

Mexico Labor Laws and the Potential for Reform

BY DAVID T. LÓPEZ
Illustration by Gilberto Saucedo

Reforming labor laws in Mexico is high on the priority list for President Felipe Calderón, who took office on Dec. 1, after an exceedingly narrow victory over a populist candidate who persists in challenging the administration.¹ The importance given to this task likely is second only to the need throughout the country for security against the rampant violence of warring drug cartels.

Because of the impact of some half-million undocumented workers who enter the United States annually from Mexico to seek employment, with a total estimate of some 5 million living in the United States,² an appreciation of the current status and of the possible changes is of vital interest to the United States, and Texas, Mexico's major trading partner among the states.³

Worker rights in Mexico are of constitutional dimensions, guaranteed in Article 123 of the Constitution of the United States of Mexico, adopted in 1917. They were first statutorily codified in the Federal Labor Law of 1931, *Ley Federal de Trabajo*,⁴ and they provide significant protection, at least for the minority of employees in regular, registered businesses. The World Bank estimates that slightly more than half of Mexican employees labor in an extraordinarily large informal sector, which consists of thousands of small and micro enterprises.⁵

The provisions of Article 123, and the implementing statutes, are in stark contrast to the "employment at will" concept in Texas law. Article 123 provides, "Every person has the right to dignified and socially useful employment; accordingly, the creation of jobs and the social organization of labor will be promoted in accordance with the law."⁶ Specific provisions include a maximum of eight hours of work in the day, and seven hours at night; double time for overtime (triple on holidays), not to exceed three hours per day, for no more than three consecutive days; a minimum wage that shall be sufficient to satisfy the usual needs of a head of a family, including the education of children; profit sharing; equal pay regardless of sex or nationality; vocational training; safety and health; the right to organize and strike; conflict resolution through conciliation and arbitration; and the right to reinstatement or compensation for an unjustified firing, among others.

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A shift split between day and night is limited to 7 1/2 hours. An employee must have a free day for every six days of service. A tripartite commission on minimum wages, comprised of representatives of the government, industry, and workers, *Comisión Nacional de los Salarios Mínimos*, sets minimum wages for distinct geographic zones. The minimum wage is low by United States standards, amounting to about \$100 a month, but in reality it has little direct impact on the workers to which it applies, employees in the formal sector, who earn above the minimum. There is, however, an indirect impact, as wages in the formal sector tend to cluster around multiples of the minimum wage.⁷

In addition to minimum wage and overtime, an employee is entitled to profit sharing, housing, and retirement contributions. Profit sharing is about 10 percent of net profits. In lieu of providing housing, an employer may pay 5 percent of the employee's salary to INFONAVIT, *Instituto Nacional Para el Fomento a la Vivienda Para Trabajadores*, a federal agency that provides loans to purchase housing. Another 2 percent is paid into SAR, a national retirement savings account, similar to our Social Security; these payments are made solely by the employer. Payments to Social Security, which cover medical and hospital care as well as indemnity for industrial accidents, are shared by the employer and the employee on set scales. Required benefits total approximately 29 percent of the employee's base salary.

Women may not be assigned to difficult or unhealthy work during pregnancy, and they are entitled to six weeks paid maternity leave before childbirth, and an additional six weeks after the birth. During lactation they are entitled to two half-hour breaks, with pay, to feed the child. In practice, many women choose to work a day shorter by one hour.

A worker discharged without just cause or for union activity has the option to seek reinstatement or an indemnity consisting of three months' pay plus 20 days' pay for each full year of employment. If the employee leaves voluntarily, he or she is entitled to a proportionate share of vacation time and year-end bonus.

An employer who hires a worker in Mexico to work outside the country is subject to the same constitutional provisions and additionally must obtain certification of the employment contract by the mayor of the city in which the worker is hired and must register the contract with the Ministry of Foreign Affairs. The employer is responsible for travel expenses to return the worker to Mexico. Preference must be given to Mexican nationals for employment within the country.

An employer must provide an organized training program for all workers. The program, which must be approved by the Ministry of Labor, must include a training committee, specific training plans, and the issuance of certification to workers completing the program. There is no requirement, however, that workers undertake or complete the training program.

The employment relationship in Mexico is considered to be a contract, whether or not reduced to writing. The contract can be for a fixed term, for a specified job, or for an unspecified term; either party may rescind the contract. An employer may rescind the contract of employment if the worker engages in violent acts, is intoxicated at work, has more than three unexcused absences in a three-month period, intentionally damages equipment or machinery, and other similar reasons. An employer must give formal notice of rescission, even if the worker has abandoned the job. Otherwise, the employer risks an action of unlawful discharge. An employee seeking rescission can demand payment of the three-months indemnity. In an action for unlawful discharge, the worker is entitled to back pay from the date of discharge until the judgment is satisfied.

The right of employees to organize unions is protected, and an employer must recognize a union once 20 percent of the employees have joined. Although the law provides an employee may not be required to join or not join a union, closed shop clauses are allowed in collective bargaining agreements, limiting employment, after such a clause is signed, to union members. Collective bargaining agreements may be for a definite or indefinite period of time, but their general provisions are subject to review every two years, and wage provisions, annually.

Under the long period of government control by the PRI, *Partido Revolucionario Institucional*, some unions and the national labor central were closely aligned with the government, exerting considerable influence over labor and economic policies. Conversely, the government wielded substantial influence over trade union policies. The Minister of Labor once commented to the author that in the previous year, nearly 98 percent of labor strikes in the nation had been resolved "with the beneficent intervention of the government."

President Calderón's predecessor, Vicente Fox, who formerly headed Coca-Cola in Mexico, sought significant labor law reform through a comprehensive bill referred to as the Abascal Project, named for the Minister of Labor at the time. The proposal, which would have limited organizing rights and the influence of major unions, was not enacted. President Fox

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alternatively sought, and got approved, a series of non-contributory governmental benefits aimed at workers in the informal sector, including expansion of Social Security coverage, an anti-poverty measure, *Oportunidades*, and a healthcare program, *Seguro Popular*, for individuals outside the Social Security system.

The challenge facing the new administration is to review and possibly reform the labor laws so that organizing and collective bargaining rights are protected without effective monopoly power to major unions or business conglomerates. The unintended consequences of encouraging individuals to remain outside the formal sector because of new benefits needs to be addressed in connection with the application of existing constitutional and statutory rights to encourage increases in regular employment and productivity. A number of factors suggest likelihood of effective reform. President Calderón has extensive political and legislative experience and has extended an invitation of cooperation to the two other major parties. He has appointed Javier Lozano, a lawyer and law professor with extensive public service experience and political skills, as minister of labor, *Secretario del Trabajo y Previsión Social*. Labor organizations at the local and national levels are still in a transition period related to the change in the national political structure. Pressure on the governments of the United States and Mexico to deal with the influx of undocumented workers could result in agreements through, or independent of, the North American Free Trade Agreement (NAFTA), such as attention to U.S. agricultural subsidies and the need for infrastructural improvements to develop southern Mexico, which remains largely agricultural. Increased opportunities and conditions for Mexican workers also will benefit our country and state.

Notes

1. "Mexico Labor News & Analysis," *UE International*, Vol. 11, No. 10 (October 2006).
2. Lowel & Suro, "How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks," (Pew Hispanic Center, 2002).
3. Trade between Texas and Mexico is estimated to total about \$56 billion in 2006, according to the Texas Center for Border Economic and Enterprise Development at Texas A&M University.
4. Major amendments were made in 1970 and 1980.
5. See "The Joy of Informality," *The Economist* (Nov. 16, 2006).
6. Translation is unofficial, by the author.
7. Fairris, Popli and Zepeda, "Minimum Wages and the Wage Structure in Mexico," Paper presented to the Latin American Studies Association (2001).



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What is the strangest moment you have encountered working with foreign clients or businesses?

One of the stranger moments was flying in to meet with a client at their headquarters in one Latin American country and being picked up in a bulletproof vehicle complete with gun portholes. I had to straddle several weapons on the floor in the backseat on the way to the office. Upon arrival at the headquarters, we basically drove into a bunker-like garage.

Another strange experience involved visiting a Mexican jail and working with Mexican counsel to release a U.S. citizen who had accidentally brought a weapon into Mexico while merely crossing the border during a stock show in El Paso to see the Mexican side of the border. Mexican law on the possession of weapons or ammunition is basically *res ipsa loquitur* with no exceptions. A Mexican jail allows you to bring in certain items for personal comfort, including food. Let's just say we were more of a full service firm than ever during this case.

How do U.S. and Mexican politics/policies affect your practice?

In some cases, we have to work on immigration alternatives to help foreign nationals who have been placed in disfavor due to changing regimes and they must attempt to find work outside of Mexico. In addition, potential investors or businesses may make decisions not to go into markets in certain countries because of legal and policy uncertainties. Changing Mexican politics and/or practices can be very costly to companies already in Mexico.

What are some of the complexities involved with representing a client in a foreign country?

In any multi-lateral or bi-lateral agreement between or among parties of different countries, one of the starting points is always choice of law, venue, jurisdiction, and language of the governing contract. In representing a client trying to engage in a transaction in a foreign country, the lawyer must be able to find competent local legal counsel.

What inspires you in your area of law?

The differences in cultures, laws, languages, and judicial systems makes the area all the more challenging and interesting, especially in a time of increasing globalization. In my specific specialty of immigration, meeting the challenges of moving business people to the countries in which they are needed requires a broad knowledge area which includes tax, corporate, patent protection, investment, and currency restrictions.

Are there some common mistakes U.S. lawyers make when dealing with Mexican clients/businesses?

Some lawyers forget that when they cross the Rio Grande, they are indeed dealing with a totally sovereign and different culture and legal system. To still act like a gringo on foreign soil does not place the U.S. lawyer on the best footing. In addition, U.S. counsel must be careful to understand why certain suggested typical legal options in the United States would not make sense to a Mexican national used to dealing with the Mexican way of doing business. Bridging that gap and understanding realistic parameters and expectations is one of the greatest challenges.