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## 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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# 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)<sup>1</sup> 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.<sup>2</sup> An underlying assumption of their argument was that Mexican labor laws were either inadequate to protect workers' interests or inadequately enforced.<sup>3</sup>

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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, BNAIED 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<sup>4</sup> 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.<sup>5</sup> The side agreement, however, did not satisfy U.S. labor, and American unions continued to oppose NAFTA.<sup>6</sup> In spite of this opposition, the U.S. Congress ratified the trade agreement in November 1993.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> Also im-

4. North American Agreement on Labor Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (1993) [hereinafter NAALC].

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, *NAO Decides to Review Union Charges Against Honeywell, General Electric*, Apr. 20, 1994, available in LEXIS, Nexis Library, Cumwts File.

7. David E. Rosenbaum, *House Backs Free Trade Pact in Major Victory for Clinton After a Long Hunt for Votes*, N.Y. TIMES, Nov. 18, 1993, at A1; Adam Clymer, *Senate Approves Brady Legislation and Trade Accord*, N.Y. TIMES, Nov. 21, 1993, at 1.

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.

9. See, e.g., Elizabeth C. Crandall, Comment, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW. 165, 177 (1994) ("In order to . . . prevent adverse effects on foreign investment, the Mexican government adopted a hands-off approach to enforcing labor regulations."); Amy H. Goldin, Comment, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L.J. 203, 209-10 (1990) (discussing the longevity of labor leaders, "cooptation" of those leaders by the

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,<sup>10</sup> and Mexican unions are more powerful than their American counterparts.<sup>11</sup> 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.<sup>12</sup>

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.

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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 broadness 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.<sup>13</sup> 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,<sup>14</sup> rights not guaranteed in the United States for another twenty years.<sup>15</sup>

The national constitution adopted in 1917<sup>16</sup> went further, explicitly abandoning traditional laissez-faire principles concerning relations between labor and capital<sup>17</sup> and recognizing the existence of class conflict and inequality.<sup>18</sup> The new constitution provided guarantees for the economically weak and formulated an arbitral role for the state in conflicts between labor and capital.<sup>19</sup> Mexico's Constitution of 1917 was the first constitution in the world to include such social guarantees.<sup>20</sup>

Labor relations in Mexico in the 1920s and 1930s were often

13. For a description of some of the violent clashes between labor and the Mexican government at that time, see JOSÉ MANUEL LASTRA LASTRA, *DERECHO SINDICAL* 89-91 (1991).

14. *Id.* at 97.

15. See *infra* note 48 and accompanying text.

16. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. [Constitution]

17. See Graciela Bensúsán, *Construcción y desarrollo de derecho laboral en México*, in 4 *EL OBRERO MEXICANO: EL DERECHO LABORAL* 9, 10 (Pablo González Casanova et al. eds., 1985).

18. See JUAN B. CLIMENT BELTRÁN, *LEY FEDERAL DEL TRABAJO: COMENTARIOS Y JURISPRUDENCIA* 36-37 (7th ed. 1993). James Smith, in comparing the Mexican and U.S. Constitutions, noted, "[t]he Mexican Constitutional Convention, unlike the Philadelphia Convention over a century earlier, addressed economic and social goals and rights, equating social justice with—if not elevating it over—individual liberty." James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 *U.S. MEXICO L.J.* 85, 94 (1993).

19. Bensúsán, *supra* note 17, at 10.

20. VÍCTOR MOZART RUSSOMANO & MIGUEL BERMÚDEZ CISNEROS, *DERECHO DEL TRABAJO (EL EMPLEADO Y EL EMPLEADOR)* 29 (1990); BUREAU OF NATIONAL AFFAIRS/ASOCIACIÓN DE JEFES DE RELACIONES INDUSTRIALES, MEXICO: POLÍTICA Y PRÁCTICA LABORAL/LABOR POLICY AND PRACTICE 54 (1985) [hereinafter *LABOR POLICY AND PRACTICE*].

turbulent. Unions fought among themselves over membership and ideology and for influence in government.<sup>21</sup> In 1938, President Lázaro Cárdenas reorganized the official ruling party,<sup>22</sup> responding to the labor unrest by officially incorporating the labor sector into the new party.<sup>23</sup> 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.<sup>24</sup> Cárdenas formed an alliance with the then-dominant *Confederación de Trabajadores de México* (CTM),<sup>25</sup> thus cementing the Mexican labor relations system that survives today.<sup>26</sup>

The CTM remains the largest and most influential labor confederation in Mexico.<sup>27</sup> Considered to be the leader of the labor movement in Mexico and one of the nation's half-dozen most powerful leaders,<sup>28</sup> Fidel Velázquez became Secretary-General of the CTM in 1941 and has since retained that position for all but one year.<sup>29</sup> Traditionally,

21. See generally IAN ROXBOROUGH, *UNIONS AND POLITICS IN MEXICO* 13-20 (1984).

22. The party was founded under President Plutarco Elías Calles in 1929 as the Partido Nacional Revolucionario (National Revolutionary Party). Cárdenas reorganized it and changed its name to the Partido de la Revolución Mexicana (Party of the Mexican Revolution, or PRM). See GEORGE W. GRAYSON, *THE MEXICAN LABOR MACHINE: POWER, POLITICS, AND PATRONAGE* 14, 83 (1989). The PRM became the Partido Revolucionario Institucional (PRI) in 1946 under President Miguel Alemán. See FRANK BRANDENBURG, *THE MAKING OF MODERN MEXICO* 101 (1964).

23. Students of the Mexican political system often label the system "corporatist." A corporatist structure allows the government to exert extraordinary control over all sectors of society. Some commentators distinguish the Mexican political system from other corporatist systems by explaining that the ruling party in Mexico governs by consensus, organizing and mobilizing the working and peasant classes, thereby attaining a high degree of legitimacy. See ROXBOROUGH, *supra* note 21, at 166. Stephen Zamora quotes ROBERTO NEWELL & LUIS RUBIO, *MEXICO'S DILEMMA: THE POLITICAL ORIGINS OF ECONOMIC CRISIS* 63 (1984): "The case of Mexico is without doubt one of authoritarianism with relatively infrequent resort to coercion. Most of its authoritarianism stems from its enormous capacity to deliver and to be responsive to 'popular' demands, while exercising political control." Zamora, *supra* note 3, at 449 n.199. The recent 1994 election may lead to a reassessment of the Mexican political system. The PRI presidential candidate won a plurality of the votes in an election which observers, although acknowledging some irregularities in the election, determined to represent the will of the people. See Tod Robberson, *Zedillo Claims Victory in Mexican Vote: Result Seen Ensuring Smooth Transition*, WASH. POST, Aug. 23, 1994, at A1.

24. See Graciela Bensusán, *Libertad sindical: cambio real o aparente en el escenario laboral*, in *MODERNIDAD Y LEGISLACIÓN LABORAL* 22, 26-27 (Graciela Bensusán & Carlos García eds., 1989).

25. GRAYSON, *supra* note 22, at 14, 83 (stating that "individuals automatically became PRM members by virtue of their affiliations with mass organizations such as CTM constituent unions").

26. *Id.* at 100.

27. See, e.g., Dora Delgado, *NAOs Deterring Would-Be Violators of Labor Laws, Mexican Official Says*, Int'l Bus. Fin. Daily (BNA) (Oct. 26, 1995). A larger PRI-affiliated umbrella organization, the *Congreso del Trabajo* (CT), was organized in 1966. See ROXBOROUGH, *supra* note 21, at 25. The CT is now affiliated with the PRI. See, e.g., LABOR, MEXICO BUS. MONTHLY, Aug. 1994. CTM is the dominant member of the CT. See Beatriz García Peralta & Manuel Perlo Cohen, *Estado, sindicalismo oficial y políticas habitacionales: análisis de una década del INFONAVIT*, in 2 *EL OBRERO MEXICANO: CONDICIONES DE TRABAJO* 108 (Pablo González Casanova et al. eds., 1984) [hereinafter 2 *OBRERO MEXICANO*].

28. See GRAYSON, *supra* note 22, at 64; see also *Foreign Labor Trends*, *supra* note 11, at 9.

29. See GRAYSON, *supra* note 22, at 64.

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.<sup>30</sup> As one analyst states, this official unionism is a fundamental foundational support of the PRI and a principal axle of the Mexican political system.<sup>31</sup>

## 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.<sup>32</sup>

Labor law in Mexico recognizes the inequality in power between labor and capital and attempts to limit the impact of this inequality.<sup>33</sup> 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 "[r]ather 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.<sup>34</sup> 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.<sup>35</sup> Second, it affirmatively recognizes the freedom of association, the right to bargain collectively, and the right to strike.<sup>36</sup> Finally, it provides for judicial partiality. Both substantive and procedural aspects of Mexican labor law expressly favor workers over employers.<sup>37</sup>

### 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.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

The *Ley Federal de Trabajo* (L.F.T.), or federal labor law,<sup>41</sup> implements the articles of the constitution.<sup>42</sup> For all workers, this law

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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.

41. DIARIO OFICIAL DE LA FEDERACIÓN (D.O.), translated in 25 COMMERCIAL LAWS OF THE WORLD; MEXICO: LABOR LAWS I (Foreign Tax Law Publishers, Inc. 1993).

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,<sup>43</sup> the rules of association and collective bargaining, and the process of conflict resolution through the labor tribunals. The sections that follow discuss these provisions.<sup>44</sup>

### 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.<sup>45</sup> In contrast, the U.S. legislative scheme presupposes an adversarial relationship between labor and management in which the government

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jurisdictions or in territorial waters or exclusive economic zones of the nation. In addition, federal jurisdiction controls any conflict that affects two or more states, or law contract that involves two or more states, as well as employer obligations involving education, training, and health and safety. All other conflicts involving the application of the L.F.T. are to be resolved by the local authorities.

43. See generally CLIMENT BELTRÁN, *supra* note 18; CLEMENTE SOTO ALVAREZ, PRONTUARIO DE DERECHO DEL TRABAJO (1991); OSCAR GABRIEL RAMOS ALVAREZ, TRABAJO Y SEGURIDAD SOCIAL (1991).

Article 352 of the L.F.T. indicates that it does not apply to family businesses operated only by family members, except for health and safety matters. See SECRETARÍA DEL TRABAJO Y PREVISIÓN SOCIAL & U.S. DEP'T OF LABOR, THE INFORMAL SECTOR IN MEXICO, Occasional Paper No. 1 (Sept. 1992). Because there is a significant informal sector in Mexico, comprised of mostly individual owners with two or fewer workers, many workers do not enjoy the full protection of the labor law. *Id.* at 22. The sector is largely made up of artisans, small business owners, and salespersons. *Id.* at 34. A 1988 survey estimated that informal employment comprises between 26 percent and 38 percent of the nonagricultural work force. *Id.* at 53.

44. Mexico is also a signatory to 75 International Labor Organization conventions governing workers rights and working conditions. Article 17 of the L.F.T. incorporates such conventions directly into Mexican law. In contrast, the United States has ratified only 11. See 7 INTERNATIONAL LABOUR ORGANISATION, WORLD LABOUR REPORT 100 (1994).

45. See *infra* part IV.

participates only as a neutral regulator.<sup>46</sup>

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.<sup>47</sup>

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)<sup>48</sup> 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,<sup>49</sup> 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 1870s<sup>50</sup> and the International Workers of the World<sup>51</sup> some forty years later, urged a broad platform of political and social reform like their European and Mexican counterparts;<sup>52</sup> however, the mainstream

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46. See PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT* LAW 232 (1990).

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 Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (describing the development and historical antecedents of the employment-at-will rule).

48. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-69 (1995). The original 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 DEMOCRACY: 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.<sup>53</sup> 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),<sup>54</sup> which establishes minimum wage and overtime pay requirements, 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.<sup>55</sup> 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.<sup>56</sup>

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 presumptive employment arrangement in the United States<sup>57</sup> and the norm for most American workers.<sup>58</sup>

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53. See LEWIS LORWIN, *THE AMERICAN FEDERATION OF LABOR* 44-54 (1970); SELIG PERLMAN, *HISTORY OF TRADE UNIONISM IN THE UNITED STATES* (1922).

54. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1995). For further discussion about the Fair 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 Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578 (1992); 142 Lab. Rel. Rep. (BNA) 180-81 (1993) (U.S. 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. Mettelle*, 333 N.W.2d 622, 628 (Minn. 1983).

58. See generally Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J. L. REF. 319, 322-24 (1983) (estimating that 59 million private 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.<sup>59</sup> Further, Mexican law mandates that these standards be applied without discrimination based on race, nationality, sex, age, religious creed, or political opinion.<sup>60</sup>

#### 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,<sup>61</sup> with some exceptions for special workers or conditions.<sup>62</sup> Mexican law establishes a six-day, forty-eight hour work week, with one day of paid rest, normally Sunday.<sup>63</sup> The law also establishes at least seven federal holidays, for which a worker must be paid double if required to work.<sup>64</sup>

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.<sup>65</sup> A national commission composed of representatives of labor, management, and the government establishes minimum wage rates that vary among geographical regions and professions.<sup>66</sup>

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59. L.F.T. arts. 56-57.

60. *Id.* art. 56.

61. MEX. CONST. art. 123, pt. A, ch. I; L.F.T. arts. 60-61.

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.<sup>67</sup> This minimum vacation allowance increases by two days for each of the next four years of service.<sup>68</sup> Thereafter, the vacation allowance grows by two days for every five years of additional service.<sup>69</sup> Part-time workers have a right to vacation in proportion to the number of days worked annually.<sup>70</sup>

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

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

## 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 states expressly that employment is for a specific project or a determined time.<sup>75</sup> The constitution itself provides that, other than for

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ESTADÍSTICA GEOGRAFÍA E INFORMÁTICA, ANUARIO ESTADÍSTICO DE LOS ESTADOS UNIDOS MEXICANOS 103-04 (1993) [hereinafter ANUARIO ESTADÍSTICO].

Deductions in the minimum wage may be made only to cover judicially decreed support payments, rent payments for employer-provided housing, housing credits, and credits for employer-provided goods. In the case of both employer-provided housing and goods, the deductions may not exceed 10% of the salary. Additionally, the employee must freely agree to credits for goods provided by the employer. MEX. CONST. art. 123, pt. A, ch. VIII; L.F.T. art. 97, with references to arts. 103, 110, 151. As will be discussed later, low wages are common in developing countries and are a primary result of an oversupply of labor. See *infra* notes 229-31 and accompanying text.

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.<sup>76</sup>

Any discharged employee may contest the grounds for discharge before a labor tribunal.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

#### 4. Workplace Safety and Health

The Mexican Constitution requires that employers maintain a safe and healthy working environment.<sup>80</sup> 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).<sup>81</sup> The federal government regulates occupational safety and health in all sectors, whether or not the industry is otherwise subject to state or federal jurisdiction.<sup>82</sup> In addition, small family-run businesses, which are exempt from most labor law provisions, are subject to the occupational safety and health regulations.<sup>83</sup>

The Secretariat of Labor and Social Welfare (STPS) sets workplace safety and health standards.<sup>84</sup> 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

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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. *Id.* Article 437 of the L.F.T. requires that reductions in force be carried out by seniority.

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).

78. *Id.*

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.

80. MEX. CONST. art. 123, pt. A, ch. XV.

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. *Id.* at I-4.

82. See *id.* at v. See also *supra* note 42.

83. L.F.T. art. 352. See *supra* note 43.

84. COMPARISON OF OSH, *supra* note 81, at I-4.

prevention.<sup>85</sup> STPS has a staff of inspectors who are responsible for monitoring compliance with the regulations.<sup>86</sup>

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.<sup>87</sup> These commissions make recommendations for hazard control, investigate accidents and illnesses, and conduct safety and health training.<sup>88</sup> 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.<sup>89</sup>

Commission surveys of workplace safety also are used to determine the annual fee that an employer is charged for worker's compensation insurance.<sup>90</sup> Under Mexican law, employers contribute to a fund administered by the Social Security Administration that indemnifies employees for work-related injuries or illnesses.<sup>91</sup> If the injury or illness is due to employer negligence, the tribunal may award up to 25% additional compensation.<sup>92</sup>

### 5. Housing

Mexican labor law imposes a distinctive obligation on employers to provide housing for their workers.<sup>93</sup> With the exception of highly compensated employees,<sup>94</sup> Mexican law requires employers either to provide the housing directly or to pay a sum equal to 5% of their

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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.

93. MEX. CONST. art. 123, pt. A, ch. XII; L.F.T. art. 136.

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.<sup>95</sup> This financial pool enables workers to obtain sufficient credit to acquire comfortable housing if they are not provided it directly by the employer.<sup>96</sup>

#### 6. Social Security and Health Care

The social security system in Mexico<sup>97</sup> covers many costs besides those arising from occupational injuries and illnesses. Benefits include medical insurance for covered workers and their families,<sup>98</sup> 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.<sup>99</sup> Worker contributions are based on salary level, and workers earning the minimum wage are exempted.<sup>100</sup> Employers pay the largest contribution for most benefits and the entire amount for the funds covering occupational hazards.<sup>101</sup>

#### 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

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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; García Peralta & Perlo Cohen, in 2 OBRERO 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 ESTADÍSTICO, *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<sup>102</sup> 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<sup>103</sup>—an amount considerably higher than the minimum wage in Mexico.<sup>104</sup> 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.<sup>105</sup>

### 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).<sup>106</sup> 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.<sup>107</sup> 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

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102. 29 U.S.C. §§ 201-219 (1988).

103. 29 U.S.C. § 206 (1988).

104. *See supra* note 66.

105. 29 U.S.C. § 207 (1988).

106. 29 U.S.C. §§ 1001-1461 (1988).

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. . . .").

constitution requires just cause for termination,<sup>108</sup> 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."<sup>109</sup> This highly individualistic approach to the employment relationship grew out of nineteenth century American notions of freedom of contract and unfettered entrepreneurship.<sup>110</sup>

In the twentieth century, the growing predominance of large corporate employers and specialized job functions<sup>111</sup> has triggered criticism of the at-will rule's harshly lopsided impact on employees.<sup>112</sup> 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.<sup>113</sup> 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-

108. See *supra* note 76.

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)).

110. See Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-26 (1980) ("[b]y 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.").

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.").

112. One commentator, for example, has stated:

[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.

Jack Steiber, *Most U.S. Workers Still May be Fired Under the Employment-at-Will Doctrine*, MONTHLY LAB. REV., May 1984, at 34, 36; see also Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482-84 (1976).

113. 42 U.S.C. § 2000e (1988).

quent acts.<sup>114</sup> Under the Age Discrimination in Employment Act,<sup>115</sup> 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,<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> Accordingly, courts have held that public policy considerations bar employers from terminating employees who refuse to commit an unlawful act,<sup>119</sup> who exercise statutory rights,<sup>120</sup> or who report an employer's unlawful

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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).

115. 29 U.S.C. §§ 621-634 (1988).

116. 42 U.S.C. §§ 12101-12213 (1993).

117. See, e.g., *Lewis v. Equitable Life Assurance Co.*, 389 N.W.2d 876, 888 (Minn. 1986) (authorizing defamation action for employees' foreseeable self-publication of employer's stated reasons for discharge); *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 924-25 (Cal. App. 1981) (authorizing contract action based upon alleged implied promise of employer not to terminate employee without some type of cause).

118. See Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 400-05 (1989) (citing 43 states as recognizing the public policy cause of action).

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).

conduct.<sup>121</sup>

Most states also recognize a contract-based exception to the at-will employment rule.<sup>122</sup> From an employer's unilateral promise, whether expressed orally<sup>123</sup> or in an employee handbook,<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> This is particularly true for lower paid workers who have difficulty obtaining legal representation because of the smaller potential for sizeable damage awards.<sup>127</sup>

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.<sup>128</sup>

121. See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (employee discharged for reporting labeling misrepresentations to employer); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (employee discharged for reporting criminal conduct to authorities). A number of jurisdictions have enacted statutes specifically prohibiting employee discharges for such "whistleblowing" activities. See, e.g., The Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended at 5 U.S.C. §§ 1201; 1212; 1214) (federal employees); MICH. COMP. LAWS § 15.361 *et seq.* (1992).

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

123. See, e.g., *Eales v. Tanana Valley Medical-Surgical Group*, 663 P.2d 958 (Alaska 1983) (finding representation that employee would not be discharged without cause within employment contract); *Bullock v. Automobile Club*, 444 N.W.2d 114 (Mich. 1989) (holding revocation of oral promise in policy manual not necessarily binding), *cert. denied*, 493 U.S. 1072, *reh'g denied*, 494 U.S. 1092 (1990).

124. See, e.g., *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985); see also Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326 (1992).

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., *Parner 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.

127. See JEROME CARLIN & JAN HOWARD, *LEGAL REPRESENTATION AND CLASS JUSTICE* 382-84; Leon Mayhew & Albert Reiss, *The Social Organization of Legal Contracts*, 34 AM. SOC. REV. 309, 310-311 (1969).

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<sup>129</sup> 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<sup>130</sup> and retired<sup>131</sup> employees. Benefits in both countries are similarly funded. Employer contributions are the sole source of worker's compensation benefits,<sup>132</sup> while both employers and employees contribute to the social security retirement system.<sup>133</sup>

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

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129. See OSHA, *supra* note 81.

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).

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).

132. Larson, *supra* note 130, at 795-96.

133. 42 U.S.C. § 401 (1988).

Leave Act<sup>134</sup> 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,<sup>135</sup> and employees are not obligated either to join or to refrain from joining a union.<sup>136</sup> The law allows the formation of trade, company, industry-wide, and professional unions.<sup>137</sup>

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.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup>

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134. 29 U.S.C. §§ 2601-2654 (1993).

135. L.F.T. art. 357.

136. *Id.* art. 358.

137. *Id.* art. 360. Workers also may form federations or confederations. *See id.* arts. 381-385.

138. *See infra* notes 175-177 and accompanying text.

139. L.F.T. arts. 364, 365.

140. CLIMENT BELTRÁN, *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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

## 2. Collective Bargaining

An employer must enter into collective negotiations upon a union's request to establish contractual terms.<sup>144</sup> The resulting contract may not diminish the minimum guarantees established by the constitution or the L.F.T.,<sup>145</sup> and all contracts automatically incorporate these minimum benefits and rights unless the parties agree upon greater benefits.<sup>146</sup>

Mexican labor law provides that a contract should include provisions concerning hours and days of work, vacation, salary, training, and contract administration.<sup>147</sup> Any contract that does not specify the amount of compensation is void.<sup>148</sup>

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.<sup>149</sup> These contracts apply to industries under federal juris-

141. *Id.* at 274.

142. L.F.T. art. 395. United States law does not permit closed shop agreements. 29 U.S.C. § 158(a)(3) (1988). The NLRB authorizes only the more limited union shop arrangement, which requires employees to contribute to the cost of union expenditures in performing its collective bargaining and grievance adjustment duties. *See Communication Workers v. Beck*, 487 U.S. 735 (1988).

143. L.F.T. arts. 923, 930; CLIMENT BELTRÁN, *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 BELTRÁN, *supra* note 18, at 137.

145. L.F.T. art. 56; *see also* CLIMENT BELTRÁN, *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

diction.<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup>

### 3. Right to Strike

Mexican law guarantees the right of employees to strike except when a labor tribunal declares such action to be illegal.<sup>154</sup> 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;<sup>155</sup> (2) where the objective of the strike is not one recognized by law as legitimate;<sup>156</sup> (3) where the strike is not supported by a majority of the workers at that establishment;<sup>157</sup> and (4) where a majority of the strikers participates in violence.<sup>158</sup> Once a labor tribunal has declared a strike illegal, workers must return to their jobs within twenty-four hours or risk permanent replacement.<sup>159</sup>

After a finding that a strike is legal, however, the company must cease operations for the strike's duration.<sup>160</sup> Only those employees privy to confidential information and other essential employees, as approved by the labor tribunal, may continue to work during a strike.<sup>161</sup> In significant contrast to U.S. law, Mexican labor law prohibits an employer from temporarily or permanently replacing legally

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(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.<sup>162</sup>

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.<sup>163</sup> In order to avoid a more lengthy resolution in the tribunals, agreements between the parties resolve most conflicts in Mexico.<sup>164</sup>

## B. *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,<sup>165</sup> to engage in organizational activities.<sup>166</sup> 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.<sup>167</sup> Accordingly, an employer commits an unlawful labor practice by discharging an employee organizer<sup>168</sup> or making threats of reprisal for union support.<sup>169</sup>

However, the NLRA's protection of organizational activity is limited,<sup>170</sup> and a common characteristic of the U.S. legal labor regime is strong employer opposition to union organizing efforts.<sup>171</sup> 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

162. *Id.* art. 447. Strikes are not causes justifying layoff. *See id.* art. 47.

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. *See E. Alvarez del Castillo, Mexico, in 8 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS* 132 (R. Blanpain ed. 1982).

164. *See del Castillo, supra* note 163, at 129.

165. The NLRA does not apply in the public sector. *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. *See, e.g., MINN. STAT. §§ 179A.01-20* (1994). Other statutes are more restrictive, and most prohibit public employee strikes. *See, e.g., D. WOLLETT ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 252 (4th ed. 1993).

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. *Id.*

167. *See* 29 U.S.C. § 158(a) (1995).

168. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

169. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

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

171. *See WEILER, supra* note 46, at 111-14.

after a union first establishes its majority status in a representation election.<sup>172</sup> A union that receives majority support from the participants in a representation election<sup>173</sup> is certified as the exclusive representative of all bargaining unit employees.<sup>174</sup>

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.<sup>175</sup> 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.<sup>176</sup> Legally, the employer may make misstatements of fact and intentionally lie.<sup>177</sup>

Many employers hire professional consultants for the purpose of orchestrating sophisticated antiunion campaigns. Frequently, employer "union free" campaigns<sup>178</sup> also include illegal tactics, such as firing employee organizers. Although the NLRA bans these tactics, it subjects the employer to relatively weak sanctions.<sup>179</sup>

## 2. Collective Bargaining

The NLRA also confers the right of employees to bargain collectively through their selected union representative.<sup>180</sup> Mandatory subjects of bargaining include wages, hours, and terms and conditions of employment,<sup>181</sup> but not matters that go to the core of an employer's entrepreneurial control,<sup>182</sup> such as plant closings<sup>183</sup> 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).

174. *See* 29 U.S.C. § 159(a) (1995).

175. *See* 29 U.S.C. § 158(c).

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

177. *See* *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

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.

180. *See* 29 U.S.C. § 157 (1995).

181. *See* 29 U.S.C. § 158(d) (1995). *See also* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

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.<sup>184</sup>

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.<sup>185</sup> Both labor and management, for example, may resort to economic weapons to pressure the bargaining process even before a breakdown in negotiations.<sup>186</sup> 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.<sup>187</sup>

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 *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.<sup>188</sup> Nonetheless, even multi-employer bargaining—which typically is not structured on an industry-wide basis—is the exception rather than the norm.<sup>189</sup> This lack of industry-wide bargaining has helped put the United States “at the top of the developed world in wage inequality.”<sup>190</sup>

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).

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).

185. See generally WEILER, *supra* note 46, at 232; Thomas Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986).

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).

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).

188. See *Kroger Co.*, 148 N.L.R.B. 569 (1964).

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. 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).

190. Kaufman & Kleiner, *supra* note 31, at 44.

### 3. The Right to Strike

The NLRA protects the right of employees to engage in "concerted activity for mutual aid or protection."<sup>191</sup> This includes a ban on an employer's ability to discharge<sup>192</sup> or otherwise retaliate against an employee who participates in a lawful strike.<sup>193</sup>

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.<sup>194</sup> 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.<sup>195</sup>

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,<sup>196</sup> Mexican law generally permits unions to choose between going on strike or submitting the dispute to a labor tribunal for binding resolution.<sup>197</sup> 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,<sup>198</sup> but it authorizes strikes, although not mandatory arbitra-

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191. 29 U.S.C. § 157 (1995). *See also* 29 U.S.C. § 163 (1995) ("[n]othing in this Act, shall be construed so as either to interfere with or impede or diminish in any way the right to strike").

192. *See* 29 U.S.C. § 158(a)(3); *NLRB v. Browning-Ferris Indus.*, 700 F.2d 385 (7th Cir. 1983).

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 NLRB 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).

195. *See Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968).

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 ELKOURI & EDNA A. ELKOURI, *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).

tion, in the event of a bargaining stalemate.<sup>199</sup>

#### 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<sup>200</sup> and to monitor occupational safety and health concerns.<sup>201</sup> Labor contracts may delegate additional tasks to these commissions and empower them to render binding decisions.<sup>202</sup>

##### 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.<sup>203</sup> 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.<sup>204</sup> They consist of an equal number of labor and management members, and a government

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199. Binding interest arbitration to establish the terms of a collective bargaining agreement is available only if the parties agree. It is an unfair labor practice for a party to insist upon acceptance of the interest arbitration alternative to the point of impasse. See Columbus Printing Pressman, 219 N.L.R.B. 268, *enforced*, 543 F.2d 1161 (5th Cir. 1976).

200. L.F.T. art. 125.

201. *Id.* art. 509.

202. *Id.* art. 392. Workplace commissions, however, may not usurp the jurisdiction of labor tribunals in resolving conflicts between labor and management. CLIMENT BELTRÁN, *supra* note 18, at 281.

203. L.F.T. arts. 591-603.

204. Del Castillo, *supra* note 163, at 88.

representative chairs them.<sup>205</sup> 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.<sup>206</sup>

These tribunals resolve both individual and collective conflicts. Individual complaints primarily involve contested dismissals.<sup>207</sup> Collective disputes frequently concern contract negotiations or contract enforcement.<sup>208</sup> In addition, the tribunals have the authority to determine the legality of strikes<sup>209</sup> and, upon a union's request, to arbitrate bargaining disputes.<sup>210</sup>

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.<sup>211</sup> Mexican law also establishes an administrative body, the Procurator for the Defense of Labor,<sup>212</sup> 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.<sup>213</sup>

### 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

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 BELTRÁN, *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 BELTRÁN, *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."<sup>214</sup> 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<sup>215</sup> or labor unions.<sup>216</sup> 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.<sup>217</sup> Independently, the NLRB, as a five-member, quasi-judicial body, reviews the unfair labor practice decisions of administrative law judges.<sup>218</sup> NLRB decisions, in turn, are subject to further review by the federal appellate courts.<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup> Therefore, commentators generally view arbitration as less formal, less expensive, and more expeditious than litigation.<sup>222</sup>

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214. WEILER, *supra* note 46, at 232.

215. 29 U.S.C. § 158(a) (1995).

216. 29 U.S.C. § 158(b) (1995).

217. 29 U.S.C. § 153(d) (1995).

218. 29 U.S.C. §§ 153(a), 160(c) (1995).

219. 29 U.S.C. § 160(f) (1995).

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").

221. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

222. See, e.g., ELKOURI & ELKOURI, *supra* note 198, at 7-9; Roger I. Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 236-37 (1977).

## 2. Individual Rights

Individual rights, such as those arising under antidiscrimination statutes,<sup>223</sup> 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.<sup>224</sup>

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.<sup>225</sup> 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.<sup>226</sup>

A significant effect of this bifurcated enforcement system is the absence of U.S. unions in the enforcement of individual rights. Unlike in Mexico,<sup>227</sup> 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).

224. The enforcement of safety and health standards under the Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.* (1995), represents an exception to the litigation model. The OSH Act authorizes the Secretary of Labor to promulgate rules that mandate certain health and safety standards. 29 U.S.C. § 655 (1995). The Secretary then enforces these standards through workplace inspections and monetary penalties for noncompliance. 29 U.S.C. § 657-59 (1995). Employers may contest citations for noncompliance in an administrative proceeding. 29 U.S.C. § 659(c) (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,<sup>228</sup> 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

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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.

States.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup>

Unlike many other developing countries, Mexico enjoyed a positive and steady gross domestic product growth rate from the 1950s into the 1970s;<sup>232</sup> real wages<sup>233</sup> also grew steadily throughout this period.<sup>234</sup> The government regularly made minimum wage adjustments to raise wage rates, increase labor support for the PRI, and promote union growth.<sup>235</sup> Only in the mid-1970s, when inflation began to climb dangerously, did the government negotiate wage ceilings with labor.<sup>236</sup>

During the 1980s, Mexico's economic crisis deepened considerably.<sup>237</sup> Mexico had a negative economic growth rate in 1982, 1983, and 1986, and inflation reached a peak of 159% in 1987.<sup>238</sup> 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.<sup>239</sup>

Real wages dropped during the 1980s by 40-50% primarily due to inflation and the wage freeze.<sup>240</sup> Mexico, however, was not alone in experiencing this pattern of declining compensation. Since 1980, the

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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).

236. See Ian Roxborough & Ilan Bizberg, *Union Locals in Mexico: the "New Unionism" in Steel and Automobiles*, 15 J. LAT. AM. STUD. 117, 118 (1983).

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.<sup>241</sup>

Mexico's economic fortunes started to turn around in the 1990s. Mexico had a balanced budget by 1992,<sup>242</sup> and in 1994, inflation was steady at 7.1%.<sup>243</sup> 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.<sup>244</sup> In addition, the many benefits mandated by Mexican law can add about 60% to the total compensation package received by Mexican workers.<sup>245</sup>

## 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.<sup>246</sup> 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.<sup>247</sup>

Mexico has one safety and health inspector for every 750 workplaces.<sup>248</sup> Although 37,000 inspections were conducted in 1990, few

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241. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., 1994 STATISTICAL ABSTRACT OF THE U.S. 427, tbl. 661 (depicting a 7% decline in average weekly earnings for private sector employees from 1980 to 1993, after adjusting for inflation).

242. *Foreign Labor Trends*, *supra* note 11, at 3.

243. See U.S. DEP'T. OF STATE, 5 DISPATCH SUPPLEMENT, *U.S.-Mexico Binational Commission Meeting Mexico City May 8-9, 1994*, at 13 (Supp. No. 3, May 1994) [hereinafter DISPATCH].

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 ESTADÍSTICO, *supra* note 66, at 90.

Sadly, the sudden devaluation of the peso in December 1994 has put the entire recovery in jeopardy. It remains to be seen whether Mexican workers will be willing to moderate their demands again through yet another recovery.

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)).

246. See sources cited *supra* note 9. See also Beatriz Johnston Hernández, *Incapacidad en México para controlar la contaminación de las maquiladoras*, PROCESO, Sept. 14, 1992, at 19.

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).

248. COMPARISON OF OSH, *supra* note 81, at II-10.

facilities are inspected on even an annual basis.<sup>249</sup> 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.<sup>250</sup>

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.<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup>

In Europe and Japan, the workplace commissions actually have the legal power to monitor and, to some degree, to enforce compliance with regulations.<sup>254</sup> In Mexico, the commissions keep records, monitor enforcement, and make recommendations, but they do not have the power to enforce their decisions.<sup>255</sup> 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

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249. *Id.*

250. *Id.* at II-10 to II-11.

251. The rate of fatal injuries per 1,000 workers exposed to risk in Mexico in 1991 was 0.14, and in Colombia in 1990 it was 0.132. In 1991 Brazil's rate was 0.200, and the Republic of Korea's was 0.290. The U.S. rate is measured per 1,000,000 hours worked and includes occupational diseases. In 1991 it was 0.021. 52 [1993] Y.B. OF LAB. STAT. (Int'l Lab. Org.) 1094, 1095, 1097, 1100.

252. Freeman & Rogers, *supra* note 31, at 23.

253. See, e.g., *id.* at 23-24.

254. *Id.* at 23.

255. Either party, however, may bring a complaint before the labor tribunal, whose decision would be binding. LABOUR CANADA, COMPARISON OF LABOUR LEGISLATION OF GENERAL APPLICATION IN CANADA, THE UNITED STATES AND MEXICO 18 (March 1991) [hereinafter LABOUR CANADA COMPARISON].

economic growth."<sup>256</sup> 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.<sup>257</sup> They also contend that government manipulation<sup>258</sup> and the operation of closed shop agreements<sup>259</sup> repress labor militancy<sup>260</sup> 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.<sup>261</sup> The net result, according to these critics, is that Mexican workers have "little or no collective bargaining power."<sup>262</sup>

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.<sup>263</sup>

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.<sup>264</sup> On the other hand, this close association also enables the state to moderate labor demands.<sup>265</sup>

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

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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 PRI. HECTOR 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 Lóyzaga 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.<sup>266</sup>

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.<sup>267</sup> In addition, numerous "independent" unions exist, some having ties to the PRI and others being completely unassociated.<sup>268</sup>

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.<sup>269</sup> 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.<sup>270</sup>

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); ANGÉLICA 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 confederation 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.

[u]nions 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.<sup>271</sup>

Another study comparing worker participation in union affairs in several countries reached a similar conclusion.<sup>272</sup> 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,<sup>273</sup> have a higher level of internal democracy than their counterparts in Great Britain and the United States.<sup>274</sup>

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.<sup>275</sup> 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.<sup>276</sup>

271. ROXBOROUGH, *supra* note 21, at 143.

272. Mark Thompson & Ian Roxborough, *Union Elections and Democracy in Mexico: A Comparative Perspective*, 20 BRIT. J. INDUS. REL. 201 (1982).

273. The "independent" unions generally, although not universally, appear to be more responsive to the rank and file than official unions are. *See id.* at 213. However, nongovernment-affiliated unions are not always less hierarchical and more democratic than the "official" unions. *See* ROXBOROUGH, *supra* note 21, at 141-43. *See generally* ROXBOROUGH, *supra* note 21, at 132-44.

274. *See* Thompson & Roxborough, *supra* note 272, at 213. In the United States, the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531 (1988), establishes procedures for union elections and imposes fiduciary responsibilities on union officers. Despite the LMRDA's goal of enhancing internal union democracy, an objective expressed by § 401, significant problems persist. Union leadership is often bureaucratic and unresponsive to membership concerns. *See, e.g.,* Roger Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13, 65-66 (1982); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 417-21 (1972). Incumbent union leaders discourage challengers by using the powers of office to reward loyal adherents and control the channels of communication. Hartley, *supra*, at 74-76; *Union Elections*, *supra*, at 448-61. The practice of electing officers, not by direct membership vote, but indirectly by delegates at conventions, further entrenches incumbency at the national and international levels. *See* WILLIAM GOULD, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 176 (1993).

275. *See* ANUARIO ESTADÍSTICO, *supra* note 66, at 82.

276. *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. *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.<sup>277</sup> Although union density also has declined in other industrialized countries during this period, the United States' experience has been far more extreme.<sup>278</sup> 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.<sup>279</sup>

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.<sup>280</sup> 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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compensation or the severance pay guaranteed by law. The employees took their case to a labor tribunal which ruled in their favor and authorized them to seize the plant and all of the remaining machinery. In addition, the tribunal impounded and ultimately gave to the employees all of the merchandise and machinery that had been removed from the plant. See Tod Robberson, *Mexican Labor Shows Who's Boss: Workers Win Suit, Now Own Factory*, WASH. POST, Nov. 16, 1993, at A24.

277. See Van Wezel Stone, *supra* note 55, at 578; 142 Lab. Rel. Rep. (BNA) 180-81 (1993) (reporting findings of the U.S. Department of Labor that 1992 union membership comprised 15.8% of the total wage and salary work force and comprised 11.5% of the private sector work force).

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).

280. 29 U.S.C. § 160(c) (1988).



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.<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup> Thus, an employer may engage in protracted "surface" bargaining with little fear of meaningful administrative intervention.<sup>284</sup>

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,<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup> 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.

283. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

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.

286. See Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 296-97 (1991).

287. 29 U.S.C. § 159(c)(3) (1988).

strike and then hiring permanent replacements who will vote to decertify the union in an eventual election.<sup>288</sup>

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.<sup>289</sup>

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.<sup>290</sup>

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.<sup>291</sup>

## 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.<sup>292</sup> 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

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288. See WEILER, *supra* note 46, at 266-67.

289. See *supra* notes 113-125 and accompanying text.

290. See *supra* note 127.

291. See Estreicher, *supra* note 128, at 287; Summers, *supra* note 112, at 508-509.

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 afrontará al TLC la industria textil*, PROCESO, Aug. 17, 1992, at 26.

international market.<sup>293</sup> However, many labor leaders and supporters fear that labor will lose hard-won gains if management is allowed this greater flexibility.<sup>294</sup> 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.<sup>295</sup> Some indicators suggest that labor has lost influence over the past decade. Government-affiliated union leaders openly express dissatisfaction with government policies,<sup>296</sup> and far fewer labor representatives win state and national elections.<sup>297</sup> 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,<sup>298</sup> 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.<sup>299</sup> 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 Juárez: moderno, concertador y sumiso*, PROCESO, May 18, 1992, at 18.

294. See Salvador Corro, *En los hechos, la Ley Federal del Trabajo ha sido modificada: CTM*, PROCESO, Aug. 31, 1992, at 28; Bensusán & García, *supra* note 24, at 16-18; Eugenia Martínez et al., *Breaking Mexican Labour: North American Free Trade Agreement*, CANADIAN DIMENSION, Nov. 1992, at 21, available in LEXIS, Nexis Library, Arcnws File.

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.

297. Jeff Silverstein, *Labor's Laissez-Faire Economics: Union Leaders (and Members) Want to Keep Their Jobs*, BUS. MEX., Dec. 1992, at 20, 20.

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,<sup>300</sup> 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.<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup> 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.<sup>304</sup> Labor unions in both the United States and

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amount of severance pay that is graduated by length of service. *Id.* at § 4.

300. See Mont. Code Ann. §§ 39-2-901 to -914 (1989) (prohibiting employers from discharging employees without good cause, or in violation of either public policy or express provisions of the employer's own written personnel policy).

301. See GOULD, *supra* note 274.

302. For an overview of the German system, see Rudolf Buschmann, *Worker Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993); Carol Rasnic, *Germany's Statutory Works Councils and Employee Codetermination: A Model for the United States?*, 14 LOY. L.A. INT'L & COMP. L.J. 275 (1992).

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.<sup>305</sup> 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.<sup>306</sup> 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.