wages by bank cheque or postal cheque or money order in cases in which payment in this manner is customary or is necessary because of special circumstances, or where a collective agreement or arbitration award so provides, or, where not so provided, with the consent of the worker concerned.

Article 4

1. National laws or regulations, collective agreements or arbitration awards may authorise the partial payment of wages in the form of allowances in kind in industries or occupations in which payment in the form of such allowances is customary or desirable because of the nature of the industry or occupation concerned; the payment of wages in the form of liquor of high alcoholic content or of noxious drugs shall not be permitted in any circumstances.

2. In cases in which partial payment of wages in the form of allowances in kind is authorised, appropriate measures shall be taken to ensure that--

(a) such allowances are appropriate for the personal use and benefit of the worker and his family; and

(b) the value attributed to such allowances is fair and reasonable.

Article 5

Wages shall be paid directly to the worker concerned except as may be otherwise provided by national laws or regulations, collective agreement or arbitration award or where the worker concerned has agreed to the contrary.

Article 6

Employers shall be prohibited from limiting in any manner the freedom of the worker to dispose of his wages.

Article 7

1. Where works stores for the sale of commodities to the workers are established or services are operated in connection with an undertaking, the workers concerned shall be free from any coercion to make use of such stores or services.

2. Where access to other stores or services is not possible, the competent authority shall take appropriate measures with the object of ensuring that goods are sold and services provided at fair and reasonable prices, or that stores established and services operated by the employer are not operated for the purpose of securing a profit but for the benefit of the workers concerned.

Article 8

1. Deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or arbitration award.

2. Workers shall be informed, in the manner deemed most appropriate by the competent authority, of the conditions under which and the extent to which such deductions may be made.

Article 9

Any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a worker to an employer or his representative or to any intermediary (such as a labour contractor or recruiter), shall be prohibited.

Article 10

1. Wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations.
2. Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family.

Article 11

1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.
2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets.
3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.

R85 Protection of Wages Recommendation, 1949

I. Deductions from Wages

1. All necessary measures should be taken to limit deductions from wages to the extent deemed to be necessary to safeguard the maintenance of the worker and his family.
2.
 - (1) Deductions from wages for the reimbursement of loss of or damage to the products, goods or installations of the employer should be authorised only when loss or damage has been caused for which the worker concerned can be clearly shown to be responsible.
 - (2) The amount of such deductions should be fair and should not exceed the actual amount of the loss or damage.
 - (3) Before a decision to make such a deduction is taken, the worker concerned should be given a reasonable opportunity to show cause why the deduction should not be made.
3. Appropriate measures should be taken to limit deductions from wages in respect of tools, materials or equipment supplied by the employer to cases in which such deductions--

- (a) are a recognised custom of the trade or occupation concerned; or
- (b) are provided for by collective agreement or arbitration award; or
- (c) are otherwise authorised by a procedure recognised by national laws or regulations.

II. Periodicity of Wage Payments

4. The maximum intervals for the payment of wages should ensure that wages are paid--

- (a) not less often than twice a month at intervals not exceeding sixteen days in the case of workers whose wages are calculated by the hour, day or week; and
- (b) not less often than once a month in the case of employed persons whose remuneration is fixed on a monthly or annual basis.

5.

(1) In the case of workers whose wages are calculated on a piece-work or output basis, the maximum intervals for the payment of wages should, so far as possible, be so fixed as to ensure that wages are paid not less often than twice a month at intervals not exceeding sixteen days.

(2) In the case of workers employed to perform a task the completion of which requires more than a fortnight, and in respect of whom intervals for the payment of wages are not otherwise fixed by collective agreement or arbitration award, appropriate measures should be taken to ensure--

- (a) that payments are made on account, not less often than twice a month at intervals not exceeding sixteen days, in proportion to the amount of work completed; and
- (b) that final settlement is made within a fortnight of the completion of the task.

III. Notification to Workers of Wage Conditions

6. The details of the wages conditions which should be brought to the knowledge of the workers should include, wherever appropriate, particulars concerning--

- (a) the rates of wages payable;
- (b) the method of calculation;

- (c) the periodicity of wage payments;
- (d) the place of payment; and
- (e) the conditions under which deductions may be made.

IV. Wages Statements and Payroll Records

7. In all appropriate cases, workers should be informed, with each payment of wages, of the following particulars relating to the pay period concerned, in so far as such particulars may be subject to change:

- (a) the gross amount of wages earned;
- (b) any deduction which may have been made, including the reasons therefor and the amount thereof; and
- (c) the net amount of wages due.

8. Employers should be required in appropriate cases to maintain records showing, in respect of each worker employed, the particulars specified in the preceding Paragraph.

V. Association of Workers in the Administration of Works Stores

9. Appropriate measures should be taken to encourage arrangements for the association of representatives of the workers concerned, and more particularly members of works welfare committees or similar bodies where such bodies exist, in the general administration of works stores or similar services established in connection with an undertaking for the sale of commodities or provision of services to the workers thereof.

R166 Termination of Employment Recommendation, 1982

I. Methods of Implementation, Scope and Definitions

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2.

(1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

(3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation.

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3.

(1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

- (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;
- (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms *termination* and *termination of employment* mean termination of employment at the initiative of the employer.

II. Standards of General Application

1. Justification for Termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

(a) age, subject to national law and practice regarding retirement;

(b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6.

(1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.

(2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

2. Procedure Prior to or at the Time of Termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.

10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

13.

(1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

(2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.

3. Procedure of Appeal against Termination

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.

15. Efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

4. Time Off from Work during the Period of Notice

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

5. Certificate of Employment

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

6. Severance Allowance and Other Income Protection

18.

(1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

(2) A worker who does not fulfill the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

III. Supplementary Provisions concerning Terminations of Employment for Economic, Technological, Structural or Similar Reasons

19.

(1) All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

(2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

1. Consultations on Major Changes in the Undertaking

20.

(1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term *the workers' representatives concerned* means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

2. Measures to Avert or Minimise Termination

21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

3. Criteria for Selection for Termination

23.

(1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

4. Priority of Rehiring

24.

(1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights-particularly seniority rights-in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

5. Mitigating the Effects of Termination

25.

(1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26.

(1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

(2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

IV. Effect on Earlier Recommendation

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

C173 Protection of Workers' Claims (Employer's Insolvency) Convention, 1992

PART I. GENERAL PROVISIONS

Article 1

1. For the purposes of this Convention, the term insolvency refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors.
2. For the purposes of this Convention, a Member may extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, for example where the amount of the employer's assets is recognised as being insufficient to justify the opening of insolvency proceedings.
3. The extent to which an employer's assets are subject to the proceedings referred to in paragraph 1 above shall be determined by national laws, regulations or practice.

Article 2

The provisions of this Convention shall be applied by means of laws or regulations or by any other means consistent with national practice.

Article 3

1. A Member which ratifies this Convention shall accept either the obligations of Part II, providing for the protection of workers' claims by means of a privilege, or the obligations of Part III, providing for the protection of workers' claims by a guarantee institution, or the obligations of both Parts. This choice shall be indicated in a declaration accompanying its ratification.
2. A Member which has initially accepted only Part II or only Part III of this Convention may thereafter, by a declaration communicated to the Director-General of the International Labour Office, extend its acceptance to the other Part.
3. A Member which accepts the obligations of both Parts of this Convention may, after consulting the most representative organisations of employers and workers, limit the

application of Part III to certain categories of workers and to certain branches of economic activity. Such limitations shall be specified in the declaration of acceptance.

4. A Member which has limited its acceptance of the obligations of Part III in accordance with paragraph 3 above shall, in its first report under article 22 of the Constitution of the International Labour Organisation, give the reasons for limiting its acceptance. In subsequent reports it shall provide information on any extension of the protection under Part III of this Convention to other categories of workers or other branches of economic activity.

5. A Member which has accepted the obligations of Parts II and III of this Convention may, after consulting the most representative organisations of employers and workers, exclude from the application of Part II those claims which are protected pursuant to Part III.

6. Acceptance by a Member of the obligations of Part II of this Convention shall ipso jure involve the termination of its obligations under Article 11 of the Protection of Wages Convention, 1949.

7. A Member which has accepted only the obligations of Part III of this Convention may, by a declaration communicated to the Director-General of the International Labour Office, terminate its obligations under Article 11 of the Protection of Wages Convention, 1949, in respect of those claims which are protected pursuant to Part III.

Article 4

1. Subject to the exceptions provided for in paragraph 2 below, and to any limitations specified in accordance with Article 3, paragraph 3, this Convention shall apply to all employees and to all branches of economic activity.

2. The competent authority, after consulting the most representative organisations of employers and workers, may exclude from Part II, Part III or both Parts of this Convention specific categories of workers, in particular public employees, by reason of the particular nature of their employment relationship, or if there are other types of guarantee affording them protection equivalent to that provided by the Convention.

3. A Member availing itself of the exceptions provided for in paragraph 2 above shall, in its reports under article 22 of the Constitution of the International Labour Organisation, provide information on such exceptions, giving the reasons therefor.

PART II. PROTECTION OF WORKERS' CLAIMS BY MEANS OF A PRIVILEGE

1. PROTECTED CLAIMS

Article 5

In the event of an employer's insolvency, workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share.

Article 6

The privilege shall cover at least:

- (a) the workers' claims for wages relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment;
- (b) the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;
- (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment;
- (d) severance pay due to workers upon termination of their employment.

2. LIMITATIONS

Article 7

1. National laws or regulations may limit the protection by privilege of workers' claims to a prescribed amount, which shall not be below a socially acceptable level.
2. Where the privilege afforded to workers' claims is so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.

3. RANK OF PRIVILEGE

Article 8

1. National laws or regulations shall give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system.
2. However, where workers' claims are protected by a guarantee institution in accordance with Part III of this Convention, the claims so protected may be given a lower rank of privilege than those of the State and the social security system.

PART III. PROTECTION OF WORKERS' CLAIMS BY A GUARANTEE INSTITUTION

1. GENERAL PRINCIPLES

Article 9

The payment of workers' claims against their employer arising out of their employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency.

Article 10

In giving effect to this Part of the Convention, a Member may, after consulting the most representative organisations of employers and workers, adopt appropriate measures for the purpose of preventing possible abuse.

Article 11

1. The organisation, management, operation and financing of wage guarantee institutions shall be determined pursuant to Article 2.
2. The preceding paragraph shall not prevent a Member, in accordance with its particular characteristics and needs, from allowing insurance companies to provide the protection referred to in Article 9, as long as they offer sufficient guarantees.

2. CLAIMS PROTECTED BY A GUARANTEE INSTITUTION

Article 12

The workers' claims protected pursuant to this Part of the Convention shall include at least:

- (a) the workers' claims for wages relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of the employment;
- (b) the workers' claims for holiday pay due as a result of work performed during a prescribed period, which shall not be less than six months, prior to the insolvency or prior to the termination of the employment;
- (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of employment;

(d) severance pay due to workers upon termination of their employment.

Article 13

1. Claims protected pursuant to this Part of the Convention may be limited to a prescribed amount, which shall not be below a socially acceptable level.
2. Where the claims protected are so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.

R180 Protection of Workers' Claims (Employer's Insolvency) Recommendation, 1992

I. DEFINITIONS AND METHODS OF APPLICATION

1.

(1) For the purposes of this Recommendation, the term *insolvency* refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors.

(2) For the purposes of this Recommendation, Members may extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, and in particular to the following:

- (a) where the enterprise has closed down or ceased its activities or is voluntarily wound up;
- (b) where the amount of the employer's assets is insufficient to justify the opening of insolvency proceedings;
- (c) where, in the course of proceedings to recover a worker's claim arising out of employment, it is found that the employer has no assets or that these are insufficient to pay the debt in question;
- (d) where the employer has died and his or her assets have been placed in the hands of an administrator and the amounts due cannot be paid out of the estate.

(3) The extent to which an employer's assets are subject to the proceedings referred to in subparagraph (1) should be determined by national laws, regulations or practice.

2. The provisions of this Recommendation may be applied by means of laws or regulations or by any other means consistent with national practice.

II. PROTECTION OF WORKERS' CLAIMS BY MEANS OF A PRIVILEGE PROTECTED CLAIMS

3.

(1) The protection afforded by a privilege should cover the following claims:

(a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during a prescribed period prior to the insolvency or prior to termination of the employment. This period should be fixed by national laws or regulations and should not be less than 12 months;

(b) holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;

(c) amounts due in respect of other types of paid absence, end-of-year and other bonuses provided for by national laws or regulations, collective agreements or individual contracts of employment, relating to a prescribed period, which should not be less than 12 months, prior to the insolvency or prior to the termination of the employment;

(d) payments due in lieu of notice of termination of employment;

(e) severance pay, compensation for unfair dismissal and other payments due to workers upon termination of their employment;

(f) compensation payable directly by the employer in respect of occupational accidents and diseases.

(2) The protection afforded by a privilege might cover the following claims:

(a) contributions due in respect of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(b) contributions due in respect of private, occupational, inter-occupational or enterprise social protection schemes independent of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(c) benefits to which the workers were entitled prior to the insolvency by virtue of their participation in enterprise social protection schemes and which are payable by the employer.

(3) Claims enumerated in subparagraphs (1) and (2) that have been awarded to a worker through an adjudication or arbitration within 12 months prior to the insolvency

should be covered by the privilege regardless of the time-limits specified in those subparagraphs.

1. LIMITATIONS

4. Where the amount of the claim protected by a privilege is limited by national laws or regulations, in order that this amount should not fall below a socially acceptable level it should take into account variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

2. CLAIM WHICH FALL DUE AFTER THE INSOLVENCY PROCEEDINGS HAVE BEEN OPENED

5. Where, in accordance with national laws and regulations, an enterprise in respect of which insolvency proceedings have been opened is authorised to continue its activities, workers' claims arising out of work performed as from the date when the continuation was authorised should not be subject to the proceedings and should be paid, out of the funds available, as and when they fall due.

3. ACCELERATED PAYMENT PROCEDURES

6.

(1) Where the insolvency proceedings cannot ensure rapid payment of workers' privileged claims, there should be a procedure for accelerated payment to ensure that the claims are paid, without awaiting the end of the proceedings, out of available funds or as soon as funds become available, unless the rapid payment of workers' claims is ensured by a guarantee institution.

(2) Accelerated payment of workers' claims may be ensured as follows:

(a) the person or institution responsible for administering the employer's assets should pay such claims as soon as it has been determined that they are genuine and payable;

(b) if the claim is contested, the worker should be able to have its validity determined by a court or any other body with jurisdiction over the matter, so as to have it paid in accordance with clause (a).

(3) The accelerated payment procedure should cover the totality of the claim protected by a privilege, or at least a part of it to be fixed by national laws or regulations.

III. PROTECTION OF WORKERS' CLAIMS BY A GUARANTEE INSTITUTION SCOPE

7. The protection of workers' claims by a guarantee institution should have as wide a coverage as possible.

1. OPERATING PRINCIPLES

8. Guarantee institutions might operate according to the following principles:

(a) they should be administratively, financially and legally independent of the employer;

(b) employers should contribute to financing these institutions, unless this is fully covered by the public authorities;

(c) they should assume their obligations vis-à-vis protected workers irrespective of whether any obligation the employer may have of contributing to their financing has been met;

(d) they should assume a subsidiary responsibility for the liabilities of insolvent employers in respect of claims protected by the guarantee and should, by way of subrogation, be able to act in place of the workers to whom they have made payments;

(e) the funds managed by guarantee institutions, other than those from general revenues, may only be used for the purpose for which they were collected.

2. CLAIMS PROTECTED BY THE GUARANTEE

9.

(1) The guarantee should cover the following claims:

(a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during a prescribed period, which should not be less than three months, prior to the insolvency or prior to the termination of the employment;

(b) holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;

(c) end-of-year and other bonuses provided for by national laws or regulations, collective agreements or individual contracts of employment, relating to a prescribed period, which should not be less than 12 months, prior to the insolvency or prior to the termination of the employment;

(d) amounts due in respect of other types of paid absence relating to a prescribed period, which should not be less than three months, prior to the insolvency or prior to the termination of the employment;

- (e) payments due in lieu of notice of termination of employment;
- (f) severance pay, compensation for unfair dismissal and other payments due to workers upon termination of their employment;
- (g) compensation payable directly by the employer in respect of occupational accidents and diseases.

(2) The guarantee might cover the following claims:

- (a) contributions due in respect of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;
- (b) contributions due in respect of private, occupational, inter- occupational, or enterprise social protection schemes independent of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;
- (c) benefits to which the workers were entitled prior to the insolvency by virtue of their participation in enterprise social protection schemes and which are payable by the employer;
- (d) wages or any other form of remuneration consistent with this Paragraph, awarded to a worker through adjudication or arbitration within three months prior to the insolvency.

3. LIMITATIONS

10. Where the amount of the claim protected by means of a guarantee institution is limited, in order that this amount should not fall below a socially acceptable level, it should take into account variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

IV. PROVISIONS COMMON TO PARTS II AND III

11. Workers or their representatives should receive timely information and be consulted with regard to insolvency proceedings which have been opened and to which the workers' claims pertain.