Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States

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In the United States, a significant part of the debate over passage of the North American Free Trade Agreement (NAFTA)1 focused on the agreement's potential effects on the American worker. United States labor organizations and their congressional supporters opposed NAFTA based on their belief that Mexico's low wages and minimal worker protection would entice U.S. companies to move to Mexico, resulting in a loss of American jobs.2 An underlying assumption of their argument was that Mexican labor laws were either inadequate to protect workers' interests or inadequately enforced.3

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1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, 32 I.L.M. 605 (1993). Although Canada was also a signatory of NAFTA, in this article the authors discuss only the United States and Mexico.
2. For example, at a congressional panel meeting in September 1993, Teamster Vice President Dennis Skelton claimed that NAFTA "will cause massive job loss" in the United States. Can the Labor Side Agreement Save NAFTA?: Hearings Before the Employment, Housing, and Aviation House Subcom. of the Comm. on Government Operations, 103d Cong., 1st Sess. 31 (Sept. 9, 1993, Oct. 7, 1993). United Steelworkers International President, Lynn R. Williams, said that NAFTA would result in an "unacceptable loss of jobs" in the United States and "wage depression and lower living standards for American workers." Id. at 27.
3. Representative William Ford (D-Mich.), Chair of the House Education and Labor Committee, argued that "Mexican health and safety and other standards are much weaker than American counterparts" and that American and Mexican labor law are "generations, decades, and maybe centuries" apart. Members of Congress, Union Leaders Speak out against NAFTA Side Agreements, Int'l Env't Daily (BNA), Sept. 16, 1993, available in LEXIS, Nexis Library, BNAID File [hereinafter Members of Congress]. Other critics, such as Senator Ernest Hollings for Foreign Policy, acknowledged the existence of tough labor laws in Mexico but argued that they are not enforced. Ernest F. Hollings, Reform Mexico First, 93 FOREIGN POL'Y 91, 100 (1993-94). In contrast, Stephen Zamora analyzed the debate in the United States itself, exposing and questioning the assumption of the debaters that Mexico should be pressured to "Americanize"—to adopt a legal, political and economic system more like that of the United States. See generally Stephen Zamora, The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement, 24 LAW & POL'Y INT'L BUS. 391 (1993).
In response to opposition by U.S. labor, the NAFTA signatories negotiated a side agreement to ensure the protection of workers’ rights in all three countries. This agreement establishes a tripartite commission empowered to hear complaints brought by any interested party that alleges that an employer is violating the labor laws of the country in which work is being performed. The side agreement, however, did not satisfy U.S. labor, and American unions continued to oppose NAFTA. In spite of this opposition, the U.S. Congress ratified the trade agreement in November 1993. Because the labor side agreement tries to ensure that each signatory country enforces its own laws, one purpose of this article is to provide practical information about Mexican labor law to U.S. labor and American companies doing business in Mexico.

This piece also has another purpose in attempting to rectify the many misperceptions regarding Mexican labor law. Much of the rhetoric used during the NAFTA debate was based on stereotypes about Mexico, which perpetuated misunderstanding and resentment between the two countries. Since NAFTA’s passage, a number of articles have explored aspects of Mexican labor law more deeply than earlier reports, but all maintain the assumption that deliberate Mexican Government policy causes inadequate enforcement of Mexican labor law. Also im-

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5. NAALC, art. 4 (Private Action), art. 8 (The Commission), arts. 27-48 (Resolution of Disputes & General Provisions).
6. Walter Shea, president of the transportation trades department of the AFL-CIO, claimed that the side agreement was “totally inadequate” and that it protected the concerns of investors more than the interests of American or Mexican workers. The agreement, he said, fails to protect the rights of workers to “freely associate, participate in collective bargaining, strike, or be protected from forced labor.” Members of Congress, supra note 3. In fact, as this article discusses later, both Mexican and U.S. law protect these rights. Under NAALC, however, possible violations of the right to organize and freely associate are subject to consultations and review by the NAALC council, but not to the imposition of the sanctions possible for other violations. NAALC, supra note 4, arts. 27-41. See also Daily Labor Report, Current Developments, NAFTA Decides to Review Union Charges Against Honeywell, General Electric, Apr. 20, 1994, available in LEXIS, Nexis Library, Curnws File.
8. During the NAFTA debates, Raul Yzaguirre, President of the National Council of La Raza, warned that “Mexico bashing and race baiting are becoming the weapons of choice among critics of the NAFTA treaty.” He quoted AFL-CIO President Lane Kirkland as saying that child labor in Mexico rivals “any of the well-publicized disasters of the worst Stalinist regimes.” Hispanic Leader Warns NAFTA Debate Drifting into “Evil Mixture of Prejudice and Ignorance”, Political Counterattack to Focus on Merits, PR Newswire, May 30, 1993, available in LEXIS, Nexis Library, Arcnws File.
plicit in these articles and others is the assumption that U.S. law is superior to Mexican law and adequately protects the interests of U.S. workers.

In reality, Mexican labor law provides the same basic rights and protections to Mexican workers that U.S. law provides to U.S. workers. Beyond those basics, and in contrast to the implications of much of the anti-NAFTA rhetoric, Mexican labor law is in many ways more protective of workers than U.S. law, and Mexican unions are more powerful than their American counterparts. This article compares U.S. and Mexican labor and employment law in order to test the assumption that U.S. law is superior. The results of this comparison may surprise many and may help to clarify the strengths and weaknesses of both systems. The analysis suggests that both countries may need to adjust to a more integrated international economic environment in order to protect workers’ interests effectively.

Since the authors wrote this article primarily for a U.S. audience, the sections on U.S. labor and employment are briefer than those discussing the Mexican system. In Part I, this work first presents a short history of labor relations and the principles and sources of labor and employment law in each country. In Parts II and III, it discusses and compares the statutory regulations and associational rights that each system provides. In Part IV, the article addresses the methods and institutions which the two countries have established to enforce those rights. Parts V and VI analyze the current and future effectiveness of each country’s system in protecting workers’ interests.

government, and corruption as a means of controlling labor demands); Charles W. Nugent, Comment, A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA’s Side Accords and Prospects for Reform, 7 TRANSNAT’L LAW. 197, 213 (1994) (“‘official’ unions... tend to be conciliatory towards employers in the collective bargaining process, reflecting the PRI’s policy of maintaining low wages to attract foreign investment.”); Susanna Peters, Comment, Labor Law for the Maquiladoras: Choosing Between Workers’ Rights and Foreign Investment, 11 COMP. LAB. L.J. 226, 247 (1990) (“Many maquila workers believe that the government and [the predominant labor union] have a greater desire to appease foreign manufacturers than to campaign for workers.”).

10. See Zamora, supra note 3, at 18.

11. Id. at 18, 27. An estimated 25% to 30% of Mexico’s private sector work force is unionized. U.S. Dep’t of Labor, Foreign Labor Trends, Mexico 1991-1992, at 2 (1992) [hereinafter Foreign Labor Trends]. In the United States, the comparable number is 11.5% of the work force. 142 Lab. Rel. Rep. (BNA) 180-81 (1993). Also, Mexico’s labor sector has more political influence than the labor sector in the United States. See infra notes 31-32 and accompanying text.

12. Through this article, the authors hope to initiate an informed discussion of the differences in approaches to labor relations in Mexico and the United States and how those differences have affected the protections and benefits which workers receive. The article’s breadth in scope necessarily limits the depth of discussion of any particular issue.
I. HISTORICAL CONTEXT, FUNDAMENTAL PRINCIPLES, AND SOURCES OF LAW

A. Mexico

1. Labor Relations History

The current labor relations system in Mexico emerged out of the 1910 Mexican Revolution. Prior to the Revolution, Mexico followed a laissez-faire model of labor relations similar to that of the United States. The Mexican government seldom intervened in affairs between labor and management, and when it did so, it usually reacted hostilely toward labor. However, the influence of Mexico's working and peasant classes in the Revolution broke that country from its laissez-faire tradition and redirected it on a path of labor relations development quite different from that of the United States. The Program of Reform adopted in October 1915 included the regulation of working conditions and recognition of the legal status of unions and the right to strike, rights not guaranteed in the United States for another twenty years.

The national constitution adopted in 1917 went further, explicitly abandoning traditional laissez-faire principles concerning relations between labor and capital and recognizing the existence of class conflict and inequality. The new constitution provided guarantees for the economically weak and formulated an arbitral role for the state in conflicts between labor and capital. Mexico's Constitution of 1917 was the first constitution in the world to include such social guarantees.

Labor relations in Mexico in the 1920s and 1930s were often
turbulent. Unions fought among themselves over membership and ideology and for influence in government. In 1938, President Lázaro Cárdenas reorganized the official ruling party, responding to the labor unrest by officially incorporating the labor sector into the new party. Union leaders at this time sought an alliance with the government in order to ensure the growth of union power through direct participation in the emerging political system. Cárdenas formed an alliance with the then-dominant Confederación de Trabajadores de México (CTM), thus cementing the Mexican labor relations system that survives today.

The CTM remains the largest and most influential labor confederation in Mexico. Considered to be the leader of the labor movement in Mexico and one of the nation’s half-dozen most powerful leaders, Fidel Velázquez became Secretary-General of the CTM in 1941 and has since retained that position for all but one year. Traditionally,
Velázquez and the labor sector have significantly influenced the PRI's selection of presidential candidates, and through that influence, they have kept labor's agenda in the forefront of national policy. As one analyst states, this official unionism is a fundamental foundational support of the PRI and a principal axle of the Mexican political system.

2. Fundamental Principles of Mexican Labor Law

The Mexican legal system generally is non-adversarial in nature. Based on a political tradition of cooperation and hierarchical management, it emphasizes conciliation rather than competition. The Mexican labor law system attempts to protect workers as a class, in contrast to the U.S. system which promotes the protection of individual rights. This legal philosophy is reflected in Mexican labor law itself; the government has granted federal agencies a large role in regulation and dispute resolution, and it emphasizes worker rights at the expense of management rights.

Labor law in Mexico recognizes the inequality in power between labor and capital and attempts to limit the impact of this inequality. The norms of Mexican labor law, therefore, have a guardian and

30. "As he has for every election year since the 1930's, Mr. Velázquez ... played a role in influencing the selection of the party's candidate." Anthony De Palma, Mexico's Unions, Frail Now, Face Trade Pact Blows, N.Y. TIMES, Dec. 14, 1993, at A3.

31. Javier Aguilar García, Los sindicatos nacionales, in 3 EL OBRERO MEXICANO: ORGANIZACIÓN Y SINDICALISMO 181 (1985). See also Zamora, supra note 3, at 449-450 (explaining that “rather than providing a vigorous, independent representation of workers’ interests, labor unions have served to organize labor into a pillar of support for the PRI. Without the active support of labor unions, the PRI would not have survived in power through the disastrous economic trials of the 1980’s”).

Labor plays a somewhat similar role in Europe, however, where the equivalent of a labor party participates directly in the political system. In fact, according to Richard Freeman and Joel Rogers, “the U.S. is anomalous in its lack of institutions linking workers in the political system.” While in Western Europe, “social democratic or labor parties govern countries regularly,” in the United States, “labor’s main route of influence is through special interest lobbying rather than through direct electoral power,” resulting in the “relative political weakness of American labor.” Richard B. Freeman & Joel Rogers, Who Speaks for Us?, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 13, 39 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

32. For further discussion, see infra part IV.

33. See CLIMENT BELTRÁN, supra note 18, at 43. Referring to Mexican labor law as “social law,” Climent Beltrán explains that “[s]ocial justice is carried out through social law; it is concrete justice, tangible and actual protection of the worker.” Id. The law does not approach a person’s labor as simply a commodity to buy and sell. The subject of labor, the human being, instead is entitled to respect and protection. Id. at 36; see also La Ley Federal de Trabajo (L.F.T.), art. 3, which states, work is a social right and social obligation. It is not an article of commerce: it requires respect for the freedoms and dignity of the person performing it and it should be carried out under conditions protecting the life, the health and a decent standard of living for the worker and his family.

Id. at 42. Article 2 of the federal labor law states that the norms of labor law are intended to maintain equilibrium and social justice in the relations between workers and employers.
humanitarian character—which seeks to protect the worker. This concept of labor law restricts traditional liberal legal concepts in three basic ways. First, it limits laissez-faire notions of freedom of contract. The Mexican Constitution and the federal labor law establish many basic rights and conditions of work that labor contracts may embellish but never diminish. Second, it affirmatively recognizes the freedom of association, the right to bargain collectively, and the right to strike. Finally, it provides for judicial partiality. Both substantive and procedural aspects of Mexican labor law expressly favor workers over employers.

3. Sources of Law

As a civil law system, legislation, not jurisprudence, plays the primary role in establishing Mexico’s legal rules. The Mexican Constitution, for example, is much more specific than its U.S. counterpart. Article 123 of the Mexican Constitution, which governs labor relations, is divided into two sections. Part A covers private sector employees, and Part B applies to public workers.

Part A has thirty-one subsections which establish specific regulations and benefits such as the eight-hour work day, the minimum wage, maternity leave, profit-sharing, health and safety regulations, employer-provided housing, and worker’s compensation. The constitution prohibits child labor and wage discrimination based on sex or nationality. Part A also grants to both labor and capital the right to organize and the right to strike or to lockout.

The Ley Federal de Trabajo (L.F.T.), or federal labor law, implements the articles of the constitution. For all workers, this law

34. See CLIMENT BELTRÁN, supra note 18, at 36.
35. See id. The substantive mandates are discussed infra part II.
36. See CLIMENT BELTRÁN, supra note 18, at 36; see also infra part III.
37. See CLIMENT BELTRÁN, supra note 18, at 37, 44.
38. The Mexican Constitution is a living document, having been amended over 350 times since its inception in 1917. See Smith, supra note 18, at 95 n.53. The federal labor law contains over 1,000 articles. Discussed at length infra.
39. The federal labor law discussed below applies to the private sector. The public sector has a separate set of regulations, La Ley de los Trabajadores al Servicio del Estado (Law of State Workers), which include most of the same basic rights and benefits as the private sector laws. However, the public sector laws place restrictions on strikes, as in the United States. See infra note 165.
40. MEX. CONST. arts. 123 A I, III, V-VII, IX, XII, XIV-XVII.
42. See LABOR POLICY AND PRACTICE, supra note 20, at 55. The constitution, article 123, § XXXI, names 22 types of industries or services considered to be under federal authority. Generally, they are the most important industries, such as textiles, electric, cinematography, rubber, sugar, and mining. Also under federal jurisdiction are businesses that are administered by the federal government, have contracts with or concessions from the federal government, or are located in federal zones or
establishes the minimum work conditions, the rules of association and collective bargaining, and the process of conflict resolution through the labor tribunals. The sections that follow discuss these provisions.

B. The United States

The extent of government involvement in labor relations clearly distinguishes the U.S. and Mexican systems. As in Mexico, labor and employment law in the United States evolved out of a laissez-faire tradition in which the federal and state governments did little to regulate the employment relationship. While Mexico has abandoned this laissez-faire model, the United States continues to embrace it. For example, the U.S. Constitution remains wholly silent on the topic of labor-management relations and workers' rights. Also, while the government's regulation of labor and employment law has grown substantially over the past quarter of a century, the U.S. workplace still remains far less subject to governmental control than do workplaces in Mexico and most of the industrialized world.

The nature of the government's role in the U.S. workplace is also different. In Mexico, the constitution and federal labor law establish the government as an active participant in labor relations. Thus, the Mexican government frequently intervenes in labor-management relations either as a mediator or a protector of workers' rights. In contrast, the U.S. legislative scheme presupposes an adversarial relationship between labor and management in which the government...
participates only as a neutral regulator.46

The employment-at-will rule, which has prevailed in the American workplace since the 1800s, embodies U.S. law's traditional "hands-off" approach. Under this rule, an employer is free to discharge an employee for any reason or no reason at all.47

The first and still most significant limitation on the at-will rule in the United States grew out of the labor movement. In 1935, Congress enacted the National Labor Relations Act (NLRA)48 which provides legal protection for employees engaged in union organization, collective bargaining, and concerted activities such as strikes and picketing.

The NLRA regulatory model, which is discussed in more detail below,49 illustrates three fundamental characteristics of the U.S. system. First, the NLRA regulates not the substance, but the process of labor-management relations. The NLRA does not establish any of the substantive terms of the employment relationship, but instead it provides a procedural framework in which management and labor privately determine these issues. Second, the process established by the NLRA is adversarial—each party is expected to use economic coercion to influence the outcome. Third, under the NLRA, the government is a neutral referee that neither takes sides nor participates in the collective bargaining process.

The role of labor in the U.S. political system also is distinct. Some early American organizations, such as the Knights of Labor in the 1870s50 and the International Workers of the World51 some forty years later, urged a broad platform of political and social reform like their European and Mexican counterparts;52 however, the mainstream

47. The employment-at-will rule generally is traced to an 1877 treatise which stated the following:
   With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at-will, and if the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof . . . [I]t is an indefinite hiring and is determinable at the will of either party.
   H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). See generally
   (describing the development and historical antecedents of the employment-at-will rule).
   version, 49 Stat. 449 (1935), is known colloquially as the Wagner Act.
49. See infra part III.B.
50. For an overview of the history and aims of the Knights of Labor, see LEON FINK, WORKINGMEN'S ECONOMY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS (1983); JOSEPH G. RAYBACK, A HISTORY OF AMERICAN LABOR 142-68 (1974).
51. For an overview of the history and aims of the International Workers of the World, see
   MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INTERNATIONAL WORKERS OF THE
   WORLD (1969); DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA 91-104 (1980).
52. Historically, Mexican unions were based on the European model. See LABOR POLICY AND
   PRACTICE, supra note 20, at 61.
of the American labor movement charted a very different course. The
American Federation of Labor (AFL), founded in 1886, advocated not
political upheaval, but economic empowerment. The AFL’s mostly
craft worker members promoted “business unionism” to share in
capitalism’s gains, not replace it altogether. Thus, in contrast to the
CTM’s partnership role with the ruling PRI party, organized labor in the
United States primarily functions as an independent, special interest
group.

Until the mid-1960s, the NLRA and the Fair Labor Standards Act
(FLSA), which establishes minimum wage and overtime pay require-
ments, were the only two federal statutes that comprehensively regulated
the U.S. workplace. That situation, however, has changed significantly
with the enactment of a number of statutes over the past thirty years.
This wave of statutory enactments reflects a shift in focus from
collective to individual rights. The U.S. labor movement has ebbed,
with a fifty percent decline in the percentage of the work force that is
unionized. As the resulting impact of the NLRA has decreased, the
number of statutes regulating the individual employment relationship has
increased. These newer statutes fall into the following two basic
categories: (1) statutes that prohibit discrimination against members of
certain protected classes and (2) statutes that establish minimum
workplace requirements.

In spite of this proliferation of statutory enactments, the U.S.
workplace still remains far less regulated than workplaces in most
industrialized nations. Moreover, the at-will rule remains the presumpti-
tive employment arrangement in the United States and the norm for
most American workers.

53. See LEWIS LORWIN, THE AMERICAN FEDERATION OF LABOR 44-54 (1970); SELIG PERLMAN,
HISTORY OF TRADE UNIONISM IN THE UNITED STATES (1922).
Labor Standards Act, see infra notes 102-105 and accompanying text.
55. The proportion of unionized employees in the nonagricultural work force has declined from
over 30% in 1960 to less than 16% in 1992. See Katherine van Wesel Stone, The Legacy of Industrial
Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining
Department of Labor reporting 1992 union membership at 15.8% of total wage and salary work
force and 11.5% of private sector work force).
56. See infra notes 102-106, 129 and accompanying text.
57. See, e.g., Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983).
58. See generally Jack Stieber & Michael Murray, Protection Against Unjust Discharge: The Need
sector employees are subject to the at-will rule and that 1.4 million of those employees are fired each
year).
II. Substantive Regulation of the Employment Relationship

A. Mexico

Mexican law provides considerable substantive regulation of the employment relationship. In fact, Mexican statutes require employers to provide a number of benefits that U.S. employees typically obtain only at the bargaining table, if at all.

The Mexican federal labor law establishes the minimum standards that apply to all workers covered by the law, regardless of the existence of union representation or a union contract. Mexican workers may bargain for greater benefits, but in no case may they bargain away or lessen the minimum standards established by law. Further, Mexican law mandates that these standards be applied without discrimination based on race, nationality, sex, age, religious creed, or political opinion.

1. Wage and Hour Regulation

The L.F.T. legislates the maximum hours an employee may work and the overtime rate of pay. The traditional work day in Mexico is eight hours, with some exceptions for special workers or conditions. Mexican law establishes a six-day, forty-eight hour work week, with one day of paid rest, normally Sunday. The law also establishes at least seven federal holidays, for which a worker must be paid double if required to work.

Overtime work beyond the basic eight-hour day may not exceed three hours per day, three consecutive days a week; those hours must be paid at double the hourly rate. A national commission composed of representatives of labor, management, and the government establishes minimum wage rates that vary among geographical regions and professions.

59. L.F.T. arts. 56-57.
60. Id. art. 56.
62. See, e.g., L.F.T. titles 5 (women and minors), 6 (special types of work); see also RAMOS ALVAREZ, supra note 43, at 18, 20, 32-35.
63. MEX. CONST. art. 123, pt. A, ch. IV; L.F.T. arts. 69, 71.
64. Id. art. 74.
65. MEX. CONST. art. 123, pt. A, ch. XI; L.F.T. arts. 66-67. If nine hours of overtime is exceeded in one week, the employer must pay those hours at a 200% higher wage rate. Id. art. 68.
66. MEX. CONST. art. 123, pt. A, ch. VI; L.F.T. arts. 90-96. For example, in 1993, the minimum wage in Nogales, Sonora, where many maquiladores (export plants owned by foreign companies) are located, was about $4.75 per day. In Mexico City the minimum wage was the same. In Oaxaca, a poorer southern state, the minimum wage was about $4.00 per day. INSTITUTO NACIONAL DE
2. Fringe Benefits

The L.F.T. provides full-time workers with the right to a paid, six-day vacation after one year of service with an employer.\(^67\) This minimum vacation allowance increases by two days for each of the next four years of service.\(^68\) Thereafter, the vacation allowance grows by two days for every five years of additional service.\(^69\) Part-time workers have a right to vacation in proportion to the number of days worked annually.\(^70\)

Mexican law requires that employers give their workers an annual bonus of at least fifteen days' wages, payable before December 20.\(^71\) Longevity in service can further augment this bonus.\(^72\)

Finally, Mexican law provides for annual profit-sharing bonuses. A national tripartite commission calculates the percentage rate for these bonuses.\(^73\) In 1985, the basic profit sharing rate was set at 10% of the profits earned by the company.\(^74\)

3. Discharge

Unlike U.S. law, Mexican labor law presumes that employment is permanent unless the job is by nature temporary and the work agreement expressly states that employment is for a specific project or a determined time.\(^75\) The constitution itself provides that, other than for

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\(^67\) L.F.T. art. 76.
\(^68\) Id.
\(^69\) Id.
\(^70\) Id. art. 77.
\(^71\) Id. art. 87.
\(^72\) Id. art. 162.
\(^73\) MEX. CONST. art. 123, pt. A, ch. IX(a); L.F.T. arts. 117-25. The Comisión Nacional para la Participación de los Trabajadores en las Utilidades de las Empresas consists of representatives of labor, management and the government. A labor organization or an employer may request that the commission reevaluate the percentage. Id. art. 587. According to James Schlagheck, "profit sharing is a long and well-established practice in Mexico. Fines enforcing corporate compliance make de facto profit sharing commonplace." JAMES L. SCHLAGHECK, THE POLITICAL, ECONOMIC, AND LABOR CLIMATE IN MEXICO 95-96 (1980). This profit-sharing right, however, does not include the right of workers to participate in the administration or decision-making processes of the company. L.F.T. art. 131.

\(^74\) See CLIMENT BELTRÁN, supra note 18, at 177.
\(^75\) L.F.T. arts. 35-37.
a layoff due to economic reasons, an employee may be discharged from his or her job only for just cause.\textsuperscript{76}

Any discharged employee may contest the grounds for discharge before a labor tribunal.\textsuperscript{77} If the tribunal finds a lack of cause, the employer must either reinstate the employee or provide a severance payment equivalent to three months' wages.\textsuperscript{78} Mexican law also obligates an employer to provide this severance payment to employees laid off for economic reasons, plus an additional twelve days of salary for each year of service.\textsuperscript{79}

4. Workplace Safety and Health

The Mexican Constitution requires that employers maintain a safe and healthy working environment.\textsuperscript{80} Mexico's General Regulations on Safety and Health in the Workplace (RGSHT), which implement this obligation, are comparable to the U.S. Occupational Safety and Health Act (OSHA).\textsuperscript{81} The federal government regulates occupational safety and health in all sectors, whether or not the industry is otherwise subject to state or federal jurisdiction.\textsuperscript{82} In addition, small family-run businesses, which are exempt from most labor law provisions, are subject to the occupational safety and health regulations.\textsuperscript{83}

The Secretariat of Labor and Social Welfare (STPS) sets workplace safety and health standards.\textsuperscript{84} Since 1978, tripartite advisory commissions made up of representatives from labor, management, and the government have been established on the national and state levels to study occupational illnesses and injuries and to recommend methods of

\textsuperscript{76} MEX. CONST. art. 123, pt. A, chs. XIX, XXII; L.F.T. arts. 47, 53. Causes that justify discharge include: committing violence against the employer, compromising the security of the establishment, revealing trade secrets, having more than three days of unexcused absences in one month, and incapacity. \textit{Id.} Article 437 of the L.F.T. requires that reductions in force be carried out by seniority.

\textsuperscript{77} MEX. CONST. art. 123, pt. A, chs. XXI, XXII; L.F.T. art. 48 (placing on the employer the burden of proving just cause).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} L.F.T. arts. 162 (individual contract), 436 (collective bargaining contract). In the event of bankruptcy, employees must be paid salaries, benefits, and severance pay due them before any other creditor may make a claim. MEX. CONST. art. 123, pt. A, ch. XXIII; L.F.T. arts. 113-114.

\textsuperscript{80} MEX. CONST. art. 123, pt. A, ch. XV.

\textsuperscript{81} See Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1988). See also MEXICAN SECRETARIAT OF LABOR AND SOCIAL WELFARE & U.S. DEP'T OF LABOR, A COMPARISON OF OCCUPATIONAL SAFETY AND HEALTH PROGRAMS IN THE UNITED STATES AND MEXICO: AN OVERVIEW, at vi (1992) [hereinafter COMPARISON OF OSH]. The RGSHT is a compilation of labor legislation from the Constitution, the L.F.T., and other federal law and international agreements. Numerous additional standards and instructions are then derived from the RGSHT. \textit{Id.} at 1-4.

\textsuperscript{82} See \textit{id.} at v. See also supra note 42.

\textsuperscript{83} L.F.T. art. 352. See supra note 43.

\textsuperscript{84} COMPARISON OF OSH, supra note 81, at 1-4.
prevention. STPS has a staff of inspectors who are responsible for monitoring compliance with the regulations.

A system of labor-management commissions enforces safety and health standards in Mexico. Each workplace with more than ten workers must have a company commission made up of labor and management representatives. These commissions make recommendations for hazard control, investigate accidents and illnesses, and conduct safety and health training. If STPS finds noncompliance with safety and health regulations, the commissions also make recommendations to employers. STPS may impose sanctions for such noncompliance only where an employer does not implement the changes recommended by the commission.

Commission surveys of workplace safety also are used to determine the annual fee that an employer is charged for worker’s compensation insurance. Under Mexican law, employers contribute to a fund administered by the Social Security Administration that indemnifies employees for work-related injuries or illnesses. If the injury or illness is due to employer negligence, the tribunal may award up to 25% additional compensation.

5. Housing

Mexican labor law imposes a distinctive obligation on employers to provide housing for their workers. With the exception of highly compensated employees, Mexican law requires employers either to provide the housing directly or to pay a sum equal to 5% of their

85. Id. at 1-2.
86. NESTOR DE BUEN LOZANO & CARLOS E. BUEN UNNA, U.S. DEP’T OF LABOR, A PRIMER ON MEXICAN LABOR LAW 21 (1991) [hereinafter PRIMER]. For more detailed descriptions of RGSHT, see Alan L. Rosas & Kenneth J. Salamon, American Chamber of Commerce of Mexico, A Tale of Two Countries: Health and Safety Law in Mexico, BUSINESS MEXICO, Apr. 1994; COMPARISON OF OSH, supra note 81, at 1-4.
87. COMPARISON OF OSH, supra note 81, at xi.
88. Id. Workplaces with more than 10 workers include about 20% of all enterprises and 80% of all wage earners. Id.
89. Id. at vi.
90. The greater the rate of injury and illness in a particular workplace, the higher the insurance premium. Id. at x-xi.
91. MEX. CONST. art 123, pt. A, ch. XIV; L.F.T. arts. 472-513. A worker or beneficiary may receive up to 36 months of pay for total incapacitation and about 25 months of salary for death. Id. arts. 495, 502.
92. L.F.T. art. 490; PRIMER, supra note 86, at 22.
94. An employer is exempt from this obligation with respect to employees who receive compensation more than ten times the minimum wage. L.F.T. art. 144.
workers’ salaries into a national workers’ housing fund. This financial pool enables workers to obtain sufficient credit to acquire comfortable housing if they are not provided it directly by the employer.

6. Social Security and Health Care

The social security system in Mexico covers many costs besides those arising from occupational injuries and illnesses. Benefits include medical insurance for covered workers and their families, maternity care, day care for children, in addition to old age, retirement, and survivor pensions. Coverage is compulsory for all workers and their families. These programs are financed from contributions by workers, employers, and the government. Worker contributions are based on salary level, and workers earning the minimum wage are exempted. Employers pay the largest contribution for most benefits and the entire amount for the funds covering occupational hazards.

B. The United States

United States law provides far less substantive regulation of the employment relationship than does Mexican law. Indeed, until the 1960s, U.S. employers essentially possessed an unlimited right to set the terms and conditions of employment for nonunionized employees. Congress, over the past twenty-five years, has enacted a number of statutes

95. Id. arts. 136, 150. Article 138 requires that the resources of the fund, known as Instituto del Fondo Nacional de la Vivienda para los Trabajadores (INFONAVIT), be administered by a tripartite body composed of representatives of labor, management, and the government. Unions—in particular the CTM—have had considerable control over the management of INFONAVIT. Under new regulations, however, INFONAVIT funds go directly into an individual employee account, lessening union involvement. Foreign Labor Trends, supra note 11, at 15, 21.

96. See L.F.T. art. 137. Demand for housing, however, is much greater than the fund is able to provide. For example, although INFONAVIT built over three million low- and medium-cost units between 1972 and 1982, only two percent of those applying for housing in 1979 received it. See Grayson, supra note 22, at 54; Garcia Peralta & Perlo Cohen, in 2 0BRERO MEXICANO, supra note 27, at 124.

97. For private-sector workers, the Mexican Institute of Social Security (IMSS) operates the social security system, and for public-sector employees, the Health and Social Security Institute for State Employees (ISSSTE) does. See Nora Lustig, Mexico: The Remaking of an Economy 83 (1992).

98. About 40% of the population is covered under IMSS, while ISSSTE covers another 10%. PEMEX, the oil industry, and the military cover their employees separately. Thus a total of about 60% of the population is covered under some form of employer-guaranteed health insurance. Id. at 84-85; Anuario Estadistico, supra note 66, at 119. The rest of the population has access to free medical care through clinics provided by the Ministry of Health. See Lustig, supra note 97, at 86.

99. See Schlagheck, supra note 73, at 101.

100. Id.

101. See id. For the total premium of IMSS medical expenses and old-age pensions, not including worker’s compensation, 12.5% is contributed by the federal government, 25% is deducted from employee paychecks, and 62.5% is paid by employers. Id. See generally Primer, supra note 86, at 22.
that now restrict the employer's prerogative. Nonetheless, U.S. employers still possess considerably more latitude to manage the workplace than do employers in most other industrialized nations.

1. Wage and Hour Regulation

The FLSA\textsuperscript{102} establishes minimum wage and overtime pay requirements. It mandates that employers pay covered employees a minimum hourly wage that is currently $4.25 per hour\textsuperscript{103}—an amount considerably higher than the minimum wage in Mexico.\textsuperscript{104} The FLSA also requires employers to compensate covered employees for work in excess of forty hours per week at one and one-half times the employee's regular rate of pay.\textsuperscript{105}

2. Fringe Benefits

United States law generally does not mandate that employers provide any minimum package of fringe benefits. In contrast to Mexico, U.S. law does not require a minimum amount of vacation pay or annual bonus and profit sharing payments. These topics are typically either determined unilaterally by the employer or at the bargaining table.

The principal U.S. law relating to employee benefits is the Employee Retirement Income Security Act (ERISA).\textsuperscript{106} ERISA establishes procedural requirements with respect to the reporting, disclosure, and fiduciary responsibilities of pension and employee benefit plans. While ERISA contains detailed provisions governing the funding and content of pension plans, it does not substantively regulate the content of employee benefit plans. Instead, the principal impact of ERISA on employment law matters is the act's broad preemptive exclusion of state regulation.\textsuperscript{107} As a result, employee benefit plans in the United States are largely unregulated by either the federal or state governments.

3. Discharge

The treatment of employment security highlights one of the starkest contrasts between Mexican and U.S. legal rules. While Mexico's

\textsuperscript{104} See supra note 66.
\textsuperscript{107} See, e.g., 29 U.S.C. § 1144(a) (1988) ("[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan. . . .").
NAFTA

constitution requires just cause for termination,\textsuperscript{108} most U.S. employers remain free to discharge employees at-will.

As articulated by the Tennessee Supreme Court, the at-will rule provides that "[a]ll may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for a cause morally wrong, without being thereby guilty of legal wrong."\textsuperscript{109} This highly individualistic approach to the employment relationship grew out of nineteenth century American notions of freedom of contract and unfettered entrepreneurship.\textsuperscript{110}

In the twentieth century, the growing predominance of large corporate employers and specialized job functions\textsuperscript{111} has triggered criticism of the at-will rule's harshly lopsided impact on employees.\textsuperscript{112} Reacting to this criticism, legislative and judicial bodies have created a number of limitations on the at-will principle. The statutory limitations primarily derive from antidiscrimination laws, while the judicial limitations result from an extension of common law tort and contract principles.

The principal federal antidiscrimination law was enacted as Title VII of the 1964 Civil Rights Act.\textsuperscript{113} Title VII prohibits employers and labor unions from discrimination in employment on the basis of race, color, religion, sex, or national origin.

Congress extended the nondiscrimination principle in two subse-

\textsuperscript{108} See \textit{supra} note 76.

\textsuperscript{109} Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884) (overruled on other grounds by Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915)).

\textsuperscript{110} See \textit{Note}, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1824-26 (1980) ("by increasing the employer's freedom in the employment relationship and restricting her liability, the at-will contract rule was meant to further economic growth and entrepreneurship.").

\textsuperscript{111} See, e.g., Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) ("[w]ith the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic.").

\textsuperscript{112} One commentator, for example, has stated:

\[\text{[I]n principal there is widespread agreement that the employment-at-will doctrine has no economic or moral justification in a modern industrialized Nation. The idea that there is equity in a rule under which the individual employee and the employer have the same right to terminate an employment relationship at will is obviously fictional in a society in which most workers are dependent upon employers for their livelihood.}\]


Under the Age Discrimination in Employment Act, adopted in 1967, employees over the age of forty years are protected from discrimination in hiring, discharge, and mandatory retirement. The Americans with Disabilities Act of 1990, effective in 1991, prohibits employers from discriminating against an otherwise qualified disabled person who, with or without reasonable accommodation, is capable of performing essential job functions.

Two characteristics of these antidiscrimination statutes should be noted. First, these statutes provide protection to individuals not as workers per se, but as members of a particular group or class. Second, employers are prohibited only from acting in a manner that discriminates on the basis of class status, even with respect to these protected groups. Employer decisions that may be irrational or unfair are not otherwise circumscribed by these statutes.

Over the past fifteen years, U.S. courts also have become less tolerant of the traditional at-will rule. Courts, for example, are now more receptive to adapting traditional tort and contract theories as a basis for challenging employment decisions. In addition, state courts have recognized new causes of action in the employment context. The three most commonly recognized new claims are discussed below.

Most jurisdictions now permit an employee to maintain a tort action claiming that a discharge decision offends public policy. Accordingly, courts have held that public policy considerations bar employers from terminating employees who refuse to commit an unlawful act, who exercise statutory rights, or who report an employer’s unlawful

114. Antidiscrimination statutes also have been adopted on the state level. Many of these state statutes go beyond federal law in terms of the classes protected. See, e.g., Minn. Stat. § 363.03 (1994) (prohibiting discrimination on the basis of sexual orientation, marital status, and receipt of public assistance in addition to the federally protected categories).


119. See, e.g., Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (refusal to participate in an unlawful price-fixing scheme); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987) (refusal to violate antipollution laws by dispensing leaded gas into car designed for unleaded gas).

120. See, e.g., Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (reversing summary judgment for employer on grounds that discharge for refusal to take polygraph test, in contravention of state statute, may give rise to cause of action); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) (affirming compensatory damages award to employee discharged for filing worker's compensation claim).
Most states also recognize a contract-based exception to the at-will employment rule. From an employer’s unilateral promise, whether expressed orally or in an employee handbook, these courts imply contractual obligations, such as some form of job security or disciplinary procedure.

A few jurisdictions go further and read a covenant of good faith and fair dealing into employment agreements. Such a covenant requires that both parties within an employment relationship refrain from acting in bad faith to frustrate the reciprocal net benefits of their bargain.

While limitations on the at-will rule have proliferated, most U.S. employees still work under an at-will status. This is particularly true for lower paid workers who have difficulty obtaining legal representation because of the smaller potential for sizeable damage awards.

The continued U.S. adherence to the at-will rule is now a global anomaly. In contrast to Mexico and also the vast majority of industrialized nations, the U.S. system is unique in failing to adopt a general prohibition on unjust dismissals.


122. See Chagares, supra note 118, at 400-05 (citing 41 states as recognizing an implied contract exception to the at-will rule).


125. See, e.g., Mitford v. De Lasala, 666 P.2d 1000 (Alaska 1983) (ruling against employer who discharged employee in effort to avoid profit sharing liability); K Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987) (holding against employer who dismissed employee in effort to avoid retirement benefit payments). Most states, however, have declined to recognize the covenant because of the inherent difficulty in determining bad faith. See, e.g., Parmer v. Americana Hotels, Inc., 652 P.2d 625, 629 (Haw. 1982) (rejecting the covenant because it would necessitate “judicial incursions into the amorphous concept of bad faith”).

126. See supra note 58.


128. See Samuel Estreicher, Unjust Dismissals in Other Countries: Some Cautionary Notes, 10 EMPLOYEE REL. L.J. 286, 287 (1984); Summers, supra note 112, at 508-09.
4. Workplace Safety and Health

OSHA\textsuperscript{129} regulates workplace safety and health in the United States. Similar to Mexican law, this U.S. Act authorizes the Secretary of Labor to adopt workplace safety and health standards. Enforcement procedures for these standards constitute the principal difference between Mexican and U.S. law. While Mexico enforces safety and health standards through a participatory system of labor-management commissions, enforcement in the United States is accomplished by means of workplace inspections with citations and accompanying monetary penalties for noncompliance.

5. Housing

United States labor and employment law contains nothing which resembles Mexico's housing mandate. United States employees are generally responsible for taking care of their own housing needs without assistance from their employers.

6. Social Security and Health Care

As in Mexico, labor and employment law in the United States provides for assistance payments to injured\textsuperscript{130} and retired\textsuperscript{131} employees. Benefits in both countries are similarly funded. Employer contributions are the sole source of worker's compensation benefits,\textsuperscript{132} while both employers and employees contribute to the social security retirement system.\textsuperscript{133}

Unlike Mexican employers, however, their U.S. counterparts are not required to provide employees with either health care or day care benefits. These significant omissions, which have been the subject of much recent public debate, again underscore the more individualistic and less regulated nature of U.S. law.

The U.S. employment law regime does provide one statutory benefit that is not recognized in Mexico. The Family and Medical

\textsuperscript{129} See OSHA, supra note 81.
\textsuperscript{130} The worker's compensation system is regulated by state rather than federal law. The typical state statute provides for the reimbursement of an employee's lost wages and medical expenses in the event of a work-related injury or illness. These benefits are payable without regard to fault. See, e.g., Arthur Larson, WORKERS' COMPENSATION LAW 1-2 (1984).
\textsuperscript{131} The Federal Old-Age, Survivors, and Disability Insurance Benefits Act, also known as the Social Security Act, provides benefit payments to qualifying retired workers beginning at age 62. 42 U.S.C. §§ 401-433 (1988). As an insurance-based program, an individual's eligibility and benefit level are determined on the basis of his or her employment history. See id. § 414 (1988).
\textsuperscript{132} Larson, supra note 130, at 795-96.
Leave Act\textsuperscript{134} requires employers with fifty or more employees to allow those workers to take up to twelve weeks of unpaid leave in order to care for a new child or a relative with a serious health condition. The same rule applies where necessitated by the employee’s own serious health condition.

III. LABOR-MANAGEMENT RELATIONS

Both Mexican and U.S. law provide employees with basic rights to organize, bargain collectively, and strike. Significant differences exist, however, with respect to the extent and manner in which these rights are protected. These contrasts expose strengths and weaknesses in both systems.

A. Mexico

1. Right to Organize or Join a Union

Workers in Mexico may form a union without previous authorization,\textsuperscript{135} and employees are not obligated either to join or to refrain from joining a union.\textsuperscript{136} The law allows the formation of trade, company, industry-wide, and professional unions.\textsuperscript{137}

The union representation process in Mexico differs significantly from that of the United States in terms of recognizing representational rights without the necessity of first establishing majority support in an election. United States employers are allowed to participate in the election process by encouraging and sometimes intimidating employees not to vote for union representation.\textsuperscript{138} The Mexican system does not give employers the same opportunity to influence the organization process.

In order to form a union in Mexico, a minimum of twenty workers must agree to become members. Subsequently, they must establish governing statutes, elect a governing body, and register with the appropriate government authority.\textsuperscript{139} Once these elements are satisfied, an employer must bargain with the union concerning the employment conditions of its members, regardless of whether the members constitute a majority of the work force.\textsuperscript{140}

\textsuperscript{135} L.F.T. art. 357.
\textsuperscript{136} Id. art. 358.
\textsuperscript{137} Id. art. 360. Workers also may form federations or confederations. See id. arts. 381-385.
\textsuperscript{138} See infra notes 175-177 and accompanying text.
\textsuperscript{139} L.F.T. arts. 364, 365.
\textsuperscript{140} CLIMENT BELTRAN, supra note 18, at 268.
A union must have majority support, however, in order to execute a contract as the exclusive representative of all the employees in a workplace. A union with majority status also may negotiate a closed shop agreement that requires all new and current employees to be members of that particular union. An employer or an employee may challenge the majority status of a union, at which point the labor tribunal will monitor a bargaining unit-wide election to verify or refute that status.

2. Collective Bargaining

An employer must enter into collective negotiations upon a union’s request to establish contractual terms. The resulting contract may not diminish the minimum guarantees established by the constitution or the L.F.T., and all contracts automatically incorporate these minimum benefits and rights unless the parties agree upon greater benefits.

Mexican labor law provides that a contract should include provisions concerning hours and days of work, vacation, salary, training, and contract administration. Any contract that does not specify the amount of compensation is void.

In addition to the typical collective bargaining agreement between a single union and a single employer, in some circumstances the law provides for an industry-wide contract known as a contrato-ley, or law contract. These contracts apply to industries under federal juris-

141. Id. at 274.
143. L.F.T. arts. 923, 930; CLIMENT BELTRAN, supra note 18, at 274.
144. L.F.T. art. 387. If there is both a company union and an industrial union, then the employer must negotiate with the organization that has the highest proportionate membership. If there are various trade unions within the company, then the employer may negotiate separate contracts with each of them according to the unions’ preference. If a company has both trade unions and company or industry unions, then the employer may bargain for a separate contract with the trade union provided that union’s membership exceeds the number of unit employees who belong to the company or industrial unions. L.F.T. art. 388; see also CLIMENT BELTRAN, supra note 18, at 137.
145. L.F.T. art. 56; see also CLIMENT BELTRAN, supra note 18, at 272.
146. L.F.T. arts. 56-57.
147. Id. art. 391.
148. Id. art. 393. The terms of a collective bargaining agreement may be set for a specific or indefinite length of time, or for a specific job. Id. art. 397. Contracts of at least two years’ duration or for an unspecified period will be subject to renegotiation every two years for working conditions and every year for wages. Id. art. 399.
149. Id. arts. 404-421. See generally SECRETARÍA DEL TRABAJO Y PREVISIÓN SOCIAL/U.S. DEPT. OF LABOR, A COMPARISON OF LABOR LAW IN THE UNITED STATES AND MEXICO: AN OVERVIEW 15-16.
Unions representing at least two-thirds of the unionized workers in a particular industry and a given area may ask the appropriate administrative authority to establish negotiations on this broader basis. Where industry-wide bargaining is perceived as beneficial, the authority will call a meeting of the affected unions and employers in order to negotiate an industry-wide contract. The majority of the unions that represent at least two-thirds of the unionized workers and the majority of their employers must approve such a contract.

3. Right to Strike

Mexican law guarantees the right of employees to strike except when a labor tribunal declares such action to be illegal. A labor tribunal may find a strike to be illegal under the following four circumstances: (1) where the union does not fulfill the notice or other procedural requirements; (2) where the objective of the strike is not one recognized by law as legitimate; (3) where the strike is not supported by a majority of the workers at that establishment; and (4) where a majority of the strikers participates in violence. Once a labor tribunal has declared a strike illegal, workers must return to their jobs within twenty-four hours or risk permanent replacement.

After a finding that a strike is legal, however, the company must cease operations for the strike's duration. Only those employees privy to confidential information and other essential employees, as approved by the labor tribunal, may continue to work during a strike. In significant contrast to U.S. law, Mexican labor law prohibits an employer from temporarily or permanently replacing legally

(1992) [hereinafter COMPARISON OF LABOR LAW].

150. L.F.T. art. 404.
151. Id. art. 406.
152. Id. arts. 409-412.
153. Id. art. 414. These industry-wide contracts assure that workers in the same industry receive the same wages and benefits without regard to the company size. Although legal, such bargaining is less common in the United States. See infra note 189 and accompanying text.
154. MEX. CONST. art. 123, ch. XVII; L.F.T. art. 440.
155. A union must give at least six days' written notice to the employer of its intent to strike. Notice must reveal the purpose and objective of the strike and the day it will commence. L.F.T. art. 920.
156. A strike's legality is upheld where its objectives are either to maintain the equilibrium between labor and capital, to obtain a collective contract, to demand post-expiration contractual revisions, to demand the fulfillment of the contract, to demand the distribution of profits, or to demand the revision of contracted salaries if certain conditions are met. Id. art. 450.
157. Id. art. 459 (referring to arts. 451, 920).
158. Id. art. 445.
159. Id. art. 932.
160. Id. art. 447.
161. Id. arts. 935, 936.
striking workers.\textsuperscript{162}

A strike may terminate by either an agreement between the parties, an arbitral decision of a person or commission named by both parties, or a decision of a labor tribunal if the conflict is submitted by the strikers.\textsuperscript{163} In order to avoid a more lengthy resolution in the tribunals, agreements between the parties resolve most conflicts in Mexico.\textsuperscript{164}

B. \textit{The United States}

1. Right to Organize or to Join a Union

In the United States, the NLRA also protects the right of employees, at least in the private sector,\textsuperscript{165} to engage in organizational activities.\textsuperscript{166} The NLRA specifically prohibits an employer from interfering with an employee’s right to join a union or from encouraging fellow employees to join a union.\textsuperscript{167} Accordingly, an employer commits an unlawful labor practice by discharging an employee organizer\textsuperscript{168} or making threats of reprisal for union support.\textsuperscript{169}

However, the NLRA’s protection of organizational activity is limited,\textsuperscript{170} and a common characteristic of the U.S. legal labor regime is strong employer opposition to union organizing efforts.\textsuperscript{171} This opposition results, in part, from the election process used to establish representational status in the United States. Unlike in Mexico, where an employer must automatically bargain with a union concerning the rights of its members, U.S. labor law imposes a duty to bargain only

\textsuperscript{162} Id. art. 447. Strikes are not causes justifying layoff. \textit{See} id. art. 47.

\textsuperscript{163} Id. art. 469. A union may submit the conflict to a labor tribunal, but an employer may not. The labor tribunal, in resolving the dispute, can set terms and conditions of employment. \textit{See} E. Alvarez del Castillo, \textit{Mexico, in 8 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS} 132 (R. Blanpain ed. 1982).

\textsuperscript{164} \textit{See} del Castillo, \textit{supra} note 163, at 129.

\textsuperscript{165} The NLRA does not apply in the public sector. \textit{See} 29 U.S.C. § 152(2). Most states have enacted statutes governing public sector labor relations. Some of these state statutes are very similar to the NLRA in terms of the rights conferred upon employees, including the right to strike. \textit{See}, e.g., \textit{Minn. Stat. §§ 179A.01-20} (1994). Other statutes are more restrictive, and most prohibit public employee strikes. \textit{See}, e.g., D. Wollett \textit{et al.}, \textit{COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT} 252 (4th ed. 1993).

\textsuperscript{166} 29 U.S.C.A. § 157 (1995). The NLRA also protects an employee’s right not to join a union and to refrain from engaging in organizational activities. \textit{Id}


\textsuperscript{170} The NLRA, for example, permits an employer to restrict employee organizing efforts to nonworking time, \textit{see} Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), and to ban the presence of nonemployee organizers on its property altogether, \textit{see} Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

\textsuperscript{171} \textit{See} Weiler, \textit{supra} note 46, at 111-14.
after a union first establishes its majority status in a representation election. A union that receives majority support from the participants in a representation election is certified as the exclusive representative of all bargaining unit employees.

United States employers may participate actively in this election process. Under the NLRA, an employer may express its opposition to union organizing efforts so long as it does not engage in threats of reprisal for union support or make promises of benefits to entice union opposition. For example, an employer may argue that a union is unnecessary, or he may predict that unfavorable consequences will likely result from a union election victory. Legally, the employer may make misstatements of fact and intentionally lie.

Many employers hire professional consultants for the purpose of orchestrating sophisticated antiunion campaigns. Frequently, employer "union free" campaigns also include illegal tactics, such as firing employee organizers. Although the NLRA bans these tactics, it subjects the employer to relatively weak sanctions.

2. Collective Bargaining

The NLRA also confers the right of employees to bargain collectively through their selected union representative. Mandatory subjects of bargaining include wages, hours, and terms and conditions of employment, but not matters that go to the core of an employer's entrepreneurial control, such as plant closings and product

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172. A union may also gain representational status through an employer's voluntary grant of recognition, but an employer lawfully may decline to do so, even if presented with authorization cards signed by a majority of the employees. See Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974).

173. Employees in the United States are entitled to proceed with a representation election only if they can show support from at least 30 percent of the employees in an appropriate election unit. See 29 C.F.R. §101.18(a)(3) (1995).


175. See 29 U.S.C. § 158(c).

176. See NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967).


178. For a discussion of both the legal and illegal tactics used by U.S. employers in opposing union organizing efforts, see Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1776-81 (1983).

179. The ineffectiveness of NLRA remedies with respect to the discharge of employee organizers is discussed infra notes 277-79 and accompanying text.


182. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that the NLRA does not require bargaining with regard to managerial decisions "which lie at the core of entrepreneurial control").
advertising.\textsuperscript{184}

The collective bargaining process in the United States differs from that of Mexico in two respects. First, the collective bargaining process established by the NLRA is more adversarial and less participatory than that which exists in Mexico.\textsuperscript{185} Both labor and management, for example, may resort to economic weapons to pressure the bargaining process even before a breakdown in negotiations.\textsuperscript{186} Furthermore, both courts and the NLRB have interpreted the NLRA as prohibiting employers from establishing participatory employee-management committees for the purpose of dealing with terms and conditions of employment.\textsuperscript{187}

Second, collective bargaining in the United States is most often conducted at the individual employer level rather than on an industry-wide basis, such as that leading to the Mexican \textit{contrato-ley}. Collective bargaining that involves more than one employer is permitted in the United States, but only if all participants voluntarily agree to such an arrangement.\textsuperscript{188} Nonetheless, even multi-employer bargaining—which typically is not structured on an industry-wide basis—is the exception rather than the norm.\textsuperscript{189} This lack of industry-wide bargaining has helped put the United States “at the top of the developed world in wage inequality.”\textsuperscript{190}

\begin{itemize}
  \item \textsuperscript{183} See, e.g., First Nat’l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (holding that an employer is not required to bargain with respect to a decision to close part of its business operation).
  \item \textsuperscript{184} See, e.g., NLRB v. Detroit Resilient Floor Decorators Local 2265, 317 F.2d 269 (6th Cir. 1963) (holding that an employer is not required to bargain with respect to deciding whether to contribute to an industry promotion fund).
  \item \textsuperscript{185} See generally Weiler, supra note 46, at 232; Thomas Kohler, \textit{Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)}, 27 B.C. L. REV. 499 (1986).
  \item \textsuperscript{186} See NLRB v. Insurance Agents’ Int’l Union, 361 U.S. 477 (1960) (finding that a union does not violate its duty to bargain by engaging in lawful but unprotected work stoppage prior to reaching an impasse in bargaining); Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969) (holding that an employer does not violate its duty to bargain by engaging in a lockout prior to reaching an impasse in bargaining absent evidence of antiunion animus).
  \item \textsuperscript{187} See NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959); Electromation, Inc., 309 N.L.R.B. 990 (1992). To the extent these committees are created unilaterally by an employer, they are construed as “dominated” by an employer in violation of 29 U.S.C. § 158(a)(2) and an impediment to free collective bargaining through a representative of the employees’ own choosing. See NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954).
  \item \textsuperscript{188} See Kroger Co., 148 N.L.R.B. 569 (1964).
  \item \textsuperscript{189} Department of Labor statistics indicate that 42\% of collective bargaining agreements covering 1000 or more employees in 1978 were negotiated on a multi-employer basis. \textit{Bureau of Labor Statistics, U.S. Dep’t of Labor, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements—Jan. 1, 1978} 12 tbl. 1.8 (1980).
  \item \textsuperscript{190} Kaufman & Kleiner, supra note 31, at 44.
\end{itemize}
3. The Right to Strike

The NLRA protects the right of employees to engage in "concerted activity for mutual aid or protection." This includes a ban on an employer's ability to discharge or otherwise retaliate against an employee who participates in a lawful strike.

In sharp contrast to Mexican law, a U.S. employer may hire either temporary or permanent replacement workers to fill the positions vacated by those engaged in a lawful strike. A temporary replacement is a worker whom an employer hires during a strike and then supplants with a returning striker. However, an employer may retain the services of a permanent replacement for an indefinite period. The strikers whose positions are filled by permanent replacements are placed on a waiting list and entitled to return to work only as their former positions become available.

United States law also is more restrictive with respect to a union's ability to choose between arbitration and economic action in attempting to resolve workplace disputes. In the face of either breach of contract or collective bargaining disputes, Mexican law generally permits unions to choose between going on strike or submitting the dispute to a labor tribunal for binding resolution. United States law usually provides only one option in either circumstance. It generally bans strikes when a union may challenge contract interpretation in grievance arbitration, but it authorizes strikes, although not mandatory arbitra-

193. See, e.g., NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (holding that an employer committed an unfair labor practice by paying accrued vacation benefits to all qualifying employees except those who participated in a lawful strike).
194. See NLRA v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (holding that the NLRA does not deprive an employer of "the right to protect and continue his business by supplying places left vacant by strikers"). An employer, however, may not hire permanent replacements to fill the positions of employees who are on strike to protest the unfair labor practices committed by the employer. See, e.g., Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).
196. See supra note 156.
197. See supra note 163 and accompanying text.
198. An estimated 96% of all U.S. collective bargaining agreements provide for arbitration of disputes concerning interpretation or application of the agreement's terms. Approximately 90% of these agreements also contain a waiver of the union's right to strike during the contract term. FRANK EKOURI & EDNA A. EKOURI, HOW ARBITRATION WORKS 6 (4th ed. 1985). Unless the agreement clearly specifies otherwise, it is presumed that the availability of grievance arbitration waives the union's right to strike in response to the alleged breach of contract. Local 174, Int'l Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).
IV. ENFORCEMENT

A. Mexico

Mexican labor law establishes various administrative and judicial institutions for labor dispute resolution. These bodies address both collective and individual disputes and are structured to facilitate voluntary resolution.

1. Workplace Commissions

At the most basic level, Mexican law requires that each workplace establish joint labor-management commissions to determine the distribution of profit sharing bonuses and to monitor occupational safety and health concerns. Labor contracts may delegate additional tasks to these commissions and empower them to render binding decisions.

2. Conciliation Tribunals

If the parties fail to resolve the dispute among themselves or at the commission level, the next step is a hearing before the appropriate conciliation tribunal. These tribunals consist of representatives from labor, management, and the government. Conciliation tribunals facilitate discussion and settlement, but they cannot impose a resolution. A party may bring a dispute before the appropriate judicial body if the conciliation process fails to achieve a voluntary resolution.

3. Judicial Institutions

The Tribunals of Conciliation and Arbitration ("labor tribunals") have jurisdiction over all labor disputes. They consist of an equal number of labor and management members, and a government...
Labor tribunal decisions are final and unappealable. However, a court of general jurisdiction may review a tribunal decision if a party brings an action to enjoin the decision. These tribunals resolve both individual and collective conflicts. Individual complaints primarily involve contested dismissals. Collective disputes frequently concern contract negotiations or contract enforcement. In addition, the tribunals have the authority to determine the legality of strikes and, upon a union's request, to arbitrate bargaining disputes.

This enforcement scheme again illustrates the protective nature of Mexican labor law towards workers. In judicial proceedings, for example, Mexican law instructs the tribunals to decide any ambiguity in the substantive law in favor of the worker. Mexican law also establishes an administrative body, the Procurator for the Defense of Labor, to represent employee interests free of charge in dispute resolution proceedings. Finally, the Mexican system provides workers with certain procedural advantages in individual disputes brought before a labor tribunal.

B. The United States

The U.S. enforcement scheme differs from Mexico's in two principal respects. First, the U.S. model is more combative and less

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205. MEX. CONST. art. 123, ch. XX; L.F.T. art. 605; COMPARISON OF LABOR LAW, supra note 149, at 24. The labor and management representatives are elected every six years, during conventions to which unions and nonunionized workers send delegates. L.F.T. art. 648. The tribunals generally are permanent bodies, although special ad hoc boards may be formed in order to address specific conflicts. Id. art. 892. The Mexico City-based Federal Tribunal also has local offices in the state capitals and other cities to process individual claims. Collective disputes under federal jurisdiction must be brought before the Mexico City tribunal. Id. art. 622. COMPARISON OF LABOR LAW, supra note 149, at 25.

206. L.F.T. art 848. For a discussion of the use of the injunction, or amparo in Mexican law, see CLIMENT BELTRAN, supra note 18, at 511-19.

207. See ROXBOROUGH, supra note 21, at 147. For example, a tribunal has the authority to determine whether a dismissal was for good cause and if not, to order either reinstatement or severance pay equal to three months' wages. L.F.T. arts. 48-49.

208. L.F.T. art. 450, chs. II, IV.

209. Id. art. 929.

210. Id. art. 450, ch. II. See also INTERNATIONAL ENCYCLOPAEDIA, supra note 163, at 110.

211. CLIMENT BELTRAN, supra note 18, at 38.

212. The purpose of the Procurator for the Defense of Labor is to represent workers and unions on questions about the application of labor norms; to provide resources for the defense of workers or unions; to act as mediator for interested parties; and, if requested, to provide free representation of the worker in a labor dispute. L.F.T. arts. 530, 534.

213. For instance, the court itself will supplement a worker's claim that is inadequately presented, or provide a worker with a three-day period in which to supply any additional necessary information. Id. art. 873; see also id. art. 879 (effect of nonappearance at hearing is admission of guilt for employer, but not for employee); id. art. 824 (allowing tribunal to appoint expert witnesses for employees).
participatory. The government’s role in the process most vividly illustrates this attitude; it acts not as a mediator, but "as the umpire in [a] protracted contest." Second, the U.S. system described below uses separate enforcement mechanisms for collective and individual rights.

1. Collective Rights

Collective rights in the United States generally are enforced in nonjudicial forums. Different forums exist for rights arising from statute as distinguished from rights arising from labor contracts.

Collective rights arising under the NLRA are enforced through administrative procedures. The NLRA prohibits various "unfair labor practices" committed by either employers or labor unions. Administratively, the NLRA establishes a National Labor Relations Board (NLRB) with two distinct functions. One branch of the NLRB, under the direction of the NLRB’s General Counsel, investigates and prosecutes unfair labor practice proceedings on behalf of complaining unions, employees, or employers. Independently, the NLRB, as a five-member, quasi-judicial body, reviews the unfair labor practice decisions of administrative law judges. NLRB decisions, in turn, are subject to further review by the federal appellate courts.

Arbitration usually enforces rights created by the provisions of collective bargaining agreements. The vast majority of such agreements negotiated under the NLRA provide for a "just cause" limitation on employee discipline, and a grievance procedure culminating in binding arbitration for disputes arising during the contract term. Typically, labor and management jointly select a neutral arbitrator from a list of private arbitrators maintained by a federal or state agency. These arbitration decisions are subject to very limited judicial review. Therefore, commentators generally view arbitration as less formal, less expensive, and more expeditious than litigation.

214. WEILER, supra note 46, at 232.
220. See Roger I. Abrams & Dennis R. Nolan, Toward a Theory of "Just Cause" in Employee Discipline Cases, 1985 DUKE L.J. 594, 594 n.1 (noting that ninety-four percent of collective bargaining agreements entered into under the NLRA contain clauses that provide that an employer may discharge employees only with "just cause").
2. Individual Rights

Individual rights, such as those arising under antidiscrimination statutes, and common law limitations to the at-will rule, are enforced through private litigation in courts of general jurisdiction. Individual litigants generally pursue these claims without union involvement.

This private enforcement approach has all of the attendant advantages and disadvantages of traditional litigation. For example, litigation may be preferable to other methods of enforcement because the inherent, significant due process guarantees allow an individual greater freedom to control her own fate. On the other hand, litigation is expensive, adversarial, and slow. Individual employees may not possess the financial resources necessary to fund a private lawsuit. Therefore, the U.S. system both deters and delays the pursuit of individual employee claims. Further, courts of general jurisdiction, in contrast to Mexico's labor tribunals, may lack expertise in the substance of the laws regulating the workplace.

A significant effect of this bifurcated enforcement system is the absence of U.S. unions in the enforcement of individual rights. Unlike in Mexico, U.S. collective bargaining agreements do not automatically incorporate substantive rights established by statute. Instead, individual statutory rights in the United States both arise and are enforced separately from the labor-management system. This separation not only gives unions less control over the employment relationship, but it also makes unions less necessary to workers who may enforce these rights on their own.

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223. An individual aggrieved under Title VII, 42 U.S.C. §2000e (1995), must initially file a claim with the Equal Employment Opportunity Commission (EEOC), the administrative agency charged with enforcing Title VII, or a similar state agency. The EEOC has authority to bring suits on behalf of claimants, but more typically issues "right to sue letters" authorizing individual claimants to initiate suits in federal court on their own behalf. 42 U.S.C. §2000e-5(f) (1995).


225. See supra note 127 and accompanying text.

226. See ELKOURI & ELKOURI, supra note 198, at 7-9 (specialized labor tribunals and arbitrators possess a greater familiarity with the needs and techniques of industrial relations).

227. See, e.g., L.F.T. art. 393.
V. EFFECTIVENESS

A. Mexico

Mexico's legal and political system differs significantly from that of the United States. In fact, the Mexican system has more in common with the European civil law system than with the United States common law system. As this comparison has illustrated, (1) Mexico is a civil law nation with a greater emphasis on constitutional and statutory regulation; (2) Mexican law promotes a more cooperative approach to resolving labor and employment disputes; (3) the Mexican government plays a more active role in establishing labor policy and in facilitating dispute resolution; and (4) labor participates directly in the government and is more politically powerful in both relative numbers and influence than in the United States. These differences are real, but one must be careful not to equate difference with either inferiority or superiority.

The negative image created by U.S. commentators during the NAFTA treaty debate overstated the failings of the Mexican labor law system. Indeed, as this comparison of U.S. and Mexican law has illustrated, the Mexican system is more protective of worker rights than its U.S. counterpart. Labor union density in Mexico is more than double that in the United States,\(^{228}\) and the labor sector of the PRI is an effective voice for workers in the government.

Nevertheless, the Mexican labor relations system has failed to protect workers to the full extent that it should. Significant problems do exist in the Mexican workplace. These problems, however, are not primarily due to defects in the substance of Mexican labor law, but rather they are reflections of limited resources and a scarcity of jobs. Three of the more accurate and tangible criticisms raised by the commentators—low wages, enforcement problems in occupational health and safety regulations, and union leadership accountability and state control—are discussed below. However, even with respect to these subjects, the critics inflate the shortcomings of the Mexican system.

1. Low Wages

Critics contend that low wages send U.S. jobs to Mexico. Industrial wages in Mexico are about one-sixth of those in the United

\(^{228}\) Approximately 25-30% of Mexico's private sector work force is unionized, as compared to 11.5% in the United States. See supra notes 11, 55.
But the cause of this discrepancy is not, as some critics suggest, the inadequacy of Mexican labor law or a deliberate government policy to keep wages low in order to attract foreign investment. The real problem with wages is simply that Mexico remains a relatively poor country as compared to the United States. Wage rates in Mexico over the past forty years mirror those in many other developing countries. As in those countries, chronic unemployment and underemployment result in a plentiful labor supply that serves to keep wages low.

Unlike many other developing countries, Mexico enjoyed a positive and steady gross domestic product growth rate from the 1950s into the 1970s, real wages also grew steadily throughout this period. The government regularly made minimum wage adjustments to raise wage rates, increase labor support for the PRI, and promote union growth. Only in the mid-1970s, when inflation began to climb dangerously, did the government negotiate wage ceilings with labor.

During the 1980s, Mexico's economic crisis deepened considerably. Mexico had a negative economic growth rate in 1982, 1983, and 1986, and inflation reached a peak of 159% in 1987. In that year, the Mexican government negotiated an Economic Solidarity Pact with representatives of labor, agriculture and business. The pact cut government spending and asked for sacrifices from both labor and business by imposing a wage and price freeze.

Real wages dropped during the 1980s by 40-50% primarily due to inflation and the wage freeze. Mexico, however, was not alone in experiencing this pattern of declining compensation. Since 1980, the

229. Geri Smith, Congratulations, Mexico, You're Due for a Raise, BUS. WK., Sept. 27, 1993, at 58.
230. Id. See also supra note 9.
231. See supra note 43.
232. See SCHLAGHECK, supra note 73, at 40-41.
233. Real wages refer to actual wages paid, adjusted for inflation.
234. See ROXBOROUGH, supra note 21, at 27.
235. See SCHLAGHECK, supra note 73, at 146. In addition, some administrations used their influence to back unions' demands for higher wages in collective bargaining disputes. Id. at 138-39. Schlagheck quotes from a Business International Corporation publication stating that in 1973 and 1974, the Echeverria administration averted national strikes by encouraging companies to accept unions' wage demands. Business International Corp., Mexico, in INVESTING, LICENSING, AND TRADE CONDITIONS ABROAD 21 (1975).
237. See generally LUSTIG, supra note 97.
238. Id. at 40-41.
239. Foreign Labor Trends, supra note 11, at 14.
240. Id.
United States also has experienced a significant decrease in wages, after adjusting for inflation.\textsuperscript{241}

Mexico’s economic fortunes started to turn around in the 1990s. Mexico had a balanced budget by 1992,\textsuperscript{242} and in 1994, inflation was steady at 7.1%.\textsuperscript{243} As the economy improved, so did wages, which in real terms rose about 129% between 1987 and 1992, just ahead of the average national productivity growth.\textsuperscript{244} In addition, the many benefits mandated by Mexican law can add about 60% to the total compensation package received by Mexican workers.\textsuperscript{245}

2. Enforcement of Occupational Safety and Health Regulations

Critics claim that the Mexican government turns a blind eye to safety and health violations so as not to discourage foreign investment.\textsuperscript{246} A lack of resources for better monitoring and the failure to develop fully the system of workplace safety and health commissions, however, may offer a better explanation of Mexico’s shortcomings in this area.\textsuperscript{247}

Mexico has one safety and health inspector for every 750 workplaces.\textsuperscript{248} Although 37,000 inspections were conducted in 1990, few


\textsuperscript{242} Foreign Labor Trends, supra note 11, at 3.


\textsuperscript{244} See id. at 15. Minimum wage increases continue to be lower than the inflation rate. See Foreign Labor Trends, supra note 11, at 7. Less than 15% of the labor force, largely unorganized, earns as little as the minimum wage, however. Id. Contract wage increases, on the other hand, have exceeded inflation. Id. at 17. In 1990, almost 80% of industrial workers earned more than the minimum wage, and 18% of those earned three or more times the minimum wage. See ANUARIO ESTADISTICO, supra note 66, at 90.

\textsuperscript{245} SCHLAGHECK, supra note 73, at 102. Also, the proportion of the population receiving benefits increased considerably in the last several decades. In 1970, social security covered 12.2 million people. In 1982, it covered 40 million. See Goldin, supra note 9, at 221 n.93 (citing Barry Carr, The Mexican Economic Debacle and the Labor Movement: A New Era or More of the Same? in MODERN MEXICO: STATE, ECONOMY, AND SOCIAL CONFLICTS 205 (N. Hamilton & T. Harding eds. 1986)).


\textsuperscript{247} According to the 1992 World Labour Report, problems with safety and health regulations are common throughout the developing world. “Many governments,” says the report, “are aware of these [enforcement] problems, but they may not have the resources to tackle them.” According to the report, however, Mexico is taking action by establishing “new mechanisms and organisations to improve safety and increase the awareness of local people.” INTERNATIONAL LABOUR ORGANISATION, 5 WORLD LABOUR REPORT 81 (1992).

\textsuperscript{248} COMPARISON OF OSH, supra note 81, at II-10.
facilities are inspected on even an annual basis. In the United States, however, the statistics are even worse. The United States has only one inspector for every 2,600 worksites; only 10,000 to 15,000 of 30,000 annual complaints of hazardous workplace conditions are investigated.

According to International Labour Organisation statistics, Mexico's occupational safety and health record is comparable to Colombia's, but better than Brazil's or South Korea's. The overall U.S. occupational safety and health record is better than Mexico's, but work-related death rates in the United States are still 3.5 times those of Japan and 5.8 times those of Sweden. These figures suggest that while Mexico searches for ways in which to improve its record, it may not want to look to the U.S. model. The European and Japanese systems which, like Mexico's, rely more on labor-management commissions for enforcement, generally are considered more effective and efficient than "inspectorate or civil liability schemes" such as those used in the United States.

In Europe and Japan, the workplace commissions actually have the legal power to monitor and, to some degree, to enforce compliance with regulations. In Mexico, the commissions keep records, monitor enforcement, and make recommendations, but they do not have the power to enforce their decisions. Perhaps the most effective and cost-efficient method of improving Mexico's health and safety record is not to adopt a costly U.S.-style inspection scheme, but rather to give enforcement powers to the already-existing workplace commissions.

3. Union Leadership Accountability and State Control

A criticism often voiced during the NAFTA debate was that Mexican unions are "passive instruments of the state . . . used to keep wages down in the service of capital accumulation and accelerated..."
economic growth. Citations

Critics describe a series of government practices that allegedly dampen the real power of labor in Mexico. For example, commentators point to a system of state patronage for key union leaders that results in a highly centralized, unresponsive system of internal union governance. They also contend that government manipulation and the operation of closed shop agreements repress labor militancy and impede the development of unions that are independent of government control. Finally, they assert that the labor tribunals generally rule in favor of management. The net result, according to these critics, is that Mexican workers have “little or no collective bargaining power.”

These characterizations bear some truth and reveal problems in the Mexican labor relations system. The critics, however, have significantly overstated the extent of these problems. Empirical studies contradict many of the critics’ claims and portray a system characterized by considerable militancy, autonomy, and direct worker participation.

The government-affiliated unions—the most influential being Fidel Velázquez’s CTM—have the advantage of access to government officials and resources. This access is both beneficial and harmful to workers’ interests. The “official” labor sector’s influence on the government is largely responsible for the substantial and growing benefits available to members of these unions and Mexican workers in general. On the other hand, this close association also enables the state to moderate labor demands.

State control of labor relations in Mexico is far from absolute, however. In spite of a long period of overall labor peace, Mexico has

256. ROXBOROUGH, supra note 21, at 5.
257. See Bensusán & García, Introducción, in MODERNIDAD Y LEGISLACIÓN LABORAL, supra note 24, at 11-12; Juan Felipe Leal & José Woldenberg, El sindicalismo mexicano, aspectos organizativos, in 7 CUADERNOS POLÍTICOS 44, 47 (Jan.-Mar. 1976).
258. For example, critics claim that the labor courts manipulate registration requirements in order to refuse to register unions not affiliated with the PRJ. HÉCTOR SANTOS AZUELA, ESTUDIOS DE DERECHO SINDICAL Y DEL TRABAJO 175-81 (1987); Nugent, supra note 9, at 213.
259. If a labor contract has a closed shop exclusion clause, any employee who tries to form a union other than the exclusive representative may be expelled from the latter union and automatically discharged. L.F.T. art. 395.
260. Goldin, supra note 9, at 4-6.
261. Management especially displays such favoritism by recognizing less radical unions as representatives of the majority and declaring strikes illegal. See SANTOS AZUELA, supra note 258, at 170-70, 174-75; Octavio Lózaga de la Cueva, Libertad sindical y derecho de huelga, in MODERNIDAD Y LEGISLACIÓN LABORAL, supra note 24, at 68, 73-74.
262. Peters, supra note 9, at 1.
263. See generally ROXBOROUGH, supra note 21.
264. See Goldin, supra note 9, at 221.
265. Many commentators cite the Solidarity Pacts as an example. See supra note 239 and accompanying text.
a long tradition of labor insurgency. Particularly in the national industrial unions, there has been a continual struggle between rank and file militants and the more conservative leadership.266

Moreover, the CTM is not the sole voice of the Mexican labor movement. Several major labor organizations other than the CTM are affiliated with the PRI.267 In addition, numerous “independent” unions exist, some having ties to the PRI and others being completely unassociated.268

A study of the Mexican auto industry conducted in the late 1970s and early 1980s illustrates the existence of “independent” unions and internal rank and file participation in union decision making.269 Six government-affiliated and three “independent” unions represented auto workers at that time. While some findings of the study suggested that the “independent” unions were more effective in pursuing worker demands, other findings indicated otherwise. The studies found two of the “official” unions to be just as “militant” as the “independent” ones, and the size of wage increases not to correlate with either the “independent” or “official” union groups.270

This study also contradicts the asserted lack of internal union democracy in Mexico. The study’s author, after reviewing his findings, concluded that

266. See ROXBOROUGH, supra note 21, at 35. For example, during the 1970s workers within several industries struggled against the established labor bureaucracy. For a discussion of this period of labor insurgency, see RAFAEL CORDERA CAMPOS, SINDICALISMO EN MOVIMIENTO: DE LA INSURGENCIA A LA NACIÓN (1988); SILVIA GÓMEZ TAGLE, INSURGENCIA Y DEMOCRACIA EN LOS SINDICATOS ELECTRICISTAS (1980); ÁNGELICA CUÉLLAR VÁZQUEZ, UNA REBELIÓN DEPENDIENTE: LA TENDENCIA DEMOCRÁTICA FREnte AL ESTADO MEXICANO (1986).

267. Those under the umbrella organization, Congreso de Trabajo (CT), include the Federación de Sindicatos de Trabajadores al Servicio del Estado (FSTSE), the major state workers union; the Confederación Revolucionara de Obreros y Campesinos (CROC), a federation of workers and peasants; the Confederación Regional Obrera Mexicana (CROM); the Confederación de Trabajadores y Campesinos (CTC); the Confederación Obrera Revolucionara (COR); and the Confederación General de Trabajadores (CGT). See GRAYSON, supra note 22, at 24-33; Foreign Labor Trends, supra note 11, at 7-10.

268. The major unions which affiliated with the PRI, but which maintained leadership significantly independent from CTM influence, include the unions of electrical workers (SUTERM), railroad workers (STFRM), telephone workers (STRM), miners (SITMMSRM), transport workers (STSTC), and education workers (SNTE). Juan Felipe Leal, Las estructuras sindicales, in 3 EL OBRERO MEXICANO: ORGANIZACIÓN Y SINDICALISMO, supra note 31, at 9, 56-57; see also GRAYSON, supra note 22, at 36.

Those unions that are not members of CT include the umbrella group of the Unidad Obrera Independiente (UOI), two University worker unions (STUNAM and SUNTU), and the Frente Auténtico de Trabajadores (FAT). See Leal, supra, at 53; GRAYSON, supra note 22, at 39.

269. See generally ROXBOROUGH, supra note 21.

270. The authors measured strike propensity, labor control over work processes, and independence with respect to the government-affiliated unions. Two of the “official” unions were among the five showing the greatest strike frequency. The same five showed the greatest control over work processes as well. See Roxborough & Bizberg, supra note 236, at 127-29.
unions which resemble the picture of charrismo [government-manipulated entities] clearly do exist. But, at least in the automobile industry, this is by no means the entire picture. There is clear and unambiguous evidence that several unions in the Mexican auto industry are characterized by lively and meaningful internal democracy.\textsuperscript{271}

Another study comparing worker participation in union affairs in several countries reached a similar conclusion.\textsuperscript{272} This study measured the extent of union democracy by analyzing such factors as the number of contested union officer elections, the closeness of such elections, the turnover of union leaders, and the existence of a permanent and organized opposition to current union leadership. Based on these considerations, the study concluded that Mexican unions, including the "official" ones,\textsuperscript{273} have a higher level of internal democracy than their counterparts in Great Britain and the United States.\textsuperscript{274}

Finally, statistical evidence also undercuts the claim that labor tribunals consistently favor management. One empirical analysis of labor tribunal decisions found that roughly one-third favors workers, one-third favors management, and the remaining one-third has a mixed resolution.\textsuperscript{275} Further, while labor tribunals sometimes have sided with less militant, government-associated unions in deciding contested elections, they also have certified nongovernment-affiliated unions as election winners.\textsuperscript{276}

\begin{itemize}
\item \textsuperscript{271} ROXBOROUGH, supra note 21, at 143.
\item \textsuperscript{273} The "independent" unions generally, although not universally, appear to be more responsive to the rank and file than official unions are. \textit{See id.} at 213. However, nongovernment-affiliated unions are not always less hierarchical and more democratic than the "official" unions. \textit{See ROXBOROUGH, supra} note 21, at 141-43. \textit{See generally ROXBOROUGH, supra} note 21, at 132-44.
\item \textsuperscript{275} \textit{See ANUARIO ESTADISTICO, supra} note 66, at 82.
\item \textsuperscript{276} \textit{See Thompson & Roxborough, supra} note 272, at 212, 214. Significantly, unions and workers continue to bring representation disputes before the tribunals, behavior which suggests a belief that such claims can be successful or at least fairly heard. \textit{Id.} at 212. For example, in 1993 the Levi Strauss Company surreptitiously closed down a plant which it had operated in Ciudad Juarez for twenty years, and it hauled off as much merchandise and machinery as could be loaded overnight. Workers knew nothing in advance of the closure, and the company did not pay them either outstanding
B. The United States

The U.S. system also has a mixed record in effectively protecting worker rights. The labor and employment law landscape in the United States is currently in a state of transition. On the one hand, labor union representation continues to decline in absolute numbers and relative importance. On the other hand, statutory and judicial sources have recognized new individual employee rights.

Union density in the U.S. private sector has declined steadily over the past thirty years. The proportion of unionized employees in the nonagricultural work force has fallen from over 30% in 1960 to approximately 16% in 1990. Although union density also has declined in other industrialized countries during this period, the United States’ experience has been far more extreme. At present, the role of unions in the United States is considerably weaker than the role of unions in most other industrialized nations. With this decline in union strength, employees suffer a loss of voice in the workplace that even individual protection against wrongful discharge cannot replace.

The ability of remaining unions to accomplish their organizational and collective bargaining goals under the NLRA regulatory scheme is also increasingly suspect. A growing number of critics complain that the NLRA's lack of effective remedies provides little deterrence against unlawful employer conduct.

Two examples illustrate the NLRA's remedial shortcomings. First, a common employer tactic in opposing union organizational campaigns is to discharge the leading employee organizers. While the NLRA makes this conduct unlawful, it does little to deter its occurrence. The usual remedy under the NLRA for illegal discharge of an employee organizer is a cease and desist order coupled with reinstatement and back pay. The NLRA does not provide for fines, punitive damages or any other “penalty,” and the discharged employee has a duty to

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278. See GOULD, supra note 274, at 14-15, tbl. 2.1 (depicting union membership as a percentage of wage and salaried employees in various industrialized countries).

279. See, e.g., id. at ch. 5; WEILER, supra note 46, at Ch. 6; Charles Craver, The National Labor Relations Act Must be Revised to Preserve Industrial Democracy, 34 ARIZ. L. REV. 397 (1992).

mitigate losses by finding alternative work. This "make whole" approach provides little in the way of deterrence for employers who realize that they can chill union organization efforts by immediately firing employee organizers.\(^{281}\) The lack of remedial clout is compounded by the fact that lengthy procedural delays in resolving the resulting unfair labor practice charges further operate to dissipate union support.\(^{282}\)

The NLRA's relatively weak remedial scheme also lessens the effectiveness of the bargaining mandate. The only remedy recognized under the NLRA for a party's refusal to engage in good faith bargaining is an order requiring the party to return to the bargaining table. The Supreme Court has ruled that the NLRB is without power to impose substantive contract terms in the event of a violation, even where the NLRB has concluded that an employer acted in a manner designed to frustrate the bargaining process.\(^{283}\) Thus, an employer may engage in protracted "surface" bargaining with little fear of meaningful administrative intervention.\(^{284}\)

An additional shortcoming of the NLRA scheme to protect worker rights results from the employer's ability to hire permanent replacements to fill the positions of striking employees. As noted above,\(^{285}\) an employer may lawfully decline to reinstate a striker at the conclusion of a strike so long as a replacement employee continues to occupy the position. This practice significantly undercuts the power of unions in two respects. First, the threat of permanent replacement serves to deter strikes as well as to limit the union's ability to use the threat of a strike as leverage in collective bargaining.\(^{286}\) Second, the permanent replacements have the right to vote in representation elections, while the voting rights of displaced strikers typically cease twelve months after the beginning of a strike.\(^{287}\) Accordingly, these electoral rules permit an employer to rid itself of a union by pushing the employees into a

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281. See Weiler, supra note 178, at 1788-90.
282. As of 1988, the median length of time from the filing of an unfair labor practice charge until adjudication by the National Labor Relations Board was 762 days. When a party sought judicial review of the Board's decision, the median interval between charge and resolution jumped to more than three years. See Gould, supra note 274, at 158-59.
284. The problem of "surface" bargaining is particularly acute when an employer uses this tactic to avoid the consummation of an initial collective bargaining agreement. At this stage, the employer's objective often is not to achieve favorable terms but rather to undercut employee support for the newly elected union. See, e.g., Gould, supra note 274, at 222.
285. See supra note 194 and accompanying text.
strike and then hiring permanent replacements who will vote to decertify the union in an eventual election.\footnote{288}

A corresponding growth in the availability of individual employee rights has accompanied this decline in the effectiveness of collective rights. An increasing number of statutes regulates the terms of the employment relationship independent of the collective bargaining process. Both legislative and judicial bodies increasingly recognize new limitations on an employer’s right to terminate employees at will.\footnote{289}

The reach of these individual rights, however, is uneven. Some employees enjoy protection against discrimination in the workplace, but others do not. Moreover, only certain employees may challenge a dismissal under contract or tort principles.

The private litigation model for the enforcement of these individual rights further limits their availability. Because litigation is expensive and time-consuming, many lower-paid employees lack access to the only forum in which they may assert their newly-created individual rights.\footnote{290}

Despite the recent explosion in individual employee rights, the at-will rule still remains the usual employment relationship for most American workers. The new individual rights do not protect workers as workers, but only certain types of individuals who happen to be workers. As such, the United States stands virtually alone among industrialized nations in failing to provide general statutory protection against unjust dismissals.\footnote{291}

VI. looking toward the future

A. Mexico

Since the economic crisis of the 1980s, Mexico has opened its economy, eliminating many of the protectionist policies of the past. Now many industries must modernize in order to survive international competition.\footnote{292} Most actors in the Mexican labor relations system agree that reforms are necessary in order to adjust to these challenges.

Management claims that it needs greater control in the workplace regarding floor management and layoffs in order to compete in the

\footnote{288. See Weiler, supra note 46, at 266-67.}
\footnote{289. See supra notes 113-125 and accompanying text.}
\footnote{290. See supra note 127.}
\footnote{291. See Estreicher, supra note 128, at 287; Summers, supra note 112, at 508-509.}
\footnote{292. For example, much of the textile industry still uses machinery imported from England in the 1800s. See Guillermo Correa, Con maquinaria de un siglo afrontar al TLC la industria textil, PROCESO, Aug. 17, 1992, at 26.}
international market. However, many labor leaders and supporters fear that labor will lose hard-won gains if management is allowed this greater flexibility. They believe that the Mexican government is now more sympathetic to business concerns than it is to workers' interests and that the current labor relations system allows management to benefit from this shift in governmental support. Some indicators suggest that labor has lost influence over the past decade. Government-affiliated union leaders openly express dissatisfaction with government policies, and far fewer labor representatives win state and national elections. These problems suggest that the old Mexican labor relations system has failed to protect workers adequately during this period of transition.

B. The United States

The international marketplace will continue to have an impact on U.S. labor and employment policy as well. Competition from foreign companies paying lower wage rates has helped cause the U.S. decline in unionization, and this trend is likely to continue.

A decline in collective rights, however, will produce pressure to enhance individual rights. For example, the Uniform Law Commissioners recently approved a Model Employment Termination Act that would require an employer to establish just cause in order to discharge virtually any employee. While only one state, Montana, has

293. See Laura Carlsen, A Common Goal, BUS. MEX., Sept. 1991, available in LEXIS, Nexis Library, Arcnws File. In the effort to modernize during the 1980s, many companies aimed for "flexibility" in labor contracts. See Bensusán, supra note 24, at 14-18. This means that in an effort to increase productivity, there is greater leeway for management in firing and hiring and in shop-floor management. See Laura Carlsen, Competing in the Workplace, BUS. MEX., Sept. 1991, available in LEXIS, Nexis Library, Arcnws File. Critics claim that companies have imposed these contract reforms unilaterally. See, e.g., Arnulfo Arteaga García, Ford: un largo y sinuoso conflicto, in Negociación y conflicto laboral en México 141, 158 (Graciela Bensusán & Samuel Leon eds., 1992) (illustrating the Ford dispute). Some younger labor leaders, however, openly advocate greater cooperation between labor and management in Mexico's efforts to modernize and become internationally competitive. See Salvador Corro, El sindicato de Hernández Judrez: moderno, concertador y sumiso, PROCESO, May 18, 1992, at 18.


295. Bensusán, supra note 24, at 36.

296. See Salvador Corro, "No estamos contentos ni nos satisface, pero no nos queda de otra", dijeron los líderes obreros, PROCESO, Oct. 26, 1992, at 28; Corro, supra note 293.


298. See, e.g., GOULD, supra, note 274, at 11-17.

299. MODEL EMPLOYMENT TERMINATION ACT § 3 (1991). Under the Model Act, an employee may waive just cause protection only through an agreement providing for payment of a minimum
enacted legislation resembling the Model Act, this proposal will undoubtedly set the agenda for a future examination of the employment relationship.

The United States, however, also must explore reinvigorating collective rights. Only a mechanism that empowers workers as a collective group will provide them with a voice in workplace decision making. Other industrialized countries have faced international competition without a similar free-fall in collective organization. For the future, the United States will benefit more from examining the labor relations structures in those countries than from criticizing the systems of its neighbors.

C. Another Model?

What is needed is a labor relations system that assures workers significant participation in the transition process while allowing businesses to make the changes necessary to survive. Although Mexico and the United States may be able to learn some lessons from each other, both also should look elsewhere for guidance. In Germany, for instance, both workers and management have made sacrifices to meet the challenge of international competition without the great disruptions in employment seen in the United States and Mexico.

German labor relations law establishes a dual representational structure that combines elements of both the U.S. and Mexican models. In Germany, large national unions represent employees in collective bargaining with equally large organizations of employers. These negotiations establish industry-wide contracts governing compensation, benefits, and other terms of employment. At the local level, German law provides for the election of employee works councils in any workplace with five or more employees. The works councils do not have the right to strike but instead have a far-reaching right of participation and co-determination with respect to most workplace issues. Labor unions in both the United States and

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301. See GOULD, supra note 274.
303. See Rasnic, supra note 302, at 288-93.
304. See Buschmann, supra note 302, at 29-31.
Mexico have resisted the works council model as a structure that enables management to coopt workers and to weaken unions.\(^{305}\) Germany's experience suggests, however, that a parallel system of strong national unions and more cooperative workplace institutions may enhance both collective bargaining and worker participation.

VII. CONCLUSION

In the United States, much of the debate over the NAFTA treaty has presumed the inadequacy of Mexican labor law to protect workers' interests. A closer examination belies that assumption. The Mexican legal regime mandates many of the same basic rights of the U.S. law. Beyond these basics, Mexican law is more protective of worker rights in many significant respects, such as in requiring cause for dismissal, in prohibiting strike replacements, and in mandating such benefits as profit sharing, medical coverage, and housing assistance.

Many of the problems that do exist in the Mexican workplace are the result of limited economic resources. Some Mexican workers do not enjoy all of the guarantees that the labor law provides, simply because the Mexican industrial base is still relatively small, and the only employment opportunities are in family-run operations that cannot realistically be regulated.\(^{306}\) Mexican workers also suffer from comparatively low wages due to an excess labor supply. These problems, however, primarily result from an underdeveloped economy and economic forces beyond the government's immediate control rather than a systematic disregard of workers' interests.

Our comparison of U.S. and Mexican labor and employment law reveals weaknesses in both systems. The United States provides far less protection for workers than is the norm not only in Mexico, but in most industrialized countries. This continuation of the traditional U.S. laissez-faire system is exemplified by such practices as employer resistance to employee organization, the hiring of permanent strike replacements, at-will dismissal, and the lack of employee voice in workplace decision making. In Mexico, manipulation by management and the government of labor law regulations, such as those providing for exclusive representation and union registration, has thwarted efforts by some workers to organize "independent" unions or to organize at all. And while close ties between labor and the government have provided labor with some advantages, those ties have probably moderated the

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305. See LASTRA LASTRA, supra note 13, at 315-17; Freeman & Rogers, supra note 31, at 37-38.
306. See supra note 43.
demands of Mexican labor as well.

The labor relations systems in the United States and in Mexico both need reform, because neither fully serves its intended purpose of furthering the interests of workers. Both countries should introduce reforms that would more truly protect organizational rights, collective bargaining efforts, and rank and file participation in decision making. Perhaps both Mexico and the United States would benefit from looking elsewhere for reform models. Indeed, a blend of the best aspects of the two systems may be desirable. For example, the successes of the German labor relations system suggest that strong and adversarial labor unions can coexist with institutionalized and cooperative labor-management committees that allow worker participation in basic decision making.

The NAFTA treaty does not modify the labor laws of either the United States or Mexico. Instead, the NAFTA labor side-agreement provides a forum that challenges each country to enforce its own labor laws fully. As such, the side agreement provides an opportunity for the two countries to work together to improve their understandings of each other’s systems, and a challenge for each country to make the changes necessary to ensure that labor’s interests are not further eroded by a changing world economy.