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ILO CONVENTION (NO. 111) CONCERNING DISCRIMINATION (EMPLOYMENT AND OCCUPATION)

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

ILO CONVENTION (NO. 111) CONCERNING DISCRIMINATION (EMPLOYMENT AND OCCUPATION), ADOPTED BY THE INTERNATIONAL LABOR CONFERENCE AT ITS 42ND SESSION IN GENEVA ON JUNE 25, 1958

MAY 18, 1998.—Convention was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate.

U.S. GOVERNMENT PRINTING OFFICE
59–118 WASHINGTON : 1998

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *May 18, 1998.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Convention (No. 111) Concerning Discrimination (Employment and Occupation), adopted by the International Labor Conference at its 42nd Session in Geneva on June 25, 1958. Also transmitted is the report of the Department of State, with a letter dated January 6, 1997, from then Secretary of Labor Robert Reich, concerning the Convention.

This Convention obligates ratifying countries to declare and pursue a national policy aimed at eliminating discrimination with respect to employment and occupation. As explained more fully in the letter from Secretary Reich, U.S. law and practice fully comport with its provisions.

In the interest of clarifying the domestic application of the Convention, my Administration proposes that two understandings accompany U.S. ratification.

The proposed understandings are as follows:

> The United States understands the meaning and scope of Convention No. 111 in light of the relevant conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations which have been adopted prior to the date of U.S. ratification. The Committee's conclusions and practice are, in any event, not legally binding on the United States and have no force and effect on courts in the United States.
>
> The United States understands that the federal nondiscrimination policy of equal pay for substantially equal work meets the requirements of Convention 111. The United States further understands that Convention 111 does not require or establish the doctrine of comparable worth with respect to compensation as that term is understood under United States law and practice.

These understandings would have no effect on our international obligations under Convention No. 111.

Ratification of this Convention would be consistent with our policy of seeking to adhere to additional international labor instruments as a means both of ensuring that our domestic labor standards meet international requirements, and of enhancing our ability to call other governments to account for failing to fulfill their obligations under International Labor Organization (ILO) conventions.

I recommend that the Senate give its advice and consent to the ratification of ILO Convention No. 111.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, October 2, 1997.

The PRESIDENT:
The White House.

THE PRESIDENT: I have the honor to submit to you, with the recommendation that it be transmitted to the Senate for advice and consent to ratification, a certified copy of the Convention (No. 111) Concerning Discrimination (Employment and Occupation), which was adopted by the International Labor Conference at its 42nd Session in Geneva on June 25, 1958.

This Convention obligates ratifying countries to declare and pursue a national policy aimed at eliminating discrimination in respect to employment and occupation. For these purposes, discrimination is defined to include 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. Interested departments and agencies have determined that the United States is in compliance with the terms of this Convention. The Secretary of Labor, in his enclosed letter of January 6, 1997, provides additional details concerning how U.S. law and practice comport with its provisions.

In the interest of clarifying the domestic application of the Convention, the Secretary of Labor has proposed that two understandings accompany U.S. ratification. These understandings (the first of which we have modified slightly with the Secretary's concurrence) would have no effect on our international obligations under Convention No. 111.

The proposed understandings we propose are as follows:

> The United States understands the meaning and scope of Convention No. 111 in light of the relevant conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations which have been adopted prior to the date of U.S. ratification. The Committee's conclusions and practice are, in any event, not legally binding on the United States and have no force and effect on courts in the United States.
>
> The United States understands that the federal nondiscrimination policy of equal pay for substantially equal work meets the requirements of Convention 111. The United States further understands that Convention 111 does not require or establish the doctrine of comparable

worth with respect to compensation as that term is understood under United States law and practice.

I am pleased to join with the Secretary of Labor in recommending that the Convention be transmitted to the Senate for advice and consent to ratification. Ratification of this Convention would be consistent with our policy of seeking to adhere to additional international labor instruments as a means both of ensuring that our domestic labor standards meet international requirements and of enhancing our ability to call other governments to account for failing to fulfill their obligations under ILO conventions. All interested departments and agencies concur in that view.

Respectfully submitted,

STROBE TALBOT.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

1997

The Honorable Warren M. Christopher
Secretary of State
Washington, D.C. 20520

Dear Secretary Christopher:

This letter expresses the coordinated view of the interested departments and agencies with respect to United States ratification of Convention No. 111 concerning Discrimination (Employment and Occupation), adopted by the International Labor Conference at its 42nd Session on June 25, 1958.

Convention No. 111 obligates ratifying countries to declare and pursue a national policy aimed at eliminating discrimination in respect of employment and occupation. The Convention defines discrimination as any distinction, exclusion or preference based on race, color, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment at work. The scope of the Convention covers access to employment, access to vocational training and terms and conditions of employment.

It is the position of the Executive Branch that Convention No. 111 should be forwarded to the President with a recommendation that he submit it to the Senate with a view to obtaining advice and consent to ratification. It is further proposed that two understandings be adopted to clarify the domestic application of the Convention.

On August 16, 1996 I transmitted to the members of the President's Committee on the ILO a report prepared by our Tripartite Advisory Panel on International Labor Standards (TAPILS) with the Panel's conclusion that there are no legal impediments to U.S. ratification.

TAPILS undertook an extensive review of Convention No. 111 which included a detailed examination of the precise meaning and obligations of the Convention and of how U.S. law and practice comport with its provisions. A tripartite working group from the Panel also met and corresponded with experts from the International Labor Office in Geneva, Switzerland, to ensure that the ILO shared TAPILS' assessment that the U.S. is in full compliance with the Convention. However, in the interest of clarifying the domestic application of the Convention, TAPILS proposed that two understandings accompany U.S. ratification. These understandings would have no effect on our international obligations under Convention No. 111.

WORKING FOR AMERICA'S WORKFORCE

Having reviewed TAPILS' legal findings, the President's Committee unanimously agreed to recommend that the President submit Convention No. 111 to the Senate with a request for advice and consent to ratification. On the basis of that decision, I initiated the current Executive Branch process. All departments and agencies which have an interest in the subject matter of Convention No. 111 have been consulted and share the view of the President's Committee with respect to the advisability of U.S. ratification.

I am enclosing the TAPILS report along with a detailed statement of how U.S. law and practice comport with the Convention. The law and practice statement was also prepared under TAPILS' guidance. These documents fully discuss the above-mentioned proposed understandings.

As you know, Convention No. 111 is one of the ILO's core human rights conventions and, indeed, one of the world's foremost documents concerning equality of opportunity and treatment. I and the other members of the President's Committee believe that ratification of Convention No. 111 will be a profoundly positive development for the United States in the ILO and well beyond. I hope Senate consideration can be requested as expeditiously as possible.

With my warmest regards,

Sincerely,

Robert B. Reich

Enclosures

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

AUG 16 1996 9614853

MEMORANDUM FOR MEMBERS OF THE PRESIDENT'S COMMITTEE ON THE ILO

FROM: Robert B. Reich

SUBJECT: U.S. Ratification of ILO Convention No. 111

The Tripartite Advisory Panel on International Labor Standards (TAPILS), our legal subcommittee, has unanimously determined that there are no legal impediments to United States ratification of ILO Convention No. 111 concerning Discrimination (Employment and Occupation). TAPILS also concluded that it would be appropriate for the United States to adopt two understandings to accompany its ratification of Convention No. 111 for the purpose of clarifying the meaning of the Convention as it relates to domestic law and procedure. These understandings would not modify or limit any international obligations under the Convention.

A copy of the TAPILS report and a Statement of U.S. Law and Practice with respect to Convention No. 111 are attached.

This is to request your endorsement of a recommendation from the President's Committee to the President that he seek the advice and consent of the U.S. Senate to ratification of Convention No. 111, based on the TAPILS report and proposed understandings.

Please telephone your endorsement to Mr. Andrew Samet, Acting Deputy Under Secretary for International Affairs, at 219-6043.

Attachments

REPORT OF THE TRIPARTITE ADVISORY PANEL ON INTERNATIONAL LABOR STANDARDS REGARDING CONVENTION NO. 111 ON EMPLOYMENT DISCRIMINATION

Summary

The Tripartite Advisory Panel on International Labor Standards (TAPILS) has examined in detail International Labor Organization (ILO) Convention 111 concerning Discrimination in Respect of Employment and Occupation. The members of TAPILS unanimously conclude that there are no legal impediments in law or practice to ratification of the Convention by the United States.

Convention 111 is a non-self-executing treaty. If ratified, Convention 111, as a non-self-executing treaty, would not be enforceable as a matter of United States law in United States courts. As existing legislation already brings the United States into compliance with Convention 111, no new legislation is required.

This report discusses the TAPILS review process and how TAPILS reviewed Convention 111 for possible ratification. A detailed description of how United States law and practice brings the United States into compliance with the Convention is included with the accompanying Statement of Law and Practice.

Function of TAPILS

TAPILS was established in 1980 by the President's Committee on the ILO. Its membership consists of legal advisors representing the Departments of Labor, State, and Commerce, the American Federation of Labor and Congress of Industrial Organizations, and the United States Council for International Business. Under its mandate, TAPILS is to examine ILO conventions and to determine and report to the President's Committee whether there are legal conflicts or differences between the requirements of the conventions and existing United States law and practice.

TAPILS examines ILO conventions in accordance with three ground rules agreed to by the President's Committee in October 1985 and incorporated in a Senate declaration adopted at the time the Senate gave its advice and consent to United States ratification of Convention 144 in 1988. The three ground rules provide that:

1) Each ILO convention will be examined on its merits on a tripartite basis;

2) If there are any differences between the convention and Federal law and practice,

these differences will be dealt with in the normal legislative process; and

3) There is no intention to change State law and practice by Federal action through ratification of ILO conventions, and the examination will include possible conflicts between Federal and State law that would be caused by such ratification.

TAPILS conducts its work through an in-depth examination of the negotiating and legislative history leading to the adoption of a given convention by the International Labor Conference as well as the conclusions reached by the ILO Committee of Experts on the Application of Conventions and Recommendations, an independent supervisory group appointed by the ILO Governing Body. TAPILS then compares the provisions and interpretations of the convention with existing United States law and practice. As a result of this comparison, TAPILS may pose written and oral questions to officials of the ILO, in both its Standards Department (which is most involved with interpretation and application of ILO conventions) and the Office of the Legal Advisor (the ILO's general counsel) in order to identify or resolve potential legal obstacles to United States ratification.

Since 1980, TAPILS has examined ILO conventions under a "two-track" approach approved by the President's Committee, alternately considering human rights conventions and technical conventions. Under this approach, TAPILS previously concluded that four technical conventions, Convention 144 concerning Tripartite Consultations, Convention 147 concerning Minimum Standards in Merchant Ships, Convention 150 concerning Labor Administration, and Convention 160 concerning Labor Statistics, and one human rights convention, Convention 105 concerning Abolition of Forced Labor, could be ratified without altering United States law and practice. The President's Committee subsequently unanimously recommended to the President that Conventions 105, 144, 147, 150 and 160 be ratified. Following the advice and consent of the United States Senate, each of the Conventions was ratified.

Preliminary Legal Review of Convention 111

The International Labor Organization (ILO) adopted Convention 111 concerning Discrimination in Respect of Employment and Occupation in 1958. It is one of the principal human rights conventions of the ILO. Article II of Convention 111 states the aim of the convention. That article states:

> Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by

> methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Convention 111 is a promotional convention. This means that the Convention obligates the ratifying country to pursue a policy which will guide present and future decisions in the fields of employment and occupation with the ultimate goal of eliminating discrimination based on the seven criteria enumerated in the convention: race; color; sex; religion; political opinion; national extraction; and social origin.

TAPILS began review of the provisions of Convention 111 and the relevant United States law and practice in 1987. In October 1987, TAPILS requested the Office of the Solicitor of the Department of Labor to prepare a preliminary legal analysis of the Convention. In January 1988, the Solicitor's office distributed its preliminary analysis of Convention 111. The report disclosed the obligations under the Convention and described the principal federal statutes which appeared to bring the United States in compliance with the convention. The report, however, also identified several possible issues related to United States law and practice which would require further study in order to determine whether the United States could ratify the Convention.

In the four years following the preliminary analysis, TAPILS concentrated its efforts on legal review of Conventions 105, 138 and 150. The United States ratified Convention 105 in 1991 and Convention 150 in 1995. TAPILS determined that the United States could not ratify Convention 138, Minimum Age, without changes in existing legislation and regulations.

During the four years when TAPILS concentrated on other ILO conventions, several significant developments occurred with respect to Convention 111. First, the Supreme Court of the United States decided a series of important cases which arguably changed the law and practice of the United States with respect to employment discrimination. Even more significant, however, was the passage of the Civil Rights Act of 1991. This statute amended five federal civil rights statutes and effectively overturned portions of a half dozen recent Supreme Court decisions on employment discrimination.

In 1992, TAPILS requested the Solicitor's office to draft a supplemental report on Convention 111 analyzing how these recent developments had affected United States national policy on discrimination. The report was completed in August 1992.

In-depth Review of Convention 111

Following the supplemental report, TAPILS concentrated more fully on Convention 111 even as it continued its work on the ratification of Convention 150. In 1993, TAPILS engaged in a series of discussions concerning some of the overall issues regarding Convention 111. These discussions included meetings between members of TAPILS and representatives of the ILO Standards Branch at the June 1993 ILO meetings in Geneva. The discussions between TAPILS and the ILO confirmed that Convention 111 is a promotional, non-self-executing convention that does not incorporate the supplemental provisions of Recommendation 111.

After these discussions with the ILO, TAPILS focused its attention on whether United States law and practice met Convention 111's requirements with respect to compensation discrimination and equal pay, political opinion discrimination and coverage of small employers. To help address these and other issues, TAPILS requested and received the help of attorneys from the Equal Employment Opportunity Commission, Department of Education and the Civil Rights Division of the Solicitor's Office of the Department of Labor. From its more detailed review of United States law and practice concerning employment discrimination, the group developed a list of ten legal questions that it submitted to the ILO in May 1995 for discussion.

These discussions led to a refinement of the questions and the identification of new issues concerning independent contractors and religious discrimination and further meetings with representatives of the ILO Standards Branch during the June 1995 ILO Conference. Following further legal review, six questions were sent to the ILO in December 1995 for written reply. See Appendix 1. The ILO unqualifyingly affirmed TAPILS legal conclusions. See Appendix 2.

Discussions with representatives of the ILO as well as legal research conducted by members of TAPILS in 1995 had indicated that the exception in Title VII of the Civil Rights Act of 1964, permitting religious organizations to limit employment to persons of their own faith, could create a possible obstacle to United States ratification of Convention 111. Following extensive research into the exception to Title VII for religious organizations, the TAPILS group submitted two questions concerning religious discrimination to the ILO in April 1996, including a detailed description of the law and practice of the United States regarding the exception to Title VII for religious organizations. See Appendix 3. The ILO responded affirmatively to TAPILS' legal conclusions. See Appendix 4.

Proposed Understandings to Convention 111.

During its consideration of Convention 111, TAPILS determined that it would be appropriate for the United States to adopt two understandings to accompany its ratification of Convention 111. An understanding to an international treaty, such as an ILO convention, clarifies or explains the meaning of the treaty as it relates to domestic law or procedure or addresses a matter incidental to the domestic operation of the treaty. Unlike a reservation to a treaty or convention -- which the ILO does not accept -- an understanding has no substantive effect on a treaty's terms. That is, an understanding does not modify or limit any of the provisions of the member's international obligations under it.

1. Defining the United States Obligations Under Convention 111.

Because TAPILS is concerned that there is an evolving and expanding interpretation of the ILO's basic human rights conventions, TAPILS concluded that, as with the earlier ratification of Convention 105 concerning Forced Labor, it would be appropriate to include an understanding to United States ratification of Convention 111 that defined the obligations of the United States under the Convention as being no more than the conclusions and practice of the ILO as interpreted by the Committee of Experts up to the time of ratification. However, in any event, the existing interpretations of Convention 111 by the Committee of Experts are not legally binding on the United States. That is:

> The United States understands the meaning and scope of Convention No. 111, having taken into account the conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations existing prior to ratification, which conclusions and practice, in any event, are not legally binding on the United States and have no force and effect on courts in the United States.

2. Compensation Discrimination.

During its review of Convention 111, TAPILS uncovered certain statements by the ILO Committee of Experts which appeared to imply that certain requirements of ILO Convention 100, Equal Remuneration, were contained in Convention 111, even though Convention 100 is not explicitly referred to in Convention 111, and the United States has not ratified Convention 100.

Because it is TAPILS' understanding that Convention 111 does not include the concept of comparable worth, the group submitted to the ILO a detailed description of United States law and practice regarding compensation discrimination based on sex, and specifically asked:

> We understand that United States nondiscrimination policy with respect to compensation found in the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act as interpreted by the courts meets the requirements of ILO Convention 111 as such compensation discrimination relates to terms and conditions of employment. Is this understanding correct?

The ILO answered this question with an unequivocal "yes."

In order to make clear that ratification of Convention 111 does not change or affect in any manner United States compensation law and practice with respect to sex, TAPILS recommends that the United States adopt the following understanding with ratification of Convention 111.

> The United States understands that the federal nondiscrimination policy of equal pay for substantially equal work meets the requirements of Convention 111. The United States further understands that Convention 111 does not require or establish the doctrine of comparable worth with respect to compensation as that term is understood under United States law and practice.

Conclusion

In accordance with the ground rules governing its review of ILO conventions, TAPILS concludes that, with the understandings described above, the United States can ratify Convention 111 without amending United States law and practice.

U.S. Department of Labor

Bureau of International Labor Affairs
Washington, D.C. 20210

December 8, 1995

Mr. Lee Swepston
Chief, Equality and Human Rights Coordination Branch
International Labor Standards Department
Geneva, Switzerland

Dear Lee:

As promised, enclosed is a series of questions prepared by the Tripartite Advisory Panel on International Labor Standards aimed at clarifying the obligations of the United States in the event of ratification of ILO Convention No. 111 concerning Discrimination (Employment and Occupation), 1958.

TAPILS' oral discussions with you and Jane Hodges-Aeberhard on matters relating to the meaning and scope of Convention No. 111 have been very helpful. At this time, we would appreciate a written response from the Office.

Because of the U.S. constitutional system, structure of government and ratification procedures, the United States requires a precise understanding of the legal requirements that it undertakes at the time it ratifies an ILO convention. While we recognize that the International Labor Office has no authority to definitively interpret ILO standards, the knowledge and experience of the ILO staff is of great value to our tripartite legal review of this and other conventions.

Thank you for your help.

Sincerely,

Julie

Julie Misner

Enclosure

December 8, 1995

MEMORANDUM

RE: Questions to the International Labor Organization for Written Reply Concerning ILO Convention 111

In order to further the U.S. tripartite legal review of United States' compliance with the requirements of ILO Convention 111, below are a series of questions that the Tripartite Advisory Panel on International Labor Standards submits to the International Labor Organization for written reply.

1. At the outset of this series of questions, it is of essential importance to clarify what Convention 111 requires to be in compliance and what is does not.

Fundamentally, it is indisputably a promotional policy convention. We understand it to be policy in the sense of a course of action by the national government of a member state of the ILO to guide present and future decisions in the field of employment and occupation toward the ultimate goal of eliminating discrimination in the areas of race, color, sex, religion, political opinion, national extraction, and social origin.

The choice of the framers of the Convention of the way in which to implement this policy was not a series of specific requirements to abolish, forbid, or eliminate discrimination. Nor was it a pattern of cease and desist demands. On the contrary, we understand that it was a much more moderate requirement to promote the policy with the view to the ultimate elimination of discrimination "by methods appropriate to national conditions and practice."

Accordingly, we understand the anti-discrimination policy to be promoted in the sense of being advanced or improved in all of the specified categories of race, sex, political opinion, etc. Discourage, dissuade and diminish spring to mind as the tools for accomplishing this promotional policy through the educational and legislative measures indicated in the Convention.

Significantly, we understand that this promotional policy is not the equivalent of a requirement that there be an absence of discrimination or its elimination in any one or more of the indicated categories either at the time of ratification or at any particular time thereafter. On the contrary, the promotional requirement is a gradual, progressive process so long as it is honestly pursued with intent to improve.

Probably no better illustration of this ongoing process exists in the United States than its efforts to combat invidious race and color discrimination. Despite past and continuing efforts on a variety of fronts consistent with the requirements of Convention 111—including legislation, judicial decisions, and executive action—deplorably there remain pockets of resistance which preclude a realistic appraisal that we have achieved a color blind society. Overcoming bias and prejudice requires more than a packet of laws. Enlightened educational

efforts—a cardinal promotional deterrent to discrimination in the optional arsenal of Convention 111—may offer a more effective antidote.

We submit this experience as a clear example that, in spite of myriad attempts to eradicate racial discrimination, it has not been wholly successful. But of equal importance to the focal point of our understanding of Convention 111, we understand that it is not a requirement of this Convention that successful results or absence of discrimination is achieved—only continuation of the promotional effort is necessary.

a. The foregoing construction of the promotional policy requirements of Convention 111 is basic to our further understandings which follow, as well as to the desire of the U.S. to ratify this Convention. Is our understanding correct?

2. The primary federal law establishing the United States national policy on nondiscrimination in employment—Title VII of the 1964 Civil Rights Act—contains an exception for employers of less than fifteen employees because of the historic and usual practice under the 120 federal employment statutes of not unduly regulating local matters at the national level, and the difficulty and expense of enforcing the law against such employers at the national level.

As we understand the requirements of Convention 111, however, the exception for small employers under Title VII is permissible for the following reasons.

First, the requirement of the Convention is the declaration and pursuit of a national policy designed to promote, "by methods appropriate to national conditions and practice" equality of opportunity and treatment in employment and occupation.

Exceptions in legally enforceable laws in the United States for employers of small numbers of employees is a well established and typical practice with respect to almost all federal employment legislation and one which we believe falls squarely within a reasonable interpretation of the intention of the framers of the prefatory and qualifying language of Article 3 above quoted.

Furthermore, the national nondiscrimination policy found in Title VII is applied to employers with fewer than 15 employees in certain circumstances under the Equal Employment Opportunity Commission's integrated enterprises and joint employer policy. This policy brings otherwise excepted small employers under Title VII if they have an interrelationship of operations and personnel policies with an employer with 15 or more employees.

Title VII's nondiscrimination policy is supplemented by other federal statutes and executive orders where there is no small employer exception. These include: Section 1981 of the Civil Rights Act of 1866 (race); Section 1983 of the Civil Rights Act of 1871 (sex); and

Executive Order 11246 (race and sex). Section 102 of the Immigration Reform and Control Act of 1986 (national origin) excepts employers with fewer than 3 employees. In addition, 47 of the 50 states have nondiscrimination statutes similar to Title VII. Of these, 33 have lower employee thresholds of coverage than does Title VII.

Second, Article 3 (b) further qualifies the enactment of legislation designed to promote this national policy "as may be calculated to secure the acceptance and observance of the policy". It is our view that the aforesaid legislation with respect to employers, depending on the number of their employees, is again consistent with the requirement of the Convention. In other words, if the United States, in its promotional policy legislation, considers the inclusion of employers with less than fifteen employees ineffective to secure the acceptance and observance of the policy, it is permissible to exclude them. Indeed, it is the strong feeling of the people of the United States that the Federal Government should not unduly interfere in local matters. As a consequence, it is something that we do not do under the broad range of our employment legislation.

Third, and of essential importance to note, the exception of small employers from the legally enforceable requirements of Title VII of the Civil Rights Act for reasons permissible under the terms of the Convention as aforesaid, does not constitute exclusion from the requirements of the Convention itself for an additional reason.

The mandate of the Convention is the pursuit of a national policy to promote equality of opportunity and treatment in respect of employment and occupation. It is not a series of definitive requirements strict compliance with which must be met by all employers, employees, or others involved in the process.

The United States, has and continues, to pursue such a promotional policy. And this is clearly evident by its enactment of its anti-discrimination legislation albeit small employers are excluded from legally enforceable compliance under Title VII of the Civil Rights Act.

a. Is our understanding correct that the exception of small employers under our principal national antidiscrimination legislation, *i.e.*, Title VII of the 1964 Civil Rights Act, is permissible under the terms of this Convention?

3. Attachment I describes the national policy on resolving questions relating to compensation discrimination based on sex under Title VII of the 1964 Civil Rights Act and the 1963 Equal Pay Act.

a. We understand that the U.S. nondiscrimination policy with respect to compensation found in the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act as interpreted by the courts meets the requirements of ILO Convention 111 as such compensation discrimination relates to terms and conditions of employment. Is this understanding correct?

4. Under the U.S. legal system, there are a number of ways in which legislative provisions can be made to have no legal effect. One way is for a court to determine that a provision is unconstitutional. Another is to amend the provision itself or delete it. A third method is to amend other legislation that is included within the terms of the provision of concern to remove the legal effect of the operative provision of the offending legislation. All three approaches are equally effective means of amending or changing the legal effect of a provision of legislation. The third approach is the means by which Section 703(f) of Title VII now has no force and effect under U.S. law.

Attachment II describes the current legal status of Section 703(f) of Title VII of the 1964 Civil Rights Act. This section only had effect if the Communist Party of the United States or any other organization was required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board. No cases ever occurred under Section 703 (f). Because the Subversive Activities Control Board was abolished by Public Law 103-199 in 1993, there is no organization of any kind to which Section 703(f) applies. Section 703(f) is now in fact a nullity "by methods appropriate to national conditions and practice."

a. Under these circumstances, we understand that ratification of Convention 111 would not require an amendment to Title VII striking Section 703(f) from the statute. Is this understanding correct?

5. The section on "political or other opinion" found in the preparatory document to the questionnaire, Report VII(1), 40th Session (1957), to what eventually became Convention 111 opens with a statement that:

> Freedom from discrimination in employment on grounds of political opinion has been achieved in many countries where there is no major difference of opinion between the leading political parties on the basic human rights and where the reins of government pass from one party or group of parties to another as a result of democratic processes. The principle has in most democracies been established that adherents of the group in power should not thereby enjoy privileges in public employment. . . .
>
> Also there are instances where governments maintain their right to nominate to key public posts persons whom they consider they can trust to carry out their policies and where in practice this may lead to the appointment of persons not on merit but in accordance with their political affiliation.

Based on our review of the governments' replies to the ILO questionnaire, Report VII (2), 40th Session (1957), there was no comment made by any government that would change this basis for consideration of political opinion discrimination under Convention 111. Only two governments had any comments at all. Thus, it was the common understanding that the

quoted language would be the basis for the 2-year discussion with respect to political opinion discrimination.

Further, our examination of the 2-year discussion in 1957 and 1958 leading to adoption of Convention 111 reveals no debate or amendment to the draft text on this point that would otherwise change the aforementioned basis to Convention 111.

In its 1963 General Survey, Report III, Part VII, the Committee of Experts expanded the basis for political opinion discrimination stating at page 183 that: ". . . the express reference to political opinion . . . was largely an innovation. . . ." In particular, the Experts were of the opinion that:

> One of the essential traits of this type of discrimination is that it is most likely due to measures taken by the state or the public authorities. Its effects may be felt in the public services, but are not confined thereto.

At page 192 of the same report, the Experts sum up by stating that Convention 111 "call[s] for the pursuance of a policy designed to eliminate discrimination on the basis of, *inter alia*, political opinion, particularly in employment under direct control of a national authority."

Further, our review of the observations of the Experts in political opinion cases under Convention 111 reveals that the prohibition on political opinion discrimination has been applied by the Experts only in instances where a governmental policy results in political opinion discrimination in either the public sector, *e.g.*, Germany, or in the private sector, *e.g.*, Cuba.

a. We understand that the prohibition on political opinion discrimination under Convention 111 has been applied by the Committee of Experts to date only in circumstances when such discrimination occurs as the result of a governmental policy. Is this understanding correct?

6. As indicated in the April 6, 1995 letter from the Washington office of the American Civil Liberties Union (Attachment III), employment discrimination based on political opinion discrimination is virtually nonexistent in the United States in the both the private and public sectors.

a. We understand that in such circumstances where discrimination based on political opinion is not present in a society, there is no requirement under Convention 111 for the ratifying country to include in its nondiscrimination legislation the elimination of discrimination based on political opinion. Is this understanding correct?

Attachment I

SUMMARY OF U.S. LAW AND PRACTICE CONCERNING COMPENSATION DISCRIMINATION

The federal government of the United States has promulgated laws designed to prohibit employment discrimination based on race, color, religion, sex, national origin, age and disability, and to eliminate artificial barriers to employment and its benefits on any of the listed bases.[1] One area to which the United States has devoted particular attention is gender-based wage discrimination and the effects of unequal wages on women's opportunities and potential. To this end, the United States Congress enacted legislation in the early years of the civil rights movement to advance the opportunities of women in the American workplace. Even before it enacted Title VII of the Civil Rights Act of 1964, which prohibits all employment discrimination based on race, ethnicity and religion as well as gender[2], the U.S. Congress, in 1963, enacted the Equal Pay Act, which prohibits gender-based wage discrimination in jobs that are substantially equal. Together, Title VII and the Equal Pay Act form the foundation of the broad protections against gender-based wage discrimination in the United States.

Statutory Provisions

Title VII and the Equal Pay Act guarantee women equal opportunity in compensation, terms, and conditions of employment. To prove intentional discrimination under Title VII, the evidence need not be direct, but may be circumstantial.[3] An employer can excuse intentional sex discrimination under Title VII only if it can show that gender is a bona fide occupational qualification. The BFOQ defense is extremely narrow, must relate to an individual's ability to perform a job, and cannot be used to justify differences in

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[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. C. Section 2000e *et. seq.*; the Equal Pay Act of 1963, 29 U.S.C. Section 206(d); the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621 *et. seq.*; the Americans With Disabilities Act of 1990, 42 U.S.C. Section 12101 *et. seq.*; and the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 701 *et. seq.*

[2] Title VII prohibits discrimination in employment based on race color, religion, sex and national origin. Section 703(a)(1) of Title VII makes it illegal for an employer to "...discriminate against any individual with respect to his compensation...because of such individual's race, color, religion, sex, or national origin." Section 703(a)(2) forbids an employer to "limit, segregate, or classify employees or applicants for employment in any way which would deprive...any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual's race, color, religion, sex or national origin."

[3] See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

compensation.[4] Even in the absence of intentional discrimination, moreover, a Title VII violation may be found if an employer's facially neutral policy or practice disproportionately excludes members of a protected group from employment opportunities, unless the employer shows that the policy is job related and is justified by business necessity[5]. Title VII thus provides broad protections against discriminatory wages and discriminatory job assignments.

Since the early 1960s, Congress has strengthened the protections for women in the workplace through passage of the Pregnancy Discrimination Act of 1978, which amends Title VII and prohibits discrimination based on pregnancy, and the Civil Rights Act of 1991, which, for the first time, provides women who are victims of intentional discrimination compensatory and punitive damages. The goals of these federal anti-discrimination statutes remain paramount today.

The Equal Pay Act of 1963 requires employers to pay equal wages to male and female employees who perform substantially equal work on jobs that require equal skill, effort, and responsibility and are performed under similar working conditions. The EPA does not offer a defense based upon a BFOQ; employers may pay men and women different wages for equal work only if the wage differential is based on a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or a factor other than sex. An employer violates the Equal Pay Act once the plaintiff shows that the jobs at issue are substantially equal, and is liable for wage discrimination unless the employer can prove that the wage disparity is based on one of the four factors listed above.

The Equal Pay Act has specifically been interpreted to mean that it is unlawful for an employer to pay different wages to men and women simply because men would not work for the lower wages paid to women performing the same job[6]. A job market in which the employer could pay women less became illegal once Congress enacted the Equal Pay Act.[7] Note that the Equal Pay Act is violated even though there is no indication that the wage differential was intentionally discriminatory.

Wage Discrimination

Title VII and the Equal Pay Act prohibit wage differentials based on sex except where the Equal Pay Act authorizes a differential. Under the Equal Pay Act, equal wages are

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[4] See *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (BFOQ defense is an extremely narrow exception to general prohibition against sex discrimination; *International Union, United States Automobile, Aerospace & Agricultural Implement Workers of America. UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

[5] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Civil Rights Act of 1991, section 105, *codified at* 42 U.S.C. § 2000e-2(k).

[6] *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974).

[7] *Ibid.*

required even though the jobs at issue may not be identical. Instead, the jobs must only be substantially equal in terms of skill, effort and responsibility, and working conditions.[8] For example, based on this standard, courts have found employers liable for paying lower wages to predominantly female nurses' adides than to predominantly male orderlies, and to predominantly female housekeepers than to predominantly male janitors.[9]

Even where the jobs are not substantially equal, Title VII will bar employers from setting unequal wages where there is evidence that such wages have been set based on the gender of the job occupants. In *County of Washington v. Gunther*[10], the Supreme Court explained that gender-based wage claims could be brought under both Title VII and the Equal Pay Act, and that, under Title VII, it is not always necessary that the jobs at issue be substantially equal. In *Gunther*, the employer had had all of its jobs rated to determine their relative value or worth. The Supreme Court ruled that Title VII's prohibition against sex discrimination was violated if, as alleged, the employer deliberately set equally related jobs dominated by women at wage rates lower than those dominated by men. Further examples of the meaning and scope of Title VII and the EPA can be found in lower court decisions.[11]

In the United States, the role of the courts is to explain what the Congress meant by the specific language it used in the statutes. The Supreme Court is the ultimate arbiter, and its rulings are binding on all lower courts and individuals or organizations covered by the statute.[12] In other words, a statute means what the courts say it means unless Congress affirmatively reverses the judicial rule by revising the legislation.

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[8] *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

[9] See, *e.g.*, *Brennan v. Owensboro-Davies County Hosp.*, 523 F.2d 1013 (6th Cir. 1975) (orderlies and nursing aides perform substantially equal jobs), cert. denied, 425 U.S. 973 (1976); *Brennan v. South Davis Community Hosp.*, 538 F.2d 859 (10th Cir. 1976) (job categories of orderlies, aides, maids, and janitors are substantially equal).

[10] 452 U.S. 161 (1979)

[11] See *e.g.*, *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.) (maintenance of separate pay systems for male clerical jobs and female clerical jobs is discriminatory), cert. denied, 479 U.S. 883 (1986); *Marcoux v. State of Maine*, 797 F.2d 1100 (1st Cir. 1986) (Title VII plaintiffs do not have to show that the jobs being compared are performed at the same location to make a valid Title VII claim); *EEOC v. Madison Community Unit School District No. 12*, 818 F.2d 577 (7th Cir. 1987) (involving both Title VII and EPA claims based on disparate pay between female and male sports coaches).

[12] *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994) ("[i]t is [the Supreme] Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute means before as well as after the decision of the case giving rise to that construction.").

Attachment II

EXCLUSION OF EMPLOYEES FROM TITLE VII FOR COMMUNIST ORGANIZATION AFFILIATIONS

Section 703(f) of Title VII states that it is not an unlawful employment practice under Title VII for an employer, labor organization, joint labor-management committee, or employment agency to take any action or measure with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board ("Board") pursuant to the Subversive Activities Control Act of 1950. 50 U.S.C. Sec. 781 *et. seq.*

On its face, this provision applies only to an employee or applicant who is discriminated against because he or she is a member of the Communist Party or any other Communist leaning organization that must register with the Board. Research by TAPILS has found, however, that the Board was disbanded in 1972 upon termination of funding and was ultimately abolished on December 17, 1993, by the "Friendship Act", Pub.L. 103-199, 107 Stat. 2329.

The Friendship Act's overarching purpose was mandating reform of Cold War era legislation. In so doing, the 1993 Congress explicitly retracted findings of its 1950 predecessor that there exists "a world communist movement which, in its origins, its development, and its present practice, is a worldwide revolutionary movement whose purpose it is by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship throughout the world through the medium of a worldwide Communist organization." 4 U.S.C.C.A.N. 2978 (1933).

Directly related to the Friendship Act's spirit of reform, the legislation included abolition of the already defunct Board and its record keeping requirements. Congress recognized that many of the original 1950 Act's provisions which "imposed a variety of restrictions on Communist and Communist-front organizations had already lapsed or been ruled to have various constitutional infirmities." 4 U.S.C.C.A.N. 2978 (1993). The complete elimination of the Board and its record keeping requirements, combined with an explicit statement by the United States Government that communism poses no threat to world security, effectively renders Section 703(f) of Title VII a nullity. Finally, it is telling that the provision has never been the subject of litigation.

Attachment III

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Kenneth B. Clark
CHAIR
NATIONAL ADVISORY COUNC

April 6, 1995

Ms. Julie Misner
Office of International Organizations
Bureau of International Labor Affairs
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Ms. Misner:

Based on our discussion, it is my understanding that it would be useful to the department, in connection with its consideration of International Labor Organization Convention No. 111, to know to what extent employment discrimination based on political activity is a current problem in the United States.

The American Civil Liberties Union is the oldest and largest civil liberties organization in the United States. We have approximately 300,000 members. In addition to our national offices in New York and Washington, we have 53 staffed affiliate offices across the country. Each of these offices has an intake department which received complaints from people who believe their rights have been violated.

We receive over 200,000 complaints ever year. Over 50,000 of these come from people who believe their civil liberties were violated by their employer.

It is very rare, however, for us to receive a complaint that an employee has been discriminated against because their employer disapproves of their off-duty political behavior. The last complaint we are aware of was received over two years ago.

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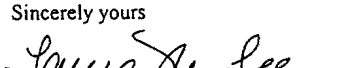
Letter to Ms. Julie Misner
April 6, 1995
Page Two

We hope this information is helpful. If you would like to discuss our experience in more detail, please don't hesitate to contact us.

Sincerely yours



Laura Murphy Lee
Director
ACLU Washington Office

Lewis L. Maltby
Director
National Taskforce on
Civil Liberties in the Workplace

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Réf. BIT/ILO EG 4-0

Votre réf.

Ms Julie Misner,
U.S. Department of Labor,
Bureau of International
Labor Affairs,
Washington, D.C. 20210
Etats-Unis

Dear ~~Ms~~ Julie Misner,

Thank you for your letter of 8 December 1995, which follows up a number of discussions we have had on the possibility that the United States might ratify the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

As you indicate, the International Labour Office has no authority to arrive at definitive interpretations of ILO Standards what follow is therefore our understanding of the way on which the meaning and requirements of this Convention have been understood by the ILO's supervisory bodies. The answers to the questions you put are the following:

Question 1(a): Yes
Question 2(a): Yes
Question 3(a): Yes
Question 4(a): Yes
Question 5(a): Yes
Question 6(a): Yes

I hope this reaction will be useful, and look forward to hearing from you if we can be of further assistance.

Sincerely yours,
For the Director-General:

Lee Swepston,
Chief,
Equality and Human Rights
Coordination Branch

U.S. Department of Labor

Bureau of International Labor Affairs
Washington, D.C. 20210

April 10, 1996

Mr. Lee Swepston
Chief, Equality and Human Rights Coordination Branch
International Labor Standards Department
International Labor Office
Geneva, Switzerland

Dear Lee:

Enclosed is a two-part question prepared by the Tripartite Advisory Panel on International Labor Standards aimed at further clarifying the obligations of the United States in the event of ratification of ILO Convention No. 111 concerning Discrimination (Employment and Occupation).

TAPILS would appreciate your written response to this question, by return fax, at your earliest convenience. My fax number is (202) 219-9074.

As always we recognize that the Office has no authority to definitively interpret ILO standards, but your advice is nevertheless of great value to our tripartite legal review of Convention No. 111.

With warmest regards.

Sincerely,

Julie

Julie Misner

Enclosures

April 9, 1996

MEMORANDUM

RE: Questions to the International Labor Organization on U.S. Policy Concerning Religious Discrimination for Written Reply

In order to further the U.S. tripartite legal review of United States compliance with the requirements of ILO Convention 111, below are two questions that the Tripartite Advisory Panel on International Labor Standards submits to the International Labor Organization for written reply.

1. Attachment I describes the national policy relating to religious discrimination under Title VII of the 1964 Civil Rights Act. As reported by the Equal Employment Opportunity Commission—the federal agency with primary responsibility for enforcing the United States' nondiscrimination policies—and the Washington office of the American Civil Liberties Union, a very limited number of employment discrimination cases based on religion come before these bodies. Both bodies indicate that religious discrimination claims involving religious institutions are virtually nonexistent in the United States.

a. We understand that in circumstances where there is not a widespread pattern of religious discrimination in a society, there is no requirement under Convention 111 for the ratifying country to prohibit by legislation every form of religious discrimination. Is this understanding correct?

b. Where discrimination on this ground is virtually nonexistent, we understand that a statutory provision prohibiting discrimination on the basis of religion that does not cover religious institutions does not contravene Convention 111. Is this understanding correct?

ATTACHMENT 1

SUMMARY OF U.S. LAW AND PRACTICE ON RELIGIOUS DISCRIMINATION

Introduction

A large number of the people who colonized what eventually became the United States came to America as a result of religious discrimination and persecution in their homelands. In many instances, they came from countries where there was little separation of church and State. As a consequence, the framers of the U.S. Constitution sought to create a constitutional environment in which the Federal Government would not interfere in the establishment of religion. The result of this constitutional policy is a society in which there is exceptional religious tolerance. The United States is a country of a wide diversity of religious faiths. Over 69% of the U.S. population considers themselves to be a member of a religious faith. It is in this context that U.S. employment discrimination policy with respect to religion has been established.

Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), prohibits employers from discriminating on the basis of an employee's or applicant's religion. Under Title VII, it is an unlawful employment practice for an employer, on the basis of religion,

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ; or
>
> to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.

Id. In addition, Title VII requires that an employer reasonably accommodate an employee's or applicant's religious observance or practices unless the employer can show that such accommodation would impose undue hardship on the conduct of its business. Section 701(j), 42 U.S.C. § 20003(j).

In order to further the United States Constitution's mandate that individuals be able to freely exercise their religion and that the Federal Government not interfere in the establishment of religion, Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), provides an exemption that does not forbid a "religious corporation, association, educational institution, or society" from

limiting employment to people of its own religion.[1] The provision applies only to entities whose function and mission are essentially religious; it does not apply to employers who simply hold deeply religious beliefs or who are only loosely affiliated with a church. Even those few employers entitled to the exemption are expressly prohibited from discrimination on any other basis such as race, sex, and national origin.

Religious Discrimination Charge Activity

The strength of Title VII's religious discrimination prohibitions and the religious tolerance present in the United States is reflected in the very limited number of claims that allege religious discrimination as compared to the other discrimination prohibitions under Title VII. According to statistics provided by the Equal Employment Opportunity Commission (EEOC), the administrative agency charged with enforcement of Title VII, only 1.1%, or 1765, of the charges it received in FY '95 alleged that a private sector employer denied someone employment because of religion.

The data maintained by the Commission does not identify which of the charged employers are religious organizations entitled to the exemption. However, the 1.1% figure includes charges against all private sector employers and, thus, vastly overstates the number of claims in which employers might assert entitlement to the Section 702 exemption. The EEOC estimates that only about four percent of the employers charged (or 65 - 70) are even arguably exempt under Section 702. Moreover, the data on charges against exempt religious organizations include all jobs in those organizations; it seems likely that only a small portion of those charges involved jobs that were not important to the organization's objectives. Finally, it is significant that the majority of charges filed are found not to be meritorious. In other words, in a work force of 130 million workers, meritorious charges against exempt religious organizations that seek to employ only co-religionists for jobs unrelated to the organizations objectives are *de minimis*.

Furthermore, according to the American Civil Liberties Union, the premier private organization in the United States concerned with individual liberties, "religion is the least common basis of

---

[1] Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2), similarly authorizes educational institutions that are owned, supported, controlled, or managed by religious entities -- or that maintain curricula "directed toward the propagation of a particular religion" -- to "hire and employ employees of a particular religion." The scope of Section 703(e)(2) was intended to be identical to that of current Section 702. See 110 Cong. Rec. 2585-2593 (daily ed. Feb. 8, 1964) (statement of Senator Purcell).

employment discrimination complaints received by the ACLU." The ACLU states in a letter, dated August 8, 1995, (attached) that:

> Our Chicago office, which is among our largest and has one of the best record keeping systems, reports that religious discrimination represents less than 1% of our employment related complaints, and less than 1/10 of 1% of all complaints. This is consistent with the experience of the national office and the other side affiliates with which I have spoken.
>
> The vast majority of the few religious discrimination complaints we do receive regard failure to offer reasonable accommodation. This generally involves conflict between the employer's work schedule and the employee's sabbath.
>
> Allegations of employers refusing to hire those of other faiths are extremely rare. The national workplace rights office of the ACLU has not received a single such complaint in its 6 years of existence. The affiliate intake officers I surveyed in response to your question were unanimous in their experience that such complaints are almost non-existent. The majority of the intake officers I spoke to had never received a single complaint of this type.

Background to Section 702(a)

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." Consistent with the principle of separation of church and state that is comprehended in this Constitutional provision, Section 702(a), as currently drafted, was included in Title VII in 1972 to "take the political hands of Caesar off of the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972) (statement of Senator Ervin). The United States Supreme Court concluded that in not forbidding religious organizations from hiring only co-religionists, § 702(a) serves a secular purpose, neither advances nor inhibits religion and avoids "governmental interference with the ability of religious organizations to define and carry out their religious missions." Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987)(non-profit church-operated gymnasium established in the hope that "all who . . . come [here]. . . feel that they are in a house dedicated to the Lord," entitled to terminate an building engineer who did not become a church member).

Indeed, the language of Section 702(a) was enacted in 1972 to address concerns that a prior version of Title VII promoted excessive government entanglement with religious decisionmaking and thus insufficiently protected the Constitution's guarantee of

religious freedom. As drafted in 1964, the Title VII exemption for religious institutions permitted such institutions only to employ "individuals of a particular religion to perform work connected with the carrying on by such [entity] of its religious activities . . ." 42 U.S.C. § 2000e-1 (1970) (emphasis added). Under that more limited exemption, courts were forced to scrutinize a religious entity's operations and decisionmaking in order to determine whether the activity at issue qualified as "religious" or not. As has been noted by a Justice of the United States Supreme Court,

> determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. [Citation omitted.] Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. . . .

Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

The current language of Section 702(a) was thus intended to promote the freedom of religion and religious diversity that has informed United States law and practice since the founding of the country. As noted by Justice Brennan,

> [d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Id. at 342.

The authority granted by Section 702(a) is, moreover, quite narrow, thus effectuating the anti-discrimination commands of Title VII to the fullest extent consistent with preservation of the Constitutional guarantee of religious freedom. Indeed, although Title VII has been in effect for over 30 years, there are only a handful of court cases in which the Section 702(a) exemption has even been asserted. Where it has been raised, it has been narrowly construed. The limitations on the application of Section 702(a) are discussed in the following section.

Application of Section 702(a)

First, an entity will be entitled to invoke the protection of Section 702(a) only if it can demonstrate that it is a bona fide

religious institution, that is, that its "purpose and character" are primarily religious. Only rarely have courts found that employers meet that strict definition. To meet it the organization must have been created and maintained to serve a religious purpose.

Thus, the Ninth Circuit has explicitly held that an employer may not invoke § 702(a) where the organization is for-profit,[2] the articles of incorporation state no religious purpose, and the company produces a secular product. EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610 (9th Cir. 1988)(closely held mining equipment company not a "religious corporation" despite the religious beliefs of its stockholders), cert. denied, 489 U.S. 1077 (1989). See also EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 461-64 (9th Cir.) (rejecting application of Section 702 to school required by founder's will to hire only Protestant teachers where school found to be an "essentially secular institution"), cert. denied, 114 S. Ct. 439 (1993); Fike v. United Methodist Children's Home of Virginia, 547 F. Supp. 286 (E.D. Va. 1982) (loose affiliation with church insufficient to establish that institution qualified as a religious organization), aff'd, 709 F.2d 284 (4th Cir. 1983). Compare McClure v. Salvation Army, 323 F.Supp. 1100 (N.D. Ga. 1971)(though lacking a traditional house of worship, the Salvation Army is a religious institution since its mission is spiritual and moral reformation and preaching the Gospel), aff'd, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983)(newspaper allowed to prefer co-religionists where it was published by an organ of the church, was founded by the Church founder, its stated purpose was to "more effectually promot[e] and extend[] the religion of Christian Science," church members had a duty to subscribe to it, and the Church Board of Directors was responsible for its editorial content).

Second, nothing in Section 702(a) authorizes religious entities to discriminate on the bases of sex, race, national origin, age, or disability. See, e.g., EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986); Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164, 1166-67 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 452 U.S. 912 (1981); Vigars v. Valley Christian Center, 805 F. Supp. 802, 805 (N.D. Cal. 1992); EEOC Compliance Manual, Volume II, Section 605, Appendix I (August, 1988). What Section 702(a) provides is simply a limited exemption to religious entities to hire those who share their religious beliefs. See, e.g., Rayburn v. General Conference

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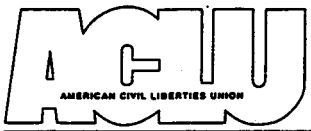
[2] The Supreme Court upheld the constitutionality of Section 702(a) only as to the operation of a religious entity's nonprofit activities. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 330 (1987); id. at 340 (Brennan, J., concurring); id. at 349 (O'Connor, J., concurring).

of Seventh-day Adventists, 772 F.2d at 1166 ("[t]he statutory exemption applies to one particular reason for employment decision -- that based upon religious preference"); compare Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) (Section 702(a) includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts).

Moreover, while the Section 702(a) exempts religious entities, the Equal Employment Opportunity Commission has taken the position that religious organizations may not discriminate in compensation, terms, conditions, or privileges of employment against those who are not co-religionists. See EEOC Compliance Manual, Volume II, Section 605, Appendix I (August 1988); see also EEOC "Policy Guidance: Religious Organizations that pay women less than men in accordance with religious beliefs," No. N-915.049 (Feb. 1, 1990) (Title VII and Equal Pay Act bar religious organizations from paying women less than men even if such policies reflect religious beliefs). As a result, where a religious institution has hired someone not of its faith for a particular position, the institution is barred from subsequently discriminating against the selectee in the terms and conditions of his/her employment on any basis, including that individual's religion.

Conclusion

As noted above, complaints of employment discrimination based on religion form a small portion of employment discrimination complaints. Of those that are filed, moreover, only a small number involve entities that claim the protection of Section 702(a). The EEOC reports that the cases of religious discrimination in which the exemption for religious institutions was at issue is *de minimis*. And, over the past six years the ACLU reports no cases involving discrimination by religious institutions against persons of other faiths. It is clear that Section 702(a) was enacted to ensure, rather than limit, religious freedom, and that it has not resulted in significant loss of job opportunities in the U.S. workforce.



Lewis L. Maltz
Director
National Task Force
on Civil Liberties
in the Workplace

National Headquarters 132 West 43rd Street New York, N.Y. 10036 (212) 944-9800 Ext.402 Fax (212) 869-9065

August 8, 1995

Ms. Julie Misner
Office of International Organizations
Bureau of International Labor Affairs
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Ms. Misner:

In response to your inquiry concerning the frequency of religious discrimination by employers:

Religion is the least common basis of employment discrimination complaints received by the ACLU. Our Chicago office, which is among our largest and has one of the best record keeping systems, reports that religious discrimination represents less than 1% of our employment related complaints, and less than 1/10 of 1% of all complaints. This is consistent with the experience of the national office and the other state affiliates with which I have spoken.

The vast majority of the few religious discrimination complaints we do receive regard failure to offer reasonable accommodation. This generally involves conflict between the employer's normal work schedule and the employee's sabbath.

Allegations of employers refusing to hire those of other faiths are extremely rare. The national workplace rights office of the ACLU has not received a single such complaint in its 6 years of existence. The affiliate intake officers I surveyed in response to your question were unanimous in their experience that such complaints are almost non-existent. The majority of the intake officers I spoke to had never received a single complaint of this type.

Nadine Strossen President Ira Glasser Executive Director Kenneth B. Clark Chair, National Advisory Council Richard Zacks Treasurer

I hope this information is useful. Please feel free to call me if you need anything more.

Sincerely yours,

Lewis L. Maltby
Director
National Taskforce on Civil
Liberties in the Workplace

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Bureau international du Travail
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TO: Ms Julie Misner, Bureau of Internaional Labor Affairs, US Department of Labor, Washington

FROM: Lee Swepston, Chief, Equality and Human Rights Co-ordination Branch

DATE: 12.04.96

FAX: (202) 219 9074

REF.: DE 1-0

No. of pages including this one: 1

Dear Ms Misner,

In reply to your faxed letter of 10 April 1996, containing two questions aimed at clarifying Convention No. 111, the answer to both questions is *"yes"*.

This is, of course, subject to the usual reservation concerning the Office's authority to interpret ILO standards.

Best regards.

Lee Swepston

Statement of United States Law and Practice with Respect to International Labor Organization Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation

Introduction

This is the statement of United States law and practice with respect to Convention 111. It includes an article by article analysis of the Convention's provisions and the extent to which United States law and practice is consistent with the Convention's provisions. As described below, after a thorough legal review, it has been determined that United States law and practice is consistent with Convention 111 and that ratification of Convention 111 would not, in any way, change or require any change in current United States law and practice.

The International Labor Organization (ILO) adopted Convention 111 concerning Discrimination in Respect of Employment and Occupation in 1958. Article 2 states the aim of the Convention. That article states:

> Each Member for which this convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Convention 111 is a promotional convention. This means that the Convention obligates the ratifying country to pursue a policy which will guide present and future decisions in the fields of employment and occupation with the ultimate goal of eliminating discrimination based on race, color, sex, religion, political opinion, national extraction and social origin.

In addition, the ratifying country is granted considerable discretion in how it will implement this policy in that the country may pursue the policy "by methods appropriate to national conditions and practice."

Convention 111 contains introductory material which briefly describes the procedural history and general purpose of the Convention. Article 1 contains the definitions of terms used throughout the Convention, including definitions for the terms "discrimination", "employment", and "occupation". Article 1 also specifically excludes distinctions based on the inherent

requirements of a job from the definition of discrimination.

Article 2 sets out the basic requirement of Convention 111 which is to "undertake() to declare and pursue a national policy designed to promote . . . equality and opportunity in respect of employment and occupation . . . ." Article 3 of Convention 111 sets out six methods to implement the basic obligation to declare and pursue a national policy as described in Article 2.

Article 4 makes clear that measures taken against individuals for acts prejudicial to the security of a ratifying country will not be considered discrimination. Article 5 describes discretionary measures that a ratifying country may take that will not be considered discrimination. Article 6 requires that the ratifying member states apply the Convention to non-metropolitan areas. Articles 7 through 15 contain standard final provisions, including rules for the convention coming into force, for notice of ratification and for denunciation.

TAPILS Legal Review

Following nine years of legal review, the Tripartite Advisory Panel on International Labor Standards (TAPILS), a subgroup of the President's Committee on the ILO, consisting of legal representatives from the Departments of Labor, State, and Commerce, the American Federation of Labor and Congress of Industrial Organizations, and the United States Council for International Business, has unanimously concluded that there are no legal impediments in law or practice to ratification of the convention by the United States. See appended TAPILS Report.

The review of Convention 111 was conducted in accordance with three ground rules agreed to by the President's Committee in October 1985 and incorporated in a Senate declaration adopted at the time the Senate gave its advice and consent to United States ratification of Convention 144 in 1988. The three ground rules provide that:

1) Each ILO convention will be examined on its merits on a tripartite basis;

2) If there are any differences between the convention and Federal law and practice, these differences will be dealt with in the normal legislative process; and

3) There is no intention to change State law and practice by Federal action through ratification of ILO conventions, and the examination will include possible conflicts between Federal and State law that would be caused by ratification.

The implementation of these ground rules assures that the legal consequences of ratification of an ILO convention, in particular, whether it would result in or mandate changes in domestic law, are identified through an orderly, in-depth examination of a convention's legal requirements prior to ratification.

Following a comprehensive legal review of the requirements of Convention 111 and United States law and practice, TAPILS has determined that the current law and practice of the United States with respect to employment discrimination satisfy the requirements of Convention 111. Therefore, Convention 111 will not require or mandate any changes in federal or state law. As discussed in a subsequent section of this report, however, TAPILS has recommended that two understandings be adopted to remove any ambiguity as to the domestic application of Convention 111.

Substantive Provisions

Convention 111 is a non-self-executing treaty. As a non-self-executing treaty, Convention 111 would not, if ratified, become directly effective as United States law. Instead, by ratifying the Convention, the United States would undertake the obligation to give domestic legal effect to its terms. As the following analysis makes clear, existing United States law and practice already serve to bring the United States into compliance with the Convention. No additional implementing legislation is required.

Article 1

Article 1 does not contain any substantive or procedural requirements. The Article, however, does contain definitions which apply to the rest of the Convention. These definitions are important to understand the scope of the obligation undertaken by the member state upon ratification.

Section 1(a) of Article 1 defines the term "discrimination" to mean:

> any distinction exclusion or preference made on the basis of race, colour, 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;

Following examination of the interpretations of the ILO Committee of Experts on the Applications of Conventions and Recommendations, as well as the written answers to questions from TAPILS by the ILO, it is clear that there is no requirement under Convention 111 to legislate prohibitions of any of the seven

enunciated grounds for discrimination where such discrimination is not present in the society.

For example, TAPILS asked the ILO in May 1995 a question concerning discrimination based on social origin, explaining that in the United States individuals move freely from one class or social category to another without the restrictions of a caste system or any similar system based on social origin. The ILO responded that under such circumstances, specific legislation prohibiting discrimination based on social origin was not necessary to comply with Convention 111. TAPILS also posed similar questions to the ILO concerning discrimination based on political opinion and religion explaining that the kind of discrimination which the Convention was intended to eliminate was virtually non-existent in the United States. Again, the ILO indicated that under such circumstances where the kind of discrimination intended to be addressed by the Convention was not present in the ratifying country, that country was not obligated to enact specific legislation concerning that type of discrimination. A more detailed discussion of these specific issues is contained later in this statement in the discussion of Article 2. In addition, the specific questions addressed to the ILO and the answers of the ILO are appended to the accompanying TAPILS report.

Paragraph 1(b) of Article 1 provides discretion for the ratifying country to expand the definition of discrimination to include other grounds of discrimination after consultation with employers, workers organizations and other appropriate bodies.

As described in this report, the United States has already undertaken to declare and pursue a policy concerning employment discrimination in areas not covered by the Convention. For example, the United States has extensive legislation regarding employment discrimination based on disability and age.

Paragraph 2 of Article 1 provides a narrow exception based on the particular requirements of the job for "any distinction, exclusion or preference based on the inherent requirements of a particular job will not be considered discrimination" under the Convention. The inherent requirements exception in Paragraph 2 of Article 1 is very similar to the defense in Title VII of the Civil Rights Act of 1964, the principal statute governing employment discrimination in the United States, providing an exception for bona fide occupational qualifications. See 42 U.S.C. § 2000e-2e(1)

Consistent with the Convention, the United States courts have narrowly interpreted this bona fide occupational qualification exception. The exception will only apply when a person's sex, for example, actually interferes with the person's ability to do a job. United Auto Workers v. Johnson Controls, Inc., 499 U.S.

187, 204 (1991).

Paragraph 3 of Article 1 provides that:

> For the purpose of this convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

The definition includes the "terms and conditions of employment" which includes the compensation paid to individual employees. Thus, a ratifying country could not, consistent with the Convention, permit individuals to receive different levels of compensation for the same work based on any of the seven enumerated categories. Such practices are forbidden in the United States by Title VII and the Equal Pay Act.

During its legal review of Convention 111, TAPILS posed a very specific question to the ILO concerning whether the United States law and practice relating to compensation discrimination based on sex, contained in Title VII and the Equal Pay Act, met the requirements of the Convention. The ILO clearly indicated that United States law and practice met the requirements of Convention 111 and that the Convention did not require the ratifying country to adopt the doctrine of comparable worth with respect to compensation. In order to make clear that Convention 111 does not establish a legal basis for changing existing United States law and practice with respect to compensation discrimination based on sex, TAPILS recommends that the United States adopt an understanding concerning compensation discrimination. The understanding is discussed in a later section of this statement.

Each of the other areas in section 3 of Article 1 is covered under Title VII of the Civil Rights Act as well as other employment discrimination statutes. See, e.g., 42 U.S.C. § 2000e-2(d) (access to vocational training); 42 U.S.C. § 2000e-2(a)(terms and conditions of employment); 42 U.S.C. § 2000(e)-2(b)(employment agencies).

In sum, the definitions in Article 1 of Convention 111 are compatible with those under United States law and practice.

Article 2

Article 2 describes the central obligation of Convention 111:

> Each Member for which this convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and

> treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

At the outset, it is important to clarify what Convention 111 requires of the ratifying country and what it does not require.

First, Convention 111 is indisputably a promotional convention. As such, the Convention requires a ratifying country to state a policy in the sense of a course of action of the national government to guide present and future decisions in the field of employment and occupation with the ultimate goal of eliminating discrimination in the seven enumerated areas. The ILO, through Convention 111, did not obligate the ratifying country to implement the Convention through a series of specific requirements to eliminate discrimination. On the contrary, the Convention reflects a more moderate requirement to promote the policy with a view to the ultimate elimination of discrimination "by methods appropriate to national conditions and practice."

Significantly, this promotional policy is not the equivalent of a requirement that there be an absence of discrimination in any of the enumerated categories either at the time of ratification or at any particular time thereafter. Instead, the promotional obligation under the convention is a gradual, progressive process, honestly pursued with an intent to improve conditions as they relate to employment discrimination. This goal is, of course, entirely consistent with long-standing United States policy.

As a matter of comparative international law, United States discrimination law is the most far-reaching in the world. United States law is a highly developed, extremely complex area of law involving the interplay of numerous federal and state statutes, executive orders, as well as countless judicial interpretations of those statutes and orders. This law and practice report will focus on the major pieces of federal or national legislation which best represent the United States' declaration and pursuit of a policy designed to promote equality in employment. It should not be overlooked, however, that virtually every state in the United States has similar statutes pertaining to employment discrimination. Some of these state statutes grant additional protections. Under the federal system, however, no state is permitted to grant less protection from employment discrimination than the federal standard.

In addition, innumerable administrative regulations relate to employment discrimination. For example, the Equal Employment Opportunity Commission, the principal administrative agency enforcing employment discrimination laws, has issued guidelines concerning discrimination based on sex, 29 C.F.R. Part 1604, religion, 29 C.F.R. Part 1605, national origin, 29 C.F.R. Part

1606, age, 29 C.F.R. Parts 1625 and 1626, and disability, 29 C.F.R. Parts 1615 and 1630. The guidelines, along with other Commission regulations, comprise approximately 300 pages in the Code of Federal Regulations.

This plethora of legislation and administrative regulations brings the United States in compliance with the Convention's basic requirement that the ratifying country "declare and pursue a national policy designed to promote . . . equality of opportunity and treatment in respect of employment and occupation. . . ." This portion of the report will describe the United States national policy against employment discrimination in the seven areas specifically mentioned in the convention: race, color, sex, religion, political opinion, national extraction and social origin.

In addition, in recognition of the historical and continuing effects of discrimination against women and minorities, employers in the United States, including the federal government, have on occasions taken affirmative steps to increase the representation of women and minorities in the workplace. These steps, commonly referred to as affirmative action, may be the result of voluntary actions, government programs or court orders. Discussions with the ILO, however, have established that affirmative action while permitted under Convention 111 is not required.

Title VII

As indicated above, the principal statute governing employment discrimination in the United States is Title VII of the Civil Rights Act of 1964, 42 U.S. § 2000(e), et seq. ("Title VII"). Title VII makes it unlawful for any employer which employs fifteen or more employees to discriminate with regard to any aspect of employment with regard to race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Title VII also prohibits discrimination by labor organizations and employment agencies. 42 U.S.C. §§ 2000e-2(b) and (c).

This single statute, for the most part, brings the United States into compliance with the promotional aspects of Convention 111 in at least the areas of race, color, religion, sex and national extraction.

While Title VII explicitly exempts employers with fewer than fifteen employees, this exception for small employers is permissible. The requirement of the convention is to declare and pursue a policy designed to promote, "by methods appropriate to national conditions and practice" equality of opportunity and treatment in employment and occupation. Exceptions in legally enforceable laws in the United States for employers of a small number of employees is a well established and typical practice with respect to almost all federal employment legislation, and

one which falls within the prefatory and qualifying language of Article 3 quoted above.

Title VII's nondiscrimination policy is also supplemented by other federal statutes and executive orders where there is no small employer exception. These include Section 1981 of the Civil Rights Act of 1871 (race) and Executive Order 11246 (race and sex). Section 102 of the Immigration Reform and Control Act of 1986 (national origin), for example, excepts employers with fewer than 3 employees. In addition, 47 of the 50 states have nondiscrimination statutes similar to Title VII. Of these, 34 have lower employee thresholds of coverage than does Title VII. Finally, various state and local discrimination laws, as well as federal administrative policies, permit the application of the national nondiscrimination policy to employers with fewer than 15 employees. So effectively, the United States policy concerning employment discrimination includes small employers in many circumstances.

Race and Color

In addition to Title VII, several other federal statutes pertain to discrimination based on race and color and so are relevant to the United States declaring and pursuing a national policy concerning employment discrimination. The most significant statutes include the following.

Section 1981 of the Civil Rights Act of 1866 establishes that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. Section 1981 makes all employers subject to lawsuits claiming discrimination in employment on the basis of race and alienage. Recently, section 1981 was amended and strengthened by the Civil Rights Act of 1991 ("CRA"). Under the CRA, the provisions of 42 U.S.C. § 1981 will be applied to all aspects of the employment relationship and not solely to the initial formation of the employment contract.

Section 1983 of the Civil Rights Act of 1871 provides that any person who deprives another person of "any rights privileges or immunities secured by the Constitution and laws" shall be legally liable to the injured party. 42 U.S.C. § 1983. Section 1983 was intended to override any discriminatory or unconstitutional state laws, and to provide a remedy for civil rights where state law was inadequate or unavailable in practice. Monroe v. Pape, 365 U.S. 167, 174 (1961).

Section 1985 of the 1871 Act also provides a cause of action for acts in furtherance of a private conspiracy which cause injury to a person or a deprivation of a right or privilege. 29 U.S.C. § 1985. Both sections 1983 and 1985 have been used in various ways as a means to prevent employment discrimination.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. The statute is designed to control discrimination in government spending programs. If the spending program is intended to provide employment, Title VI would prohibit discrimination in the spending program on the proscribed grounds.

Executive Order 11246 requires any employer who has a contract with the federal government to take affirmative actions to hire and promote women and racial minorities. See 2 C.F.R. § 339. In fiscal year 1993, for example, the United States government granted over 176,000 prime contracts worth over $160 billion. The requirements of Executive Order 11246, therefore, directly affected over 17,000 corporations and institutions of higher education.

Executive Order 11478 further declares that "[i]t is the policy of the United States to provide equal opportunity in Federal employment to all persons," and requires that all executive agencies take affirmative action to implement this policy.

Finally, it should also be noted that as of 1993 forty-seven of the fifty states had state statutes similar to Title VII governing employment discrimination. Each of these statutes prohibits employment discrimination based on race or color.

These statutes, along with Title VII, clearly state the United States national policy concerning employment discrimination based on race and color. These statutes and the enforcement of these statutes bring the United States into complete compliance with the obligation under Article 2 to "declare and pursue" a national policy designed to promote equality of opportunity and treatment in employment with respect to race and color.

Sex

As indicated above, Title VII specifically prohibits discrimination based on sex. Title VII not only prohibits direct discrimination based on sex, but also prohibits policies or practices which have a disproportionate impact based on sex as well as the form of discrimination commonly referred to as sexual harassment.

In addition to Title VII, several other federal statutes pertain to discrimination based on sex and so are relevant to the United States declaring and pursuing a national policy concerning employment discrimination. The most significant statutes include the following.

The Equal Pay Act of 1963, 29 U.S.C. § 206(d), requires employers to pay equal wages to male and female employees who perform substantially equal work on jobs that require equal skill, effort, and responsibility and are performed under similar working conditions. Employers may pay men and women different wages for equal work only if the wage differential is based on a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or a factor other than sex. Once the plaintiff shows that the jobs at issue are substantially equal, the employer will be liable for wage discrimination unless the employer can prove that the wage disparity is based on one of the four factors listed above.

Since the early 1960's, Congress has further strengthened the protections for women in the workplace through passage of the Pregnancy Discrimination Act of 1978, which amends Title VII and prohibits discrimination based on pregnancy, and the Civil Rights Act of 1991, which, for the first time, provides victims of intentional sex discrimination compensatory and punitive damages.

Title IX of the Education Amendments, 20 U.S.C. § 1681, prohibits discrimination based on sex in the administration of education programs. It prohibits sex discrimination in employment at educational institutions receiving federal funding even if the federal funding does not directly finance employment. Recently, the United States strengthened Title IX with the enactment of the Civil Rights Restoration Act of 1987, Pub. L. 100-259. Through the passage of the Civil Rights Restoration Act, Congress has made it clear that all programs with a school receiving federal aid must comply with employment discrimination statutes. Executive Orders 11246 and 11478, discussed above under the category of Race and Color, also apply equally to discrimination based on sex.

These statutes, along with Title VII, clearly state the United States policy concerning employment discrimination based on sex. These statutes and the enforcement of these statutes bring the United States into complete compliance with the obligation under Article 2 to "declare and pursue" a national policy designed to promote equality of opportunity and treatment in employment with respect to sex.

Religion

A cornerstone of the United States political and social system is freedom of religion. The First Amendment to the United States

Constitution states, in part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Thus, no national or state religion exists in the United States and each individual is free to follow the dictates of his or her conscience concerning religious matters. In that regard, the United States fully satisfies the promotional intent of the Convention in this area.

In addition, as noted above, Title VII prohibits employment discrimination based on religion. 42 U.S.C. § 2000e-2(a). Title VII also requires that employers accommodate their employees' religious observances and practices unless the employer can establish that such accommodation would impose undue hardship on the conduct of the business. 42 U.S.C. § 2000e-(j).

These constitutional and statutory protections have helped produce a multi-religious society characterized by an extra-ordinary tolerance for disparate religious beliefs and practices. During its legal review of Convention 111, TAPILS determined that less than 2% of the charges filed alleging employment discrimination involved allegations of religious discrimination.

Thus, the United States has clearly stated its policy concerning employment discrimination based on religion through the protections of the First Amendment as well as legislation such as Title VII. The effectiveness of this policy is demonstrated by the widespread religious tolerance in the United States and the fact that discrimination claims based on religions are exceedingly rare. In those instances where a meritorious employment discrimination claim based on religion is alleged, an adequate legal remedy is provided under United States laws. In this way, the United States meets the requirement under Convention 111 to declare and pursue a national policy with regard to employment discrimination based on religion.

National Origin/National Extraction

As indicated above, Title VII also prohibits discrimination based on national origin. The term "national origin" has been defined as the country where a person is born, or more broadly, the country from which the person's ancestors came. See 29 C.F.R. § 1606.1 (EEOC guidelines on national origin discrimination). The prohibition against discrimination on the basis of national origin has been applied to a wide variety of ethnic groups in the United States. Title VII, however, does not prevent an employer from discriminating on the basis of citizenship unless such discrimination has the purpose of discriminating on the basis of national origin. The term "national origin" as used in Title VII and other statutes is the equivalent of "national extraction" as used in Convention 111.

Also, as discussed above, Section 1981 of the Civil Rights Act of 1866 establishes that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Section 1981 "protects from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987).

In 1986, the Congress of the United States passed the Immigration Reform and Control Act which further strengthened United States law with respect to discrimination on the basis of national origin by making such discrimination an unfair immigration related employment practice. 8 U.S.C. § 1324b(a)(1).

These statutes, along with Title VII, clearly state the United States policy concerning employment discrimination based on national origin. These statutes and the enforcement of these statutes bring the United States into complete compliance with the obligation under Article 2 to "declare and pursue" a national policy designed to promote equality of opportunity and treatment in employment with respect to national origin.

Political Opinion

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law ... abridging the freedom of speech ..., or the rights of the people peaceably to assemble and to petition the Government for a redress of grievances." This fundamental precept of American democratic society has resulted in a political culture marked by the free exchange of political opinions and a widespread tolerance of basic individual rights. Absent from United States society is the kind of discrimination based on political opinion contemplated by Convention 111, namely, political opinion discrimination in the public or private sector resulting from a law or governmental policy.

The legal review of Convention 111 determined that when, as in the United States, the kind of political opinion discrimination contemplated by the Convention does not exist, it is not necessary for that country to specifically prohibit political opinion discrimination by statute. Therefore, it is not necessary for the United States to enact a statute prohibiting employment discrimination based on political opinion since review of the law and practice of the United States established that such discrimination is virtually non-existent and that the United States has no law or public policy which results in such discrimination.

In addition, the specific law and practice in the United States provides numerous protections against such discrimination.

First, broad protections against discrimination based on political opinion are granted the more than 18 million Americans who work for the local, state and federal governments. These protections are anchored in the First Amendment of the United States Constitution and its freedoms of speech and association which are applied to state and local governments through the Fourteenth Amendment. These constitutional rights are zealously protected by the courts in the United States. For example, the courts have held that the political affiliations and beliefs of any individual may only be considered if the government can demonstrate an overriding, "vital" state interest requiring that the person's private political beliefs conform with that of the public employer. Branti v. Finkel, 445 U.S. 507 (1980). Generally, the courts have only permitted a person's political affiliations or beliefs to be considered when that person would occupy a policy-making position within the state or federal entity. Id.; Elrod v. Burns, 427 U.S. 347 (1976). Thus, any government entity in the United States, whether it is federal, state or local, may not lawfully hire, discharge, promote, transfer or recall a person solely because of their political affiliations or beliefs unless those political beliefs are an appropriate requirement of the job. Rutan v. Republican Party of Illinois, 497 U.S. 62, 74-75 (1990).

In addition, the Civil Service Reform Act of 1978, which governs federal employees, prohibits personnel actions on the basis of political affiliation. 5 U.S.C. § 2302(b)(1)(E). Regulations of the Office of Personnel Management also specifically prohibit discrimination based on political affiliation in the executive branch of the federal government. 5 C.F.R. § 4.2.

There is no federal statute in the United States which explicitly prohibits private employers from basing employment decisions on a private employee's political opinions. However, employment discrimination based on political opinion has not been a significant problem in the United States because of the country's longstanding traditions of individual and political freedom. For example, inquiries to the American Civil Liberties Union (ALCU) the country's principal private organization concerned with issues of individual freedom, have indicated that employment discrimination by private employers based on political opinion is virtually non-existent in the United States. Where discrimination based on political opinion is not present in a society, there is no requirement under Convention 111 for the ratifying country to include in its non-discrimination legislation the elimination of discrimination based on political opinion.

The fact that such employment discrimination is exceedingly rare does not mean, however, that it cannot occur or that there are no protections for private employees in the United States from discrimination based on political opinion. For example, over 18

million American workers belong to unions and thus work under the protections of negotiated collective bargaining agreements. Additional workers, who are not union members, also work pursuant to these collective bargaining agreements. The vast majority of collective bargaining agreements permit an employer to discharge an employee only after following procedures contained in the agreement and "for just cause." See Bornstein and Gosline, Labor and Employment Arbitration § 19.03. Under such a standard, an employer cannot discharge or otherwise discipline an employee for off-the-job behavior unless that behavior adversely affects the employee's work.

In addition, there are statutes which provide protections for certain aspects of political expression. At least three jurisdictions provide very broad protections from discrimination based on political opinion which would clearly meet and perhaps surpass the obligations under Convention 111. See C.F.S.A. § 31-51(q)(Connecticut); D.C. Code §1-2512 (District of Columbia); L.P.R.A. § 146 (Puerto Rico).

Other statutes are more narrow and provide protections in more limited circumstances. For example, numerous federal and state statutes protect the fundamental means of political expression, the vote, from influence by other individuals, including employers.

Federal law prohibits "attempts to intimidate, threaten, or coerce []any other person for the purpose of interfering with the right ... to vote" for a candidate for federal office. 18 U.S.C. § 594. Federal law also prohibits expenditures to influence voting, that is, soliciting, receiving, or accepting an expenditure in consideration of a vote or withholding a vote. 18 U.S.C. § 597. Federal law prohibits any promises or threats to be made in connection with federal employment in exchange for political activity. 18 U.S.C. §§ 600-01. Virtually every state has similar protective statutes.

Thus, the prohibition in Convention 111 concerning employment discrimination based on political opinion is intended to prevent such discrimination based on government policies. There are no such violative government practices in the United States and, in fact, discrimination based on political opinion is exceedingly rare in the United States. In addition, public and private sector employees are protected from such discrimination in a variety of ways as described above. Therefore, the law and practice of the United States is in complete compliance with the obligation under Article 2 to "declare and pursue" a national policy designed to promote equality of opportunity and treatment in employment with respect to political opinion.

Social Origin

In the United States, there has never been any question about the possibility of all individuals to pass from one "class" or social category to another; no such "classes" or categories are in fact recognized. The concept of upward mobility is firmly entrenched in American society and is one of the reasons that the United States has one-half of the world's immigration each year. As a consequence, U.S. law and practice at the federal and state level does not expressly prohibit discrimination based on social origin. As with political opinion discrimination, there is no obligation on the part of the ratifying nation to prohibit by statute employment discrimination based on social origin where such discrimination does not exist.

The ILO has also indicated that in the absence of a societal caste system or other distinctions based on social status or origin, the broad prohibition of discrimination based on race, colour and national origin under Title VII of the 1964 Civil Rights Act is sufficient as a matter of United States national policy to meet the requirement against discrimination based on social origin found in Convention 111.

Additional Areas of Protections

The United States has clearly stated a national policy concerning equality of opportunity and treatment in respect of employment and occupation in areas other than the seven areas enumerated in Article 2 of Convention 111. The United States provides extensive protections in the areas of employment discrimination based on age and disability. The principal federal statutes providing protections in these areas are: the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-631; the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Such additional protections are permitted under the Convention, but are not required.

Article 3

Article 3 sets out means for achieving the basic obligation in Article 2 to declare and pursue a national policy with regard to employment discrimination. In Article 3, when the ratifying member undertakes the obligation, the means may be accomplished "by methods appropriate to national conditions and practice" providing wide discretion in how to implement Convention 111.

Section (a)

Section (a) of Article 3 obliges the member state "to seek the co-operation of employers' and workers' organizations and other

appropriate bodies in promoting the acceptance and observance of this policy."

Under United States law and practice, the United States seeks the cooperation of employer and worker organizations with the national policy concerning employment discrimination in several ways. For example, the Equal Employment Opportunity Commission ("the Commission") is the central administrative authority for the enforcement of Title VII, Title I of the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), and the Age Discrimination in Employment Act ("ADEA"). As the principal enforcement agency for employment discrimination, the Commission has undertaken to seek the cooperation of employers' and workers' organizations, as well as others, in promoting acceptance and observance of the United States policy against employment discrimination. The Commission's efforts in this regard include the following.

First, the Commission publishes Notices of Proposed Rulemaking to solicit public comment on the guidelines it adopts to implement federal antidiscrimination laws. The Commission's guidelines or regulations, which are ultimately published in the United States Code of Federal Regulations, are an important source of guidance for employers and labor organizations, among others, about the requirements of Title VII, the ADA, the EPA and the ADEA.

Notices of Proposed Rulemaking are published before regulations are put into final form, to allow all interested parties to provide input during the drafting process. The Commission's Notices of Proposed Rulemaking ensure that the public is kept fully informed about, and can influence, considerations underlying the adoption of substantive antidiscrimination policies. Commission guidelines that have been adopted through this process include those governing discrimination on the basis of national origin; discrimination on the basis of pregnancy; standards for the validation of employment tests; and standards under EPA, the ADA and ADEA.

When implementing the ADA, for example, the Commission issued an "advance" Notice of Proposed Rulemaking to solicit public input before the Commission had even drafted its proposed rules. Between September and November of 1990, the Commission held 62 input meetings throughout the country to obtain suggestions for the proposed rules. In addition, under the ADEA, the Commission has utilized negotiated rulemaking in which interested parties are called in prior to the issuance of regulation so that the parties and the Commission can negotiate a regulation which reflects, to the greatest extent possible, the legitimate interests of the parties.

Beyond soliciting public input before finalizing its written policy pronouncements, the Commission has also long encouraged

employers, unions, and others to express their views through meetings, telephone calls, or correspondence with Commission officials and employees. For example, the Commission has recently undertaken an extensive and systematic series of outreach meetings designed to involve the public in Commission decisions about the enforcement of federal law. On March 4, 1995, President Clinton issued a memorandum directing agencies, including the Commission, to "promptly convene groups consisting of frontline regulators and the people affected by their regulations." In response, the Commission scheduled meetings that included more than 18,000 individuals to discuss how the Commission implements its responsibilities under the different laws it enforces.

Finally, the Commission is required by Presidential mandate to circulate proposed guidelines and regulations affecting Federal sector employment to other government agencies. In coordinating with Federal agencies, the Commission uses a broad standard in determining which agencies are "affected" to ensure the widest possible circulation. For example, when regulations governing Federal sector employment procedures were being developed, all Federal agencies were given the opportunity to comment since their development would ultimately affect all agencies' individual employment practices. A similar process was employed in relation to prohibitions of discrimination based on disability because Federal agencies would be required to comply with new standards governing their employment activities.

The activities of the Commission illustrate how the United States seeks "the cooperation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of this policy" concerning employment discrimination. Thus, United States law and practice meets the obligation under section (a) of Article 3 of Convention 111.

Section (b)

Section (b) of Article 3 obliges each member state "to enact such legislation and to promote such educational programs as may be calculated to secure acceptance and observance of the policy." As indicated above in the discussion under Article 2, the United States federal and state governments have enacted many pieces of legislation calculated to secure the acceptance and observance of its policies concerning employment discrimination. The enactment and enforcement of these legislative acts brings the United States into compliance with the legislative obligation of this section of the Convention.

With regard to the obligation under section (b) concerning educational programs, the Equal Employment Opportunity Commission has again taken the lead in developing educational programs designed to secure the acceptance and observance of the United

States policy concerning employment discrimination. The Commission's mission statement explicitly commits the Commission to accomplishment of its enforcement objectives through, among other things, education, policy development and research, and provisions of technical assistance. The Commission's outreach program consists of two primary components that provide the public with a broad range of public education, technical assistance, and training activities on equal employment opportunity laws and their enforcement. First, the EEOC makes information available on its operations, programs, and activities through printed materials, speeches, workshops, and technical assistance programs. These activities are produced with appropriated funds and are delivered free-of-charge to audiences across the country. Second, the EEOC is able to offer more specialized and in-depth training services through its Revolving Fund. Programs sponsored by the Revolving Fund augment those activities that are provided at no cost to the public. In Fiscal Year 1993, the forty-six Commission seminars conducted under the auspices of the Revolving Fund reached 3,938 representatives of public and private employers, attorneys, and human resource practitioners. In Fiscal Year 1994, 6,173 individuals participated in the offered seminars.

Under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12206, moreover, the Commission has engaged in far-reaching technical assistance to educate employers and others about statutory requirements barring employment discrimination on the basis of disability. For example, technical assistance activities conducted under the ADA include publication of a Technical Assistance Manual that sets forth practical guidance on implementing the new antidiscrimination requirements in the workplace and identifies governmental and non-governmental sources for further technical assistance.

Moreover, at the request of sponsoring groups, Commission representatives have participated in thousands of conferences, seminars, workshops, and other presentations to address rights and obligations under the federal nondiscrimination laws, as well as the Commission's enforcement responsibilities. For example, between Fiscal Year 1991 and Fiscal Year 1994, Commission employees reporting to the Office of Program Operations, which oversees all field investigative personnel, gave 6,181 presentations to members of the public, reaching 395,262 participants.

With specific regard to federal employment, the Commission has undertaken numerous activities to educate government agencies about, and to provide technical assistance to them in complying with, their nondiscrimination and affirmative employment obligations. These activities include seminars, training sessions and the publication of the Digest of Equal Employment Opportunity Law, to assist supervisory and staff attorneys in

researching legal issues. The Digest had 1,266 subscribers by the end of 1993.

Each Commission office also responds to countless written inquiries seeking particularized guidance on the requirements of the laws. The Commission's policy documents, including its 870 page Compliance Manual, enforcement guidance, regulatory guidelines, and Commission decisions, are also available to the public. Indeed, to respond to the increasing volume of requests for guidance documents, the Commission has established an EEOC Publications Distribution Center, which can be reached through a toll-free telephone number, to disseminate Commission materials in a timely and efficient manner. Close to 1.6 million publications were distributed through this service during Fiscal Year 1993.

Through these various programs the United States clearly meets the obligation under section 3(b) to promote educational programs "calculated to secure the acceptance and observance of the policy" concerning employment discrimination.

Section (c)

Section (c) of Article 3 obliges the member state "to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy." The legal review of Convention 111 has shown no policies under United States law and practice that need to be repealed.

Section (d)

Section (d) of Article 3 obliges the ratifying country "to pursue the policy in respect of employment under the direct control of the national authority."

Federal law and policy clearly satisfy this obligation. The vast majority of federal employment discrimination statutes, discussed above, apply to the United States federal government. For example, Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, national origin, religion and sex, was extended to Federal employees in 1972. Overall responsibility for administration of Title VII rests with the EEOC. However, each Federal agency must have a unit responsible for investigating complaints alleging a violation of Title VII. Federal employees must file their complaints with their agency before appealing to the EEOC. EEOC regulations implementing Title VII, as well as the Equal Pay Act and the Age Discrimination in Employment Act, with respect to Federal employment are found at 29 C.F.R. 1614. Section 717 of Title VII further requires the EEOC to annually review and approve affirmative employment programs for Federal departments and agencies.

These programs illustrated the two complementary approaches of the federal Title VII nondiscrimination policy. First, the federal government prevents and addresses discrimination in the workplace through the handling of individual complaints through an orderly legal process. Second, the federal government maintains affirmative employment programs to eliminate discrimination in the federal workplace.

The Equal Pay Act, which prohibits pay differences on the basis of sex, and the Age Discrimination in Employment Act, which prohibits discrimination on the basis of age for those 40 or older, also apply to federal employees. The statutes are administered by the EEOC in the same manner as Title VII.

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, requires Federal agencies in the executive branch to prepare affirmative action plans for the hiring, placement, and advancement of individuals with disabilities. This Act prohibits discrimination against qualified individuals with disabilities.

The Antidiscrimination in Employment Act, 5 U.S.C. § 7201, requires that under the Federal Equal Opportunity Recruitment Program (FEORP), Federal agencies and their components establish "target recruitment programs" to remedy any underrepresentation of minorities and women in their employment ranks. Guidance for Federal agencies is issued by the Office of Personnel Management (OPM) in the Federal Personnel Manual, Chapter 720, Subchapter 2. Agencies can use any appropriate combination of internal and external recruitment sources as the means to correct identified underrepresentations. The responsibilities of Federal agencies under FEORP also are spelled out in OPM regulations at Title 5 C.F.R. Part 720.

Several Executive Orders concerning employment discrimination also directly affect the Federal government. For example, Executive Order 11478 prohibits discrimination on the basis of race, color, religion, sex, and national origin. This Executive Order also requires the heads of Federal executive departments to establish and maintain affirmative action programs for all civilian employees. Executive Order 11141 prohibits discrimination on the basis of age. Executive Order 12125 exempts severely physically disabled and mentally retarded individuals from competitive examinations for Federal government jobs.

The Federal government also assures compliance with employment discrimination law by conditioning the receipt of Federal funds upon compliance with certain employment discrimination standards. For example, Executive Order 11246 requires any employer who has a contract with the Federal government to take affirmative actions to hire and promote women and minorities. Regulations describing the general obligations of contractors and

subcontractors are found at 41 C.F.R. Chapter 60-1. Regulations that describe the required elements of an affirmative action program are found at 41 C.F.R. Chapter 60-2. See also 41 C.F.R. Chapters 60-4 (Affirmative Action in Construction); 60-20 (Sex Discrimination Guidelines); and 60-50 (Religious and National Origin Discrimination).

Through all of these legislative enactments and programs, the United States pursues its policy concerning employment discrimination with respect to employment under the direction of the national authority. Therefore, the law and practice of the United States meets the obligation of section (d) of Article 3 of Convention 111.

Section (e)

Section (e) of Article 3 obliges the ratifying member to "ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of the national authority." The law and practice of the United States meets this obligation in a variety of ways.

The principal Federal program in the United States concerning vocational training and occupational guidance is the Job Training and Partnership Act ("JTPA"). The JTPA provides training and employment programs for various groups, including disadvantaged adults and youths, 29 U.S.C. §§ 1601-5, dislocated workers, 29 U.S.C. §§ 1651-8, Native Americans, 29 U.S.C. § 1671, and farm workers, 29 U.S.C. § 1672. The JTPA specifically provides that:

> No individual shall be excluded from participation in, denied the benefits of, subjected to discriminations under, or denied employment in the administration of or in connection with any such program because of race, color, religion, sex, national origin, age, disability, or political affiliation or belief.

29 U.S.C. § 1577.

Therefore, the federal government has clearly stated its policy of non-discrimination with regard to its principal training and employment programs.

In addition, the Bureau of Apprenticeship and Training of the Department of Labor supervises the National Apprenticeship System pursuant to the National Apprenticeship Act. Under the program, apprentices receive supervised, on-the-job training combined with related technical instruction in a specific occupation funded by sponsors and through State support.

The Department of Labor's policy regarding Equal Employment Opportunity in registered apprenticeship is as follows:

> Each sponsor of an apprenticeship program shall:
>
> (a)(1) Recruit, select, employ, and train apprentices during their apprenticeship, without discrimination because of race, color, religion, national origin, or sex, and
>
> (a)(2) Uniformly apply rules and regulations concerning apprentices, including but not limited to, equality of wages, periodic advancement, promotion, assignment of work, job performance, rotation among all work processes of the trade, imposition of penalties or other disciplinary action, and all other aspects of the apprenticeship program administration by the program sponsor; and
>
> (a)(3) Take affirmative action to provide equal opportunity in apprenticeship, including adoption of an affirmative action plan as required by this part.

29 C.F.R. § 30.3.

In addition, the United States Department of Education grants money to states under a variety of programs for vocational education and training. See, e.g., 20 U.S.C. Chapter 44. Under these programs, states submit plans to the Department of Education which contain assurances as to how the money will be spent. These assurances invariably contain an assurance that the money will not be spent in a discriminatory manner. See 34 C.F.R. § 100.1-3.

Thus, the major training and apprenticeship programs sponsored by the Federal government clearly ensure the observance of the national policy toward employment discrimination. The United States is not aware of any governmental program concerning vocational training and guidance that does not contain similar protections. Therefore, the law and practice of the United States meets the obligation in section (e) of Article 3 of Convention 111.

Section (f) of Article 3 obliges the ratifying country to "indicate in its annual reports on the application of the convention the action taken in pursuance of the policy and the

results secured by such action." The United States will submit the relevant information in its annual reports at the appropriate time.

Article 4

Article 4 provides an exception to the general application of Convention 111. The Article provides that:

> Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

With regard to the obligation under Article 4, it should be noted that Title VII contains a specific exception concerning persons required to receive and maintain national security clearances for their employment. The exception provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-
>
> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive Order of the President; and
>
> (2) such individual has not fulfilled or has ceased to fulfill that requirement.

42 U.S.C. § 2000-2(g).

The national security clearance program is conducted under a series of Executive Orders. See, e.g., E.O. 12829 (Jan. 6, 1993)

(National Industrial Security Program); E.O. 12968 (Aug. 2, 1995)(Access to Classified Information). This system of excepting security matters from Title VII is entirely consistent with the express language of Article 4.

Article 5

Article 5, section 1 provides that "special measures of protection or assistance" provided for in other conventions or recommendations adopted by the International Labour Conference shall not be deemed to be discrimination. This section places no obligation upon the ratifying country but merely makes clear that any special measures provided in other ILO conventions or recommendations would not be considered to be discrimination under Convention 111.

Like section 1 of Article 5, section 2 places no affirmative obligations upon the ratifying county. Instead, the section permits the ratifying country to adopt certain special measures on behalf of persons who, for reasons of "sex, age, disablement, family responsibilities or social or cultural status," may require such measures without those measures being considered discrimination under Convention 111.

The United States provides under its law and practice many such discretionary measures. For example, the United States provides for extensive protections in the areas of employment discrimination based on age and disability. The principal federal statutes providing protection in these areas are: the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-631; the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

Recently, the United States increased protections against employment discrimination for individuals with family responsibilities under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. The Act "entitle[s] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition." 29 U.S.C. § 2601(b)(2).

Thus, the law and practice of the United States is consistent with Article 5.

Article 6

Article 6 obliges each member state to apply the Convention to "non-metropolitan territories." Under the United States system of government, the major employment discrimination statutes, described above, are applicable throughout the United States and

its territories. No exceptions are made for "non-metropolitan territories" and so the United States is in compliance with this portion of the Convention.

Understandings

As the above discussion of the substantive provisions of Convention 111 demonstrates, United States law and practice are fully consistent with the requirements of the convention, and thus create no obstacle to ratification. Nevertheless, to remove the possibility that certain ambiguities might arise after ratification, it would be advisable to adopt two understandings to the Convention:

1. The United States understands the meaning and scope of Convention No. 111, having taken into account the conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations existing prior to ratification, which conclusions and practice, in any event, are not legally binding on the United States and have no force and effect on courts in the United States.

2. The United States understands that the federal nondiscrimination policy of equal pay for substantially equal work meets the requirements of Convention 111. The United States further understands that Convention 111 does not require or establish the doctrine of comparable worth with respect to compensation as that term is understood under United States law and practice.

The first understanding reflects the fact that, as part of its examination of the Convention to determine whether there were any legal impediments to ratification, the United States, on a tripartite basis, carefully reviewed the existing conclusions and practice of the ILO's Committee of Experts. These conclusions and practice constitute the most detailed analysis of the Convention and, within the ILO, carry considerable moral and political force.

The conclusions and practice of the Committee of Experts are not, however, legally binding on the United States or courts of law in the United States. They cannot affect United States obligations under the Convention, nor could they be used as rules of decision in courts in the United States. The first understanding makes clear that existing interpretations of Convention 111 by the Committee of Experts are not legally binding. It also makes clear that the United States and Federal and State courts, in the event that Convention 111 is ratified, would not be legally bound to accept any subsequent interpretation rendered by the Committee

of Experts regarding that Convention. The understanding, however, does not purport to alter the international obligations of the United States in any way.

As stated above, because Convention 111 is a non-self-executing treaty, United States ratification would not make the Convention effective as United States law. In any event, in cases involving questions of employment discrimination, no court in the United States could apply the terms of the Convention as rules of decision, but would instead apply such Constitutional and statutory provisions as give effect to Convention 111 in the United States. As a result, no court in the United States could have occasion to rely on interpretations of Convention 111 rendered by the Committee of Experts.

The second understanding reflects the fact that during its tripartite examination of Convention 111, the United States submitted a detailed description of its law and practice on resolving questions relating to compensation discrimination based on sex under Title VII of the 1964 Civil Rights Act and the 1963 Equal Pay Act.

Following submission of this detailed description of United States law and practice regarding compensation discrimination based on sex, including the United States law and practice with regard to comparable worth, the TAPILS group specifically asked the ILO:

> We understand the U.S. nondiscrimination policy with respect to compensation found in the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act as interpreted by the courts meets the requirements of ILO Convention 111 as such compensation discrimination relates to terms and conditions of employment. Is this understanding correct?

The ILO answered this question with an unequivocal "yes."

Still, so there is no possible misunderstanding domestically concerning whether ratification of Convention 111 would change compensation discrimination law and practice in the United States, TAPILS recommends that the United States adopt this understanding with ratification of the Convention.

Final Provisions

Article 7

The formal ratification of the Convention shall be communicated to the Director-General of the ILO for registration.

Article 8

The Convention will be binding on all members who have registered their ratification with the Director-General once two members have registered. Thereafter, the Convention will become binding on members twelve months after they register. Convention 111 came into force in June 15, 1960.

Article 9

Under section one of this article, a member may denounce the entire convention ten years after the Convention becomes binding on the matter. Such denunciation takes effect one year after it is communicated to the Director-General.

Under section two, if a member does not denounce the Convention within one year after the Convention has been binding upon the member for ten years, the Convention will continue to be binding upon the member for ten more years.

Article 10

The Director-General shall communicate to the members the registration of all ratification and denunciations and the dates when those events will come into effect.

Article 11

The Director-General shall communicate all ratification and denunciations of the Convention to the Secretary-General of the United Nations.

Article 12

The Governing Body of the ILO shall present a report on the Convention and whether it should be revised in whole or in part at such a time when the Governing Body considers such report necessary.

Article 13

If a new convention is adopted by the conference, revising this Convention in whole or in part, then ratification of the new convention will mean automatic denunciation of this Convention unless the new convention provides otherwise. This Convention will remain in force for those members who have adopted it but have not accepted the revised convention.

Article 14

The English and French versions of the Convention are equally authoritative.

U.S. Department of Justice

Office of Policy Development

Assistant Attorney General

Washington, D.C. 20530

May 30, 1997

David P. Stewart
Assistant Legal Adviser
U.S. Department of State
Washington, D.C. 20520

Re: Ratification of ILO Convention No. 111

Dear Mr. Stewart:

As you requested, we have reviewed the materials you provided us regarding International Labor Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation.

Based on our review of these materials and the interpretation of the Convention provided by the Departments of State and Labor and other interested agencies, the Department of Justice sees no inconsistency between the Convention's provisions and provisions of domestic law. Therefore, the Department supports the executive branch recommendation to transmit ILO Convention 111 to the Senate for advice and consent.

Sincerely,

Eleanor D. Acheson

International Labour Conference
Conférence internationale du Travail

CONVENTION 111

CONVENTION CONCERNING
DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION,
ADOPTED BY THE CONFERENCE
AT ITS FORTY-SECOND SESSION,
GENEVA, 25 JUNE 1958

CONVENTION 111

CONVENTION CONCERNANT
LA DISCRIMINATION EN MATIÈRE D'EMPLOI ET DE PROFESSION,
ADOPTÉE PAR LA CONFÉRENCE
A SA QUARANTE-DEUXIÈME SESSION,
GENÈVE, 25 JUIN 1958

AUTHENTIC TEXT
TEXTE AUTHENTIQUE

Convention 111

CONVENTION CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION.

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on 4 June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights,

adopts this twenty-fifth day of June of the year one thousand nine hundred and fifty-eight the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958 :

Article 1

1. For the purpose of this Convention the term "discrimination" includes—

(a) any distinction, exclusion or preference made on the basis of race, colour, 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 ;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice—

(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy ;

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy ;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy ;

(d) to pursue the policy in respect of employment under the direct control of a national authority ;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority ;

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Article 6

Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 12

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force ;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14

The English and French versions of the text of this Convention are equally authoritative.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the International Labour Organisation during its Forty-second Session which was held at Geneva and declared closed the twenty-sixth day of June 1958.

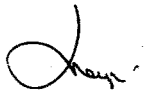
IN FAITH WHEREOF we have appended our signatures this fifth day of July 1958.

The text of the Convention as here presented is a true copy of the text authenticated by the signatures of the President of the International Labour Conference and of the Director-General of the International Labour Office.

Le texte de la convention présenté ici est une copie exacte du texte authentiqué par les signatures du Président de la Conférence internationale du Travail et du Directeur général du Bureau international du Travail.

Certified true and complete copy,
Copie certifiée conforme et complète,

for the Director-General of the International Labour Office :
pour le Directeur général du Bureau international du Travail :



FRANCIS MAUPAIN
Legal Adviser
of the International Labour Office
Conseiller juridique
du Bureau international du Travail