Article 28 of Mexico's Federal Labor Law: Does it protect Mexican workers abroad?

The legal scope of Article 28 of Mexico's Federal Labor Law in the protection of Mexican workers who work outside of Mexico.

EXECUTIVE SUMMARY

Global Workers Justice Alliance

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EXECUTIVE SUMMARY

INTRODUCTION

Global Workers Justice Alliance ("Global Workers") is a non-governmental organization based in New York City whose mission is to fight against worker exploitation by promoting "portable justice" for transnational migrants, by means of a cross-border network of labor rights defenders and resources.

One of the challenges identified by Global Workers is access to justice in Mexico for those Mexican migrant workers who have suffered abuses at the hands of labor recruiters and foreign employers within the framework of the U.S. work visa program as well as the bilateral migrant work programs entered into with Canada.

The objective of this report is to determine if Article 28 of the Mexican Federal Labor Law of 1970 (the "LFT," by its Spanish acronym), which regulates the provision of services by Mexican workers outside of the Republic of Mexico, constitutes a viable and effective legal recourse in situations where the LFT's minimum standards are violated to the worker's detriment, be it by individual labor recruiters, recruitment agencies, the foreign employer, or the Mexican government.

I. THE ECONOMIC CONTEXT OF MEXICAN GUEST WORKER RECRUITMENT

A. Global Trends: ''Flexibility,'' Deregulation, and Precarious Work

Proponents of globalized capitalism have advanced the argument that, in order to compete in a global economy, countries must take measures to reduce their labor costs. In order to facilitate optimally efficient labor force, neoliberal economists argue, labor protections must be dismantled so that market forces may operate freely. Governments around the world have responded by adopting policies that encourage what is euphemistically known as "labor market flexibility," a fundamental reconceptualization of the nature of "work."

In general terms, this "flexibility" has been achieved at the cost of the working class: Full-time, permanent positions are replaced by temporary or fixed-term contracts. New laws allow employers to fire workers without notice or cause. Employees' freedom to organize and bargain collectively, already seriously compromised as a result of the policies just mentioned, is further restricted through anti-union legislation. Under the framework of economic globalization, worker's rights are seen as obstacles to market expansion.

Proponents of labor flexibilization attempt to justify deregulatory policies such as these by using the discourse of "job creation." However, the question we must ask ourselves is, "What kinds of jobs are being created?" As one academic explains: "If all labor becomes temporary and part-time, all possibility of employment stability

disappears, and with it the rights to a salary, pension, and all other benefits associated with full-time work."[1] Other consequences associated with such "precarious work" are a loss of workers' purchasing power and increased participation in the informal economy.

In Mexico, the most recent labor "reform" legislation was proposed by the Institutional Revolutionary Party (PRI) in March 2011, with the backing of the National Action Party (PAN). The proposed reforms would facilitate subcontracting and outsourcing; encourage the use of probationary and training contracts; and legitimize the so-called "*renuncia en blanco*."[2] The reforms would also reduce workers' compensation for wrongful termination; permit employers to set wages unilaterally; and give employers total control over workers' hours and work assignments.[3] Even though the proposed reforms have yet to become law, Mexican employers are already putting these policies into practice.

Any legislative reform that legitimizes labor market flexibilization will only aggravate the already dire economic reality that forces thousands of Mexicans to seek their fortune outside the country. Despite the promises associated with free trade, precarious work has increased markedly since the implementation of the North American Free Trade Agreement (NAFTA) in January 1994. This in turn has generated increased demand for better-paying work opportunities abroad. Access to such jobs is controlled in large part by recruitment agencies and by individual labor recruiters, who operate on the margins of legality. Before examining these actors and the laws that apply to them, it is appropriate first to present a brief overview of the economic situation of Mexico's working class.

B. The Economic Reality of the Working Class in Mexico

In the years since NAFTA's passage, trade liberalization between the United States and Mexico has devastated the Mexican countryside, resulting in massive and sustained job losses in the agricultural sector. While non-agricultural employment has increased, the majority of these new jobs have been precarious in nature, many of them with low wages in *maquiladoras*.[4] This lack of opportunity in Mexico has led a part of the Mexican labor force to seek recruitment to work outside the country. Many of these migrants come from rural Mexico, where as many as one-sixth of the nation's farmworkers have been displaced by unemployment and are willing to take employment wherever they can find it, whether elsewhere in Mexico or abroad.

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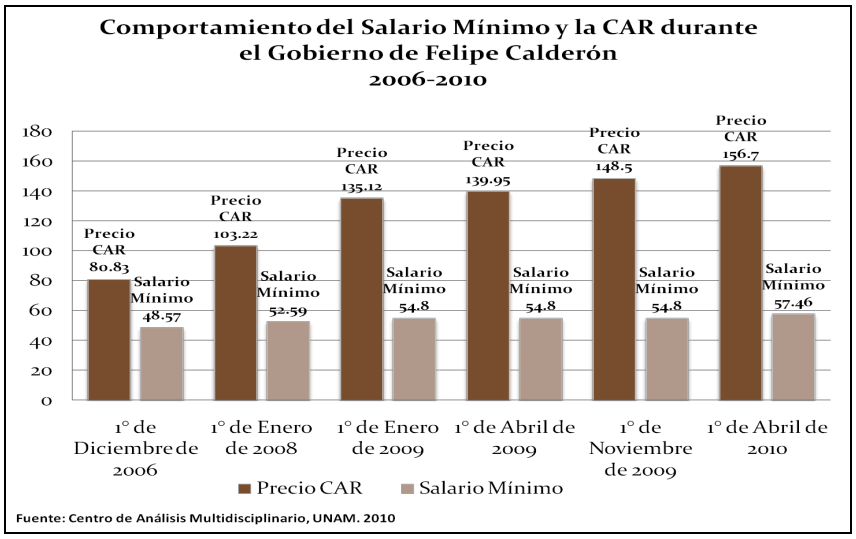
[1] Rendón Corona 2003:36.
[2] The *renuncia en blanco* ("blank resignation") is a hiring practice in which a new worker, as a condition of employment, is made to sign an undated letter of resignation that can later be used as evidence showing that the worker quit voluntarily. A worker who resigns forfeits any procedural rights to challenge his or her separation from employment.
[3] Unlike similar reforms proposed by the PAN in 2010, however, the PRI proposal does not contemplate changes to Article 28 of the Federal Labor Law, the subject of this report.
[4] Salas 2006:33, 42-43.

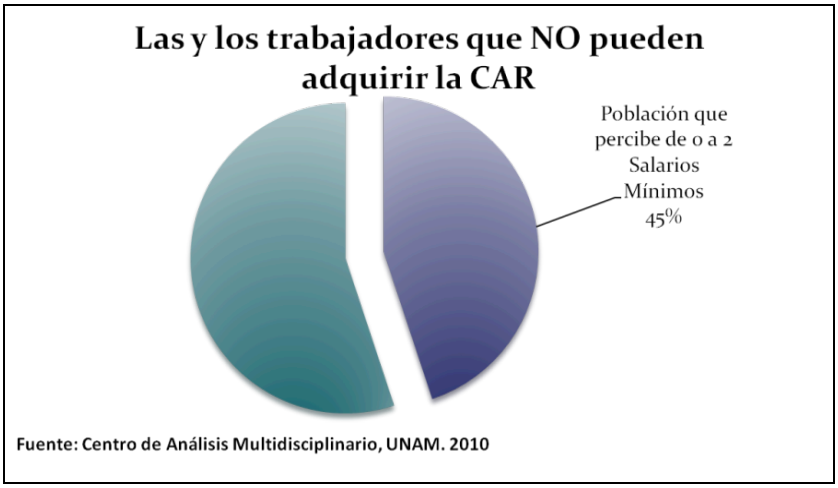
Those workers who are able to find employment in Mexico are nonetheless often unable to live with dignity. In January 2011, the federal minimum wage was raised by 4.1% to a national average[5] of about 58 pesos per day, or roughly $4.37 U.S. dollars. As the following table shows, in recent years the cost of the "basic basket" of consumer necessities[6] has shot out of reach while minimum wages have remained stagnant: by 2010, a minimum wage worker could afford to purchase 40% less food than in 2006.



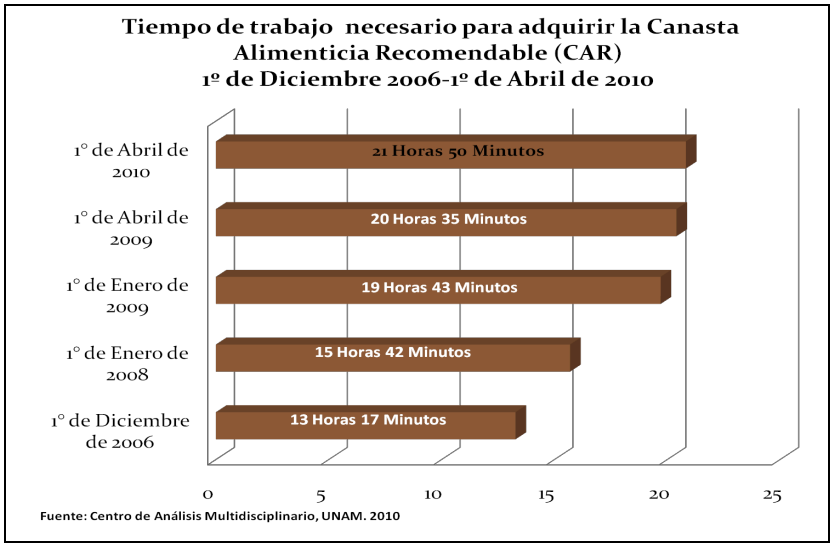
The more than 19.5 million Mexicans who earn less than double the minimum wage – about 45% of the Mexican workforce – are simply unable to meet their families' basic survival needs with consistency.

[5] Mexico's federal minimum wage law divides the country into three regions, whose respective minimum wages are 59.82, 58.13, and 56.70 pesos per day.

[6] The "basic basket" represents a list of specific consumer goods and services (e.g., food, clothing, furniture, medicine and medical care, financial services). Economists track the total cost of the "basket" and each of its contents over time as a means of measuring inflation.



The lack of employment stability and sufficient wages force workers to take on extra hours, by working overtime or by taking on multiple jobs just to make ends meet. The following table illustrates the time that it takes for a worker to acquire one day's share of the "basic basket."



The preceding tables demonstrate the circumstances that force large numbers of Mexican workers to accept any available job in order to meet the basic necessities of themselves and their families. Having broadly described the economic reality of the Mexican working class, we can now turn to the phenomenon of Mexican foreign labor recruitment.

C. The Recruitment of Mexicans to Work Abroad

Foreign labor recruitment in Mexico is generally carried out by individual recruiters and, to a lesser extent, by recruitment agencies. These actors, some of whom operate outside the law, act as middlemen and hold tremendous power because there is no way for prospective employers and employees to interact directly. The following paragraphs will briefly outline the legal framework that applies to recruiters (individuals and agencies), followed by an examination of recruiters' common practices.

1. ILO Convention 96: Fee-Charging Employment Agencies[7]

The International Labour Organization ("ILO") has attempted to regulate recruitment agencies[8] via Convention No. 96 Concerning Fee-Charging Employment Agencies ("Convention 96" or "the Convention"). Member states may accept either the Convention's minimum objective of regulating for-profit recruitment agencies (Part III of the Convention) or go further and agree to gradually abolish them (Part II of the Convention). When Mexico ratified Convention 96 in March 1991, it agreed only to regulate for-profit recruitment under Part III.

Part III of the Convention sets standards for state licensing of for-profit recruitment agencies and approval of the fees they may charge.[9] Of particular relevance to this report is the provision that establishes that recruitment agencies (whether or not operated for profit) "shall only place or recruit workers abroad if permitted so to do by the competent authority and under conditions determined by the laws or regulations in force."[10] Member states are also to establish appropriate penalties, including cancellation of an agency's operating license, for violations of Part III or its implementing legislation."[11]

It is against the backdrop of Mexico's international obligations that we turn to an analysis of Mexico's domestic legislation regulating labor recruitment.

2. Mexican Regulation of Recruitment Agencies

In Mexico, labor recruitment is regulated by Articles 539(E)-(F) of the Federal Labor Law ("LFT") and by the administrative Regulation of Worker Recruitment Agencies ("the Recruitment Regulation"), issued in March 2006. These instruments constitute the domestic legislation implementing Part III of ILO Convention 96, violation of which should be punished thereunder. Under Article 539, non-profit entities may participate in

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[7] International Labour Organization: "Convention concerning Fee-Charging Employment Agencies" (Revised 1949) (Entry into force: 18 July 1951).

[8] By its terms, Convention 96 applies to "any person, company, institution, agency or other organisation which acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker[.]"*Id.* at Art. I § 1(a).

[9] *Id.* at Arts. 10(a)-(c) and 11(a)-(b).

[10] *Id.* at Arts. 10(d) (for-profit agencies) and 11(d) (not-for-profit agencies).

[11] *Id.* at Art. 13.

labor recruitment only if they register with the government.[12] For-profit recruitment agencies are to be licensed only in exceptional circumstances, and only for the recruitment of workers who are to perform specialized tasks; the recruitment service is to be provided to the worker free of charge.[13] Mexican law defines "recruitment agency" broadly enough to include individual recruiters, but exempts the National Employment Service ("SNE"), a division of the Secretariat of Labor and Social Welfare ("STPS"). The SNE conducts recruitment of Mexicans to work in Canada under a bilateral agreement detailed below.

The Recruitment Regulation sets out a series of obligations with which recruitment agencies must comply, and specifically stipulates that STPS is to ensure that all recruitment of Mexicans for work abroad complies with Article 123 of the Mexican Constitution and Articles 28 and 29 of the LFT.[14] STPS is also to ensure that the working conditions contracted for meet or exceed the standards of the country where the activity is to take place, and that workers are not made to sign away these rights in subsequent contracts.[15] Penalties for violating the Recruitment Regulation include fines as well as suspension or termination of an agency's operating license.[16]

Despite the legal requirement that recruitment agencies register with the government, lack of enforcement has permitted the proliferation of clandestine organizations that operate outside the law from places like hotels, businesses, or law offices.[17] STPS inspectors who are tipped off about illegal recruitment commonly find that, by the time they have arrived, the "office" has disappeared without a trace.[18] While it is impossible to know how many illegal recruitment agencies exist, it is certainly more than the 295 legal agencies[19] that were registered with the government in April 2010.[20] A cursory glance at the classified ads in newspapers, magazines, or websites demonstrates the impunity with which these illegal agencies operate.[21]

[12] Federal Labor Law, Art. 539(E).
[13] *Id.* at (F).
[14] Regulation of Worker Recruitment Agencies, Art. 13.
[15] *Id.*
[16] *Id.* at Arts. 33(II) and 35.
[17] Sánchez 2010.
[18] Interview with Lic. Oscar Ortíz Millán, General Subcoordinator of the SNE (2010).
[19] Of these 295 licit recruitment agencies, only 15% were not operated for a profit (e.g., university or municipal government placement agencies). The for-profit agencies (85%) are generally not exclusively engaged in labor placement, but also offer other administrative and payroll services (e.g., services related to subcontracting of personnel, principally in the administrative and custodial sectors). It is our understanding that these 295 recruitment agencies are not those who recruit Mexican workers to work in the United States and Canada.
[20] Sánchez 2010.
[21] *Id.*

3. Foreign Labor Recruitment in Practice

a. Recruitment to the United States

There is no bilateral agreement between Mexico and the United States, only the U.S. visa system. Under the so-called H-2A visa program, U.S. employers may hire foreign workers for temporary or seasonal agricultural employment in the United States if they can demonstrate to the satisfaction of the U.S. Department of Labor that (1) there are not sufficient U.S. workers available and (2) the employment of foreign workers will not adversely affect the wages and working conditions of similarly-employed U.S. workers.[22] Under the H-2B program, employers may petition for foreign workers to perform "[non-agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]."[23]

Recruitment of Mexicans to the United States is typically carried out by individual recruiters, who are usually current or former employees of the U.S. employer, or their family members, in their communities of origin. According to the United Farm Workers union, the majority of the workers recruited in this manner are charged illegal recruitment fees ranging from $100 USD to as much as $9000 USD.[24] Other U.S. employers turn to private recruitment agencies in the United States to handle their foreign recruitment needs. In theory, these recruiters are subject to the obligations and sanctions of the Mexican Recruitment Regulation, given that recruitment takes place on Mexican soil. However, the reality is that there is no effective government enforcement. Once the workers enter the United States, employer intimidation, language barriers, and lack of financial resources prevent them from pursuing their rights under either Mexican or U.S. law.[25]

b. Recruitment to Canada

The SNE conducts recruitment of certain Mexican workers under bilateral agreements between Mexico and Canada.[26] The most prominent of these is the Mexico-Canada Seasonal Agricultural Workers Program ("PTAT" by its Spanish acronym). Under a Memorandum of Understanding between the two governments, the SNE recruits and selects the workers in Mexico. A representative of the Mexican government also assists in administering the program from Canada.[27] The STPS asserts that it guarantees that employment offered in Canada is genuine and free of deception or abuses. However, because the SNE is not considered a "recruitment agency" under Mexican law, it is not subject to Mexico's Recruitment Regulation or the sanctions for its violation.

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[22] 8 U.S.C. § 1188(a)(1)(A)-(B).
[23] 8 U.S.C. § 1101(a)(15)(H)(ii)(b).
[24] Interview with Erik Nicholson, United Farm Workers.
[25] Affidavit of Alma P. Soria Ayuso, Consul General of Mexico in Portland, Oregon (1999).
[26] Canada is the only country with which Mexico has entered into a bilateral agreement concerning labor migration.
[27] "Human Resources and Skills Development Canada," http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml

Between 1974 and 2010, 208,684 Mexicans have worked in Canada under the PTAT since 1974, with nearly 16,000 participants in 2010 alone.[28] The Mexican government claims to maintain permanent contact with the workers, providing them with information and consular protection. According to an SNE representative, the PTAT ensures that Mexicans enjoy favorable working conditions in Canada.[29] However, Canadian migrant rights defenders have cast doubt on the Mexican government's claims, accusing the Mexican consulates of condoning exploitative working conditions in order to protect the economic and political benefits associated with the smooth running of the PTAT.[30]

II. MEXICO'S LEGAL FRAMEWORK CONCERNING THE RECRUITMENT OF ITS WORKERS TO OTHER COUNTRIES

A. The Mexican Constitution and the Federal Labor Law (LFT)

In its opening paragraph, Article 123 of the Mexican Constitution (hereafter "Constitution") states that "[e]very person has a right to work in a dignified and socially useful way."[31] Article 123 regulates individual and collective labor relations in both the public and private sectors by establishing a series of minimum labor standards as well as general procedures for their enforcement. The rights and procedures applicable to the private sector will be discussed later on in this report.

The Mexican Federal Labor Law ("LFT") is the legislation implementing the guarantees of Article 123. The LFT establishes that the federal labor standards have as their objective the achievement of equality and social justice in the relations between workers and employers,[32] as well as protection of the worker, whose rights and dignity are to be respected.[33] In this sense, work "should take place in conditions that ensure the life, health, and a decent economic status for the worker and his or her family."[34] Accordingly, the responsibility for safeguarding workers' rights lies with the state, and not with the whims of the employer.

Having set out the essential legal framework, we can at last turn to a discussion of Article 28, the subject of this report.

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[28] Consul General of Mexico in Toronto, Secretariat of Foreign Relation, "Programa de Trabajadores Agrícolas Temporales Mexico-Canadá," available at http://consulmex.sre.gob.mx/toronto/index.php/es/programa-de-trabajadores-agricolas

[29] Interview with Lic. Oscar Ortíz Millán, General Subcoordinator of the SNE (2010).

[30] *See, e.g.*, the documentary film "El Contrato" (The Contract), National Film Board of Canada (2003); Justicia for Migrant Workers (Canadian NGO), http:www.justicia4migrantworkers.org/justicia_new.htm

[31] Translation by Carlos Pérez Vázquez, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México (2005).

[32] Federal Labor Law/ Ley Federal del Trabajo (LFT) Art. 2.

[33] *Id*. at Art. 3.

[34] *Id*.

B. Article 28 of the Federal Labor Law (LFT)

Article 28 of the LFT (hereafter "Article 28"), in effect since May 1, 1970, establishes the standards that are to be observed in the performance of services by Mexican workers outside of the Mexican Republic. The basis of Article 28 is set out in Article 123(A)(XXVI) of the Constitution:

Every work contract between a Mexican and a foreign employer shall be certified (*legalizado*) by the municipal authority competent to do so as well as authorized by the Consul of the country where the employee will have to go. Such contracts will include not only all ordinary stipulations but also one specifying that the costs of repatriating the worker will be borne by the contracting employer.

1. Constitutional guarantees of Article 28[35]

The following is a description of the core protections established under Article 28 of the LFT:

> Article 28: In the provision of services by Mexican workers outside of the Republic, the following standards shall be observed:
>
> *i.* Working conditions shall be recorded in writing and shall contain as a condition of their validity the following guarantees:
>
> *a.* Article 25 [of the LFT] requirements of a work contract must contain the following; [36]
>
> *I.* Name, nationality, age, gender, marital status, and address of both the worker and employer;
> *II.* If the work is for a specific time frame, and if so, what is it;
> *III.* The nature of the services needed, as specifically as possible;
> *IV.* Location(s) of employment;
> *V.* Rate, and method of payment;
> *VI.* Date and place of payment;
> *VII.* How, when and where the workers will get trained for the job, as established by the employer and its corporation, and in compliance with this statute;
> *VIII.* Any other work conditions, such as days off, and/or vacations, or any other conditions as applied by the employer.
>
> *ii.* The employer shall provide an address within [Mexico] for all legal purposes.
>
> *iii.* The writing that contains the working conditions shall be submitted for the approval of the Conciliation and Arbitration Board[37] within whose jurisdiction it was created. After confirming that the writing meets the

[35] *Id*. at Art. 28, §I.
[36] *Id.*
[37] The Conciliation and Arbitration Boards are administrative tribunals that hear labor and employment matters.

requirements of Section I, the Board shall determine the amount of the bond or deposit that it deems sufficient to guarantee compliance with the terms contracted for.

iv. The deposit shall be made in the Bank of Mexico or in the financial institution designated by it. The employer shall confirm to the Board that the bond has been provided or that the deposit has been produced; Once the employer has demonstrated to the Board that it has complied with its contractual obligations, the Board shall order the cancellation of the bond or the return of the deposit;

v. A work visa shall be solicited from the consular authority of the nation in which the work will be performed;

vi. The costs of transportation from the place of origin to the worksite, repatriation, transit and meals of the worker shall be borne exclusively by the employer, as well as the worker's family, if they are traveling too, as well as border crossings and compliance with immigration requirements, and all other similar costs;

vii. The worker shall receive in full the wages owed to him, without any deduction for costs, such as transportation, repatriation, transit and meals or immigration fees;

viii. He or she shall have the right to compensation for workplace hazards in an amount at least as great as that specified in [the LFT];

ix. The worker shall have the right to enjoy, at the worksite or nearby, whether by lease or any other arrangement, housing that is sanitary and dignified.

x. Comply with any other obligations in the employment contract, including those rights required by Article 25.

Article 28 is the direct successor to Article 29 of the prior Federal Labor Law of 1931. Former Article 29 was a central element of the Bracero agreement between the United States and Mexico in the 1940s, as acknowledged by Mexico's then Secretary of Foreign Relations.[38] In a subsequent communications related to non-agricultural Mexican workers, the Secretary not only reiterated this principle, but included the entire text of Former Article 29 for more clarity.[39] By contrast, decades later, the Mexican government would negotiate the terms of the PTAT while ignoring the requirements of Article 28, specifically the obligation that the costs of transporting and repatriating the worker, as well as the administrative costs of immigration, are to be, borne exclusively by the employer and without any deductions from the worker's wages.

2. Reach and Limitations of Article 28 in Protecting the Rights of Mexican Workers Abroad

Article 28 was designed to protect the individual working relationships of Mexican workers abroad by imposing requirements that seek to achieve the following objectives:

[38] Agreement between the United States of America and Mexico regarding the temporary migration of Mexican agricultural workers. Available at http://www.latinamericanstudies.org/immigration/bracero-agreement-1942.pdf

[39] Agreement to regulate the employment of non-agricultural Mexican migrant workers. (April 1943).

- First, obtaining the prior approval of the Conciliation and Arbitration Board with respect to the proposed working conditions;

- Second, granting jurisdiction to said Board over violations of those conditions committed outside of Mexico; and

- Third, avoiding cross-border procedural difficulties that arise from attempting to notify an employer who has been sued in a foreign country and, even more difficult, from executing a judgment over goods located outside of Mexico.

However, despite the good intentions of this federal legislation, the main limitations of Article 28 are:

- The restrictive interpretation of Article 28 by a federal Circuit Court[40] in Mexico;

- The Mexican government's apparent position that Article 28 does not apply to the PTAT;

- The Mexican government's apparent position that, if Article 28 were to be complied with, it would increase illegal immigration because employers would find it cheaper and easier to just use undocumented workers; and

- The fact that compliance with Article 28 depends completely on the good faith of the employer.

Against this backdrop, what happens when a foreign employer does not comply with its contractual or substantive legal obligations with respect to a Mexican worker? Setting aside the possibility that the worker could sue the employer in the courts of the country where the worker is performing the work (an unlikely scenario, given the linguistic, economic, and cultural barriers, along with the threat of employer retaliation), or that the worker could attempt to enforce Article 28 in a U.S. court (as some academics have suggested[41]), we must ask whether the Mexican worker has any effective recourse upon returning to Mexico and, in particular, whether Article 28 constitutes such a recourse.

III. Applying Article 28 to HYPOTHETICAL Scenarios

In order to analyze how Article 28 might be put into practice, this report posits three hypothetical scenarios:

- In the first hypothetical, the foreign employer has contracted Mexican workers in compliance with the procedural requirements of Article 28.

[40] Circuit Courts (Colegiados de Circuito) are three-judge federal courts.
[41] *See, e.g.,*Chien 2010:15-63 and Griffith 2008:383-425.

- In the second hypothetical, the foreign employer ignores Article 28 completely.

- In the third hypothetical, a Canadian employer contracts Mexican workers under the PTAT using standard form contracts, the terms of which violate Article 28.

A. First Hypothetical

Facts: The foreign employer has presented the proposed labor contract to the Board of Arbitration and Conciliation of competent jurisdiction and has deposited the required bond, but does not comply with the substantive terms promised in the agreement.

This scenario is the simplest and least contentious, because the worker would be able to sue the foreign employer before the Board as if it were a Mexican employer operating in Mexican territory. The Board would have the practical ability to serve notice on the foreign employer at the Mexican address given by the employer for all legal purposes, and to execute a judgment against the bond or deposit that the employer surrendered in Mexico. This is an ideal scenario and, obviously, the most unlikely of the three.

1. Potential Defendants

The potential defendants would be the foreign employer named in the work contract, as well as the recruiter, whether an individual or an agency, so long as the recruiter would be considered an "intermediary employer" under Articles 12 and 15 of the LFT. Under Mexican labor law, a contractor will be considered an "intermediary employer" when he or she contracts workers in his or her own name, claiming to be the employer, but in reality is doing the contracting under the pay or for the benefit of an undisclosed principal. In the case of recruitment to the United States, it appears that most recruiters neither hold themselves out to be the employer nor claim to act as such, which would very likely prevent these recruiters from being held jointly liable as intermediary employers.

2. The Competent Authority

The Conciliation and Arbitration Boards are federal administrative tribunals that hear labor and employment matters. These Boards are comprised of three members: one representative of the government, one representative of the employers, and one representative of the workers. The Federal Board can hear labor and employment cases for 21 specified industries. Local Boards have residual jurisdiction over all other labor and employment cases. Agricultural workers, who constitute the majority of Mexicans recruited to work abroad, would likely have to go before a Local Board.

3. The Applicable Procedures

In general terms, the LFT states that labor cases are to be public, free of charge, speedy, predominantly oral, and initiated at the urging of a party. A worker can also turn to the Labor Prosecutor's office (*Procuraduría de la Defensa del Trabajo*), which can represent the worker free of charge.

a. Special & Standard Procedures for Article 28 (III) Cases:

Articles 893-899 of the LFT also establish **special procedures** for Article 28(III) cases, as well as cases where the amount in controversy *does not* ***exceed*** *three months* of the plaintiff's salary. The **special procedures** are as follows:

- The case begins with the filing of a written complaint, in which the worker may offer evidence to the competent Board.

- The Board sets a hearing regarding conciliation, claims and defenses, evidence, and decision. The Board may serve notice on the foreign employer at the address it has given for all legal purposes, advising the employer that, in the event of its non-appearance, all of plaintiff's claims will be deemed admitted.

- At the hearing, the Board shall seek to reconcile the parties. Should an amicable resolution prove impossible, each of the parties may present a statement and offer evidence. After taking evidence, the Board will hear the allegations and render a judgment.

- The special procedures call for the court to use the evidentiary and procedural guidelines under Chapters XII and XVII of Title 14 of the LFT, respectively.

Given the lack of jurisprudence on the procedure to enforce Article 28, there is uncertainty as to whether the special procedures described above apply only to violations occurring ***before*** the worker has departed Mexico. If this is the case, then the standard procedures under Chapter XVII of Title 14 of the LFT will apply to the employer's non-compliance with the terms and conditions of employment after the worker's arrival in the host country. The **standard procedures** are as follows:

- The case begins with the filing of a written complaint in which the worker sets out the underlying facts, with the ability to tender evidence he or she deems pertinent.

- The Board sets a hearing that consists of three stages:
  i. Conciliation
  ii. Claims and Defenses
  iii. Tendering and Admission of Evidence

- The Board serves notice on the parties; advising the defendant employer that, if it does not attend the hearing, the facts of the complaint will be deemed admitted and the employer will lose the right to present contrary evidence. The court will serve the employer at the address given per Article 28.

- At the conciliation stage, the Board will encourage talks between the parties, urging them to reach a settlement. If this fails, the parties progress to the next stage.

- At the claims and defenses stage, the Board President again urges the parties to reconcile their differences. If this fails, the plaintiff worker will present his or her complaint. The defendant employer then presents its answer, orally or in writing, setting out its defenses and affirming or denying the allegations in the complaint.

- At the evidentiary stage, the parties each tender their evidence (and objections) in turn. The court sets a separate hearing in which the evidence is actually called. The parties may present their final arguments at this hearing.

- After all evidence has been called and following the presentation of final arguments, the Board closes the hearing and prepares its decision.

Of important note to worker rights defenders is the fact that employment cases are generally subject to a **statutory limitations period of one year**,[42] with certain exceptions.[43] In the case of contractual clauses that violate or attempt to waive worker rights protection standards, a suit seeking a judicial declaration that such clauses are void shall have no limitations period. Finally, if the Board's resolution violates Constitutional procedural guarantees, a constitutional injunction (*amparo*)[44] will lie.

b. Potential Sanctions

Should the Board rule against the foreign employer, ordering it to pay a money judgment, the execution of the judgment would be relatively simple, given that it would simply involve seizing the bond or deposit that the employer would have provided at the time of hiring in accordance with Article 28(III) and (V).

B. Second Hypothetical

Facts: The foreign employer has not presented the employment contract to the competent Board nor to the Consulate of the country where the work is to be performed. The employer does not comply with its contractual obligations to the worker.

This hypothetical appears quite common in the case of persons engaged in recruiting Mexican workers to the United States. Given that, in this scenario, the

[42] LFT Art. 516
[43] LFT Art. 517-519.
[44] A constitutional injunction (*juicio de amparo*) is a suit filed in a Mexican federal court by an individual, whether a Mexican national or a foreigner, who alleges that his or her constitutional rights have been violated by Mexican authorities at the federal, state or local level. The crux of an *amparo* suit is to enjoin the authorities from continuing to violate the victim's constitutional rights. Jorge A. Vargas, "The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995," 11 Am. U. J. Int'l L. & Pol'y 295, 341, n.89 (1996).

employer has totally ignored the pre-employment procedural requirements of Article 28, enforcing its substantive guarantees becomes a genuine challenge for legal and practical reasons. There is no address in Mexico where the employer may be served, and likewise no goods located in Mexico that could be seized in order to satisfy a judgment. Moreover, the interpretation of Article 28 by a Mexican federal court (see below) casts doubt on the viability of an Article 28 case before the Board of Arbitration and Conciliation.

1. Is it possible to enforce Article 28 when the parties have not consented to its application?

This question inevitably arises due to a decision of a Mexican federal court regarding the Board's jurisdiction to hear Article 28 cases when the parties have not consented to its application at the time of contracting. The most recent publicly available court decision[45] that we have been able to find comes from the Third Collegiate Court for Labor Cases of the First Circuit in an appeal from 1995. According to the court:

[I]f the parties did not place themselves within the ambit of Article 28 because the Mexican worker was not engaged pursuant to its terms to work abroad, it is evident that the provision at hand may not be applied, and that the Board is not competent to apply it or demand compliance with its terms, precisely because the parties did not subject themselves to what the provision stipulates [*emphasis added*].

In our view, the court's decision is inconsistent with both the letter and the spirit of the LFT, because a foreign employer's very failure to follow the procedures of Article 28 at the time of engaging the worker would itself allow that employer to escape sanction. This interpretation would not only leave the affected worker without any legal remedy but would also jeopardize the integrity of the LFT as a whole by legitimizing attempts by employers to avoid complying with what are supposed to be obligatory legal mandates.

Unlike typical principles of private law, the rights and standards of the LFT are considered "of public order" and, as such, may not be waived by the parties.[46] Further, Article 5 of the LFT states that any "agreement" that violates an employee's rights is null

[45] In contrast with the Anglo-American legal system, where court decisions are public and their entire texts regularly published in numerous databases, in Mexico court decisions are, in general, private. However, the Supreme Court of Justice of the Nation publishes excerpts of federal judicial opinions where it considers them to be persuasive precedent (*tesis aislada*) or binding precedent (*jurisprudencia firme*) in accordance with a complicated set of rules contained in the *Amparo Law*. (Again in contrast to the common-law system, a particular court decision from a lower court may generally only be cited as precedent where the Supreme Court of Justice has specifically so held.) In general, the maximum length of a published precedential opinion is a few paragraphs, and its content focuses on the interpretation of a purely legal concept, generally with little reference to the facts of the case that gave rise to it.

[46] *Cf. Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 704-08 (1945) (recognizing the "public-private" nature of an employee's rights under the Fair Labor Standards Act of 1938 (("FLSA")), 29 U.S.C. §§ 201-219; although "conferred on a private party, [FLSA rights] affect[ ] the public interest" and may not be waived).

and void. The text of Article 28 is likewise clearly imperative, stating that its principles "*shall be observed*" (emphasis added). Finally, Article 18 of the LFT states that doubtful cases are to be construed in the manner that most favors the worker.

In any case, the court's decision is nothing more than an isolated precedent with some persuasive value rather than binding jurisprudence. However, the case still represents a negative precedent that would have to be overcome in any attempt to enforce Article 28.

2. Potential Defendants

Given that the employer in this hypothetical has not designated an address in Mexico where it may be served with process, a plaintiff might attempt to serve the employer at its foreign address, or name the recruiter or agency that assisted in contracting the worker in Mexico (assuming that the recruiter is an "intermediary employer" under Mexican law). We will briefly examine these possibilities.

a. Foreign Employer as Defendant

In the complaint, the worker must indicate an address at which the defendant may be served. Given that, in this hypothetical, the employer has provided no such address, the worker will have to provide the employer's address abroad or the place where the worker last worked for the employer. The Conciliation and Arbitration Board will then send the notice abroad via diplomatic channels.

In order for Mexican courts to recognize documents originating abroad, the documents must be officially acknowledged by the diplomatic or consular authorities. Foreign language documents must be accompanied by an official translation prepared by a Board-appointed official translator.

Unfortunately, these processes are both time-consuming and complicated, and require the cooperation of numerous domestic and foreign government authorities.

b. Recruiter/Agency as Defendant

As discussed above, it is unlikely that the typical recruiter or agency that recruits Mexicans to work in the United States will be considered an "intermediary employer" under Mexican law. Therefore, such a recruiter or agency is unlikely to be liable for violations of Article 28.

However, the worker might want to file a complaint against the recruiter with the Labor Inspection (part of the STPS) under Articles 13 and 30 of the Recruitment Regulation on the following bases:

- Acting as a for-profit recruitment agency without registering with or obtaining prior authorization from the STPS;

- Recruiting Mexican workers to work abroad without the prior authorization of the Secretariat of the Interior (*Secretaría de Gobernación*, or "SEGOB");

- Charging the workers a fee for recruitment services.

Nonetheless, some of the sanctions set out by the Regulation (such as suspension or cancellation of the recruiter's license) have no effect on recruiters who never registered in the first place. Thus, the imposition of fines appears to be the only available effective sanction, assuming that the Labor Inspection is able to successfully collect the fine.

Please note that this alternative legal avenue may present risks to the life and personal integrity of the worker, and to his or her advocates, due to the infiltration of organized criminal groups into the world of clandestine worker recruitment. A risk analysis is essential before proceeding.

C. Third Hypothetical

Facts: A Canadian employer and a Mexican worker enter into a standard form contract under the PTAT. The employer has stopped complying with its contractual obligations to the worker.

1. The Employment Contract

A contract under the PTAT is entered into using a standard form (hereinafter the "Canadian Contract"), with predefined terms and conditions resulting from negotiations between the Mexican and Canadian governments. The Canadian Contract is a standard form contract because its terms and conditions have already been set without any opportunity for the worker to negotiate. The Canadian Contract ignores the obligations established by Article 123 of the Mexican Constitution as well as Article 28.

Although the Canadian Contract does not require the signature of the Mexican government's agent in Canada charged with overseeing the PTAT, it commits this agent to:

- Approving the accommodations provided by the employer to the worker, in the absence of the competent authority in the province where the worker is employed;

- Receiving the worker's wages from the employer and retaining them "in safe keeping for the benefit of the worker" if the employer is unable to locate the worker or if the worker has died. The agent is to take necessary steps to locate and pay the worker or, in the case of his or her death, deliver the wages to his or her beneficiaries;

- Approving the insurance coverage obtained by the employer to cover workplace hazards, among other obligations.

The Canadian Contract states the working conditions to which the Mexican worker will be subject during his or her stay in Canada. It is important to emphasize that the workplace benefits that are not defined in the contract are to be determined by the laws of the applicable Canadian province (e.g., vacation pay).

On the other hand, some clauses of the Canadian Contract plainly contradict the requirements of Article 28. For example, Clause VII.3 states that the worker agrees to pay the employer for the costs of airfare and processing of work permits via regular deductions from his or her wages. This clause violates Article 123(A)(XXVI) of the Mexican Constitution (which establishes that in "[e]very contract of employment entered into between a Mexican [worker] and a foreign entrepreneur... it shall be clearly specified that repatriation expenses are borne by the hiring entrepreneur"), as well as Article 28(I)(b) of the LFT (which establishes that the worker's transportation and repatriation expenses as well as the expenses incurred in complying with any applicable immigration provisions "shall be born exclusively by the employer" and no amount shall be deducted from the worker's wages to cover these expenses).

The Canadian Contract also contains a choice of law clause stating that the laws of Canada and of the province will govern the contract where the worker is employed. The Mexican government appears to believe that Article 123 of the Constitution and Article 28 of the LFT are not applicable-despite their obviously mandatory nature-and that Canadian law prevails. In negotiating the PTAT, the Mexican government could have negotiated the extraterritorial application of Mexican labor laws related to recruitment, just as it did in the 1940s when negotiating the Bracero Program with the United States.

The Commission for Labor Cooperation states that:

...The Agreement [between the foreign employer and the Mexican worker] states that it is to be governed by the laws of Canada and the applicable province. On its face, the Agreement is a legal contract enforceable in court; however there have been no known cases of a SAWP worker bringing a breach of contract action in court, and it would be highly unlikely that a worker would have the resources to do so. However, according to the Agreement, if a government agent determines that the employer has violated the Agreement, the contract can be rescinded and the worker can be transferred to another farm or can be repatriated with partial compensation. The source country could also exclude the employer from the program.[47]

2. Potential Defendants.

Assuming that the Canadian Contract does not prevail over Article 123 of the Constitution and Article 28 of the LFT, one might consider naming as additional defendants the entities of the Mexican government involved in the administration of the

[47] Commission for Labor Cooperation, "Migrant Workers' Rights in North America" (2010) at 20, online: http://new.naalc.org/userfiles/file/CLC-Migrant%20Workers%20-%20English.pdf

PTAT. As it has been established, the STPS, its SNE, and the Mexican government's PTAT agent not only play a central role in PTAT recruitment and administration, but also systematically violate the aforementioned legal guarantees.

Under the LFT, it appears that the only way to force the STPS to comply with its Mexican legal obligations would be to establish that it is an "intermediary employer." This seems a dubious proposition. In any case, in light of the political interests at play, it is quite improbable that a lawsuit of this kind against the STPS or its SNE would get very far. Moreover, the SNE is specifically excluded from the reach of the Recruitment Regulation.

At a minimum, if the Canadian employer were to be sued, one could ask the Board to call the STPS to appear as an interested third party, given its role as a promoter of and recruiter in the PTAT.

3. The Competent Authority

The Mexican government appears to have taken the position that Article 28 does not apply to PTAT workers; that Canadian law applies to any disputes under the program; and that any litigation should be conducted in Canadian courts. This appears to be consistent with the Third Collegiate Tribunal's decision mentioned above, because the parties to a Canadian Contract have expressly consented to the application of Canadian law (rather than Article 28), a position that we believe to be legally incorrect. Given the political importance of the PTAT for the Mexican government, it is highly probable that the Conciliation and Arbitration Boards-characterized by little or no independence or impartiality—would declare themselves to have no jurisdiction based on the precedent of the Third Collegiate Tribunal.

4. Other Potential Legal Avenues

Given the lack of jurisprudence on point, there is uncertainty as to the existence of a viable legal avenue against the STPS, its SNE, the Secretariat of Foreign Affairs ("SRE"), or any other entity responsible for the systemic violations of Article 28 under the PTAT.

The violations of Article 123 of the Constitution could give rise to a constitutional injunction (*amparo*) as a potential legal avenue.[48] This uncertain procedure should be

[48] This potential avenue would consist of the filing of an "indirect *amparo*" suit before the competent federal trial judge. Because violations of Article 123 of the Constitution cannot by themselves form the basis of an *amparo*, it is fundamentally important that the plaintiff assert a violation of Article 16 of the Constitution as a jurisdictional "hook." Article 16, which can serve as the basis for an *amparo* suit, provides that "[n]o one may be disturbed in his family, domicile, papers or possessions, except by virtue of a written mandate from the competent authority..." In the opinion of Mexico's most prominent commentator on *amparo* law, every violation of any constitutional or legal provision entails a violation of Article 16 of the Mexican Constitution. Therefore, a violation of Article 123 simultaneously infringes upon the guarantee of legality in Article 16. See Burgoa Orihuela 2004:263.

studied in depth by any party hoping to make use of it, preferably with the assistance of a constitutional law specialist, particularly in light of the June 2011 constitutional reforms.

Note that the foregoing considerations may change after the entering into force of the recent reforms to Articles 1 and 103 of the Constitution, among others. Nonetheless, as these reforms seek to expand constitutional protection, an *amparo* suit may remain a viable strategy.

Factual bases for an *amparo* might include acts of authority related to:

- The negotiation and execution of the Memorandum of Understanding between Mexico and Canada concerning PTAT (MOU);
- The administration of PTAT, and particularly worker recruitment;
- The negotiation, drafting, and use of the Canadian Contract to set terms and conditions of employment contrary to both Article 123 of the Constitution and the LFT as its implementing legislation;
- The application of the MOU to the migrant worker; and
- The requirement that the recruited worker sign the Canadian Contract.

In order to make it more likely for a court to hear a worker's case, the worker plaintiff should consider requesting to the SNE—after being selected to participate in the PTAT but before signing the Canadian Contract—that it modify the Canadian Contract to comply with Article 28. The SNE is most likely to refuse to amend the Canadian Contract. Such refusal (which the SNE is obligated to provide in writing under Article 8 of the Constitution) would be an act of authority likely challengeable through the filing of an *amparo* suit.

Advocates should keep in mind that a successful *amparo* would benefit only the particular plaintiff, and not all those similarly situated.

IV. Recommendations

The following recommendations are limited to legal proceedings before Mexican authorities. They may be pursued individually or together, simultaneously or consecutively, depending on the strategy and objectives of the organization(s) involved.

It is important to keep in mind that, as a general rule, judicial processes in Mexico do not result in decisions that constitute legal precedents of general application. There is, however, an exception: an *amparo* resulting in a final decision that, in the judgment of the Mexican Supreme Court of Justice, is of sufficient importance to constitute a persuasive precedent and, in time, binding precedent.

A. Recommendations for Cases of Mexican Workers Recruited to Work in the United States

- Look for a test case wherein someone has clearly committed an Article 28 violation to the detriment of a Mexican worker who has worked in the United States, and bring a labor lawsuit before the Conciliation and Arbitration Board of competent jurisdiction. Such a case would be one that not only brings together suitable factual and legal characteristics, but which also involves a worker who, because of his or her circumstances, will not be exposed to retaliation such as firing or blacklisting.

- File a complaint against the recruiter before the STPS' Labor Inspection, simultaneously with or as an alternative to the labor lawsuit, for violations of multiple provisions of the Regulation of Worker Placement Agencies, emphasizing the application of fines and civil penalties (assuming that the filing of the case does not present undue risk to the life of the worker or the labor rights defenders involved).

B. Recommendations for Cases of Mexican Workers Recruited to Work in Canada

- Look for a test case wherein someone has committed a violation of Article 28 to the detriment of a Mexican worker who has worked in Canada under one of the bilateral migrant labor programs between Mexico and Canada, and present a labor complaint to the competent Conciliation and Arbitration Board.

- Conduct an in-depth study, with the assistance of an expert in Mexican constitutional law, of the viability of an "indirect *amparo*" suit based on actions of Mexican federal authorities that violate Article 16 of the Constitution as well as Article 123 of the Constitution and Article 28 of the LFT.

- Should an *amparo* be theoretically viable, look for a test case and have the worker file the *amparo* with the competent federal district judge, against the STPS, the SNE and the SRE, challenging their official actions in regard to the negotiation and administration of the PTAT, and against any other governmental authority responsible for violations of the constitutional and LFT articles mentioned above.

- Should the *amparo* suit be successful:

    - Use the court decision as a tool in lobbying the Mexican government, especially the STPS and the SNE, to renegotiate the Canadian Contract with the Canadian government so that the Contract falls in line with the requirements of Article 28; and/or

    - Continue promoting similar indirect *amparo* cases based on the same legal theories, presented by other workers similarly affected, in order

to exert pressure before the courts as part of a coordinated strategy to lobby the Mexican government.

C. Strategic Recommendations

- Spur the creation of networks and projects to defend, promote, and disseminate worker's rights, especially with regard to the foregoing recommendations, among the various migrant rights organizations, lawyers, and academics in Mexico, the United States, and Canada, particularly those who have shown interest in the use of Article 28 of the LFT.