

## Labor Aspects in North America Free Trade Agreement (NAFTA) Renegotiation

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Few issues were more dramatically debated during the 2016 U.S. election than the country's participation in trade agreements, particularly in the North American Free Trade Agreement (NAFTA) and the Trans Pacific Partnership (TPP). Since the election, the U.S. has withdrawn from TPP and is seeking renegotiation of NAFTA.

In this article, we review the current status of NAFTA discussions and identify some oft-overlooked (at least in the U.S.) impacts of these trade agreement negotiations on Mexican labor law.

### NAFTA and Associated Labor Issues

NAFTA took effect on January 1, 1994, with the goal of encouraging economic integration among the U.S., Mexico, and Canada. It was expected to increase economic prosperity for all three countries.

Over the years, NAFTA has been the subject of significant scrutiny, most notably by President Donald Trump, due to the decline in U.S. jobs. Trump spent considerable time during his campaign promising to renegotiate any trade deals that he deemed to be "bad" or unfair, which he believes caused the loss of American jobs. According to the President, NAFTA is one of those deals. He has blamed NAFTA repeatedly for the economic "carnage" he claims to have inherited and the offshoring of hundreds of thousands of U.S. manufacturing jobs.

During the original NAFTA negotiations, there was strong resistance from the trade union federation AFL-CIO, as well as from several members of Congress. They were concerned that U.S. jobs would be lost to the Mexican labor force because of the lower salaries paid in Mexico, the control of trade unions by the Mexican government, and the prevalence of "protection labor contracts." In fact, Ross Perot, an independent presidential candidate at the time, said NAFTA would have the effect of a "vacuum cleaner," sucking U.S. jobs to Mexico with cheaper labor costs. The Trump Administration intends to level the playing field in an effort to bring jobs back to the U.S.

On July 17, 2017, the Trump Administration released a summary of objectives for the NAFTA renegotiation. This summary was updated in November 2017. Included in the updated summary is a brief outline of potential U.S. negotiating objectives for labor. The summary emphasizes moving labor provisions into the core of the renegotiated agreement, rather than staying in a side agreement.

According to the Office of the U.S. Trade Representative, "the negotiating objectives also include adding a digital economy chapter and incorporating and strengthening labor and environment obligations that are currently in NAFTA side agreements." The Office continued, "Additionally, among other objectives, the Administration will work to eliminate unfair subsidies, market-distorting practices by state-owned enterprises, and burdensome restrictions on intellectual property." To this end, following are some of the primary labor objectives to be included in NAFTA:

- Provide access to fair, equitable, and transparent administrative and judicial proceedings;
- Require NAFTA countries to have laws governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;
- Ensure that these labor obligations are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the agreement;
- Require that NAFTA countries take initiatives to prohibit trade in goods produced by forced labor, regardless of whether the source country is a NAFTA country; and
- Establish a means for stakeholder participation, including through public advisory committees, as well as a process for the public to raise concerns directly with NAFTA governments if they believe a NAFTA country is not meeting its labor commitments.

### TPP and Its Impact on Mexican Labor Law

In the second term of the Obama Administration, 12 countries, including the U.S. and Mexico, began

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negotiations to form the TPP. The goal of the TPP was to bind Pacific nations closer through lower tariffs, while also serving as a buttress against China's growing regional influence. According to the Obama Administration, the agreement aimed to "promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in the signatories' countries; and promote transparency, good governance, and enhanced labor and environmental protections." Due to concerns of the Obama Administration, the treaty included a chapter establishing the adoption of labor rights in the laws of the signatory countries, especially concerning job conditions, minimum wages, right of association, collective bargaining rights, and access to an independent labor justice. Somewhat ironically, the U.S. goals in NAFTA renegotiations arguably parallel the objectives of the now-rejected TPP's freedom of association, right to collective bargaining, minimum living wages, and a fair and transparent labor justice.

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The Mexican Government had a strong interest in being part of the TPP. This was the principal motive to amend the Mexican Constitution to replace the Conciliation and Arbitration Boards with Labor Courts that would be responsive to the Federal Judicial Branch on federal jurisdiction cases and to the State Judicial Authorities in local matters.

As part of the Mexican constitutional amendment, Mexican labor laws also are set to undergo a reformation process. Main objectives of this reform are to:

- Enforce more accountability and transparency of union actions;
- Allow temporary, part-time, and trial periods for workers; and
- Restrict striking rights.

The reform also provides some clarity to companies doing business in Mexico. Accordingly, unions' right to strike now requires the demonstration by the trade union of its actual representation of the workers involved (*i.e.*, that it is the bargaining agent for such workers), thus avoiding extortionate calls to strike. In addition, the Mexican constitutional amendment provides for creation of a decentralized public organization with management autonomy responsible for a conciliatory process prior to any litigation, as well as trade unions' certification and registry of collective bargaining agreements. This constitutional amendment subjects these two administrative procedures to the control and oversight of the Mexican federal jurisdiction. Also, reforms to the Mexican Federal Labor Law have been submitted to the Mexican Congress by the Mexican President. These reforms guarantee freedom of association and the right to collective bargaining free from employer's interference in order to eliminate the practice of "protection labor contracts" executed without workers' knowledge and consent. Although there are mixed reviews on the impact the "modernized" reform has had on the labor market, the intent is to grow the Mexican middle class by increasing manufacturing production.

Manufacturers, whether based in the U.S. or Mexico, should be prepared for a significant change in the labor paradigms and practices currently in Mexico. They should assume a more proactive stance toward their Mexican workers and their unions, in order to be able to manage a smooth and controlled transition to a system of independent and fair collective negotiations.

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Trump has met with Mexican President Enrique Peña Nieto and Canadian Prime Minister Justin Trudeau many times concerning NAFTA renegotiations. After the meetings held in Virginia (on October 11-17) ended at an impasse on the basic notion of what a revised version of NAFTA should achieve, the parties resumed discussions in Mexico City in November. Canada and Mexico stand by the idea of free trade; the U.S. wants to make it fairer, saying that its partners to the north and to the south are benefiting more than the U.S. through access to its much bigger market. The discussions are scheduled to resume in January 2018.

It is evident the Trump Administration's main priority in renegotiating NAFTA is eliminating the more than \$60 billion annual trade deficit with Mexico and encouraging the relocation of American industry from Mexico back to the U.S. It is too early to know whether this will be successful. What is clear, however, is that trade agreements are affecting labor law in Mexico.

Jackson Lewis and its fellow Mexican L&E Global member De La Vega & Martinez Rojas (attorneys Oscar De la Vega and Eduardo Arrocha) will keep you informed on significant developments concerning the NAFTA renegotiations as they progress. In the interim, please contact Jackson Lewis with any questions.

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