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Potential Solutions to the Problem of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico

Michelle Smith†

I. INTRODUCTION

Export processing plants, or “maquiladoras,” which operate in the Northern border cities of Mexico, practice rampant pregnancy discrimination. The discriminatory practices range from refusing to hire pregnant women to refusing pregnant women appropriate breaks and time off for pregnancy-related illnesses and complications, resulting in miscarriages at work. Although workers in other countries encounter similar abuses, the fact that U.S. companies move to Mexico and exploit workers in the most vulnerable situations in order to reduce operating costs, seems to elevate the violation to an even more egregious level.  

† Attorney, National Labor Relations Board (“NLRB”), Region 32; J.D., Golden Gate University School of Law. This article does not reflect the views of the NLRB. Thanks to Professors Maria Ontiveros and Maria Blanco, and to the National Labor Committee for their inspiration to write this paper. Also thanks to Aimee Durfee, Rachel Gibson, and Megan Weinstein at the Berkeley Women's Law Journal for their editorial support.


One way to stop U.S. employers from continuing to violate workers' rights is to assert legal claims under both U.S. and Mexican law. Although Title VII does not prevent U.S. employers from discriminating against non-U.S. citizens employed abroad, some maquiladora workers may be U.S. citizens and thus, may bring claims under Title VII. In addition to Title VII, U.S. state and federal tort laws provide a basis for potential legal claims. Further, Mexican labor laws prohibit many of the discriminatory practices, and workers can file complaints with Mexican administrative agencies or in Mexican civil court. Since Mexican administrative agencies responsible for enforcing workers' rights are seldom effective, filing administrative claims probably will not provide recourse for the maquiladora workers unless Mexico starts enforcing its labor laws. Nonetheless, the administrative claims should be filed because they may be prerequisite to filing a claim in U.S. courts or a submission under the North American Agreement on Labor Cooperation ("NAALC").

NAALC, which is the labor side agreement to the North American Free Trade Agreement ("NAFTA"), provides yet another mechanism for confronting pregnancy discrimination. The U.S. National Administrative Office ("U.S. NAO") established under NAALC is empowered to investigate Mexico's failure to enforce Mexican labor laws. After its investigation, the U.S. NAO issues a public report of its findings and may request consultations with Mexico's Secretary of Labor to discuss the findings. The final stage in the NAALC process allows for monetary sanctions and suspension of benefits when member countries exhibit persistent patterns of failure to enforce certain labor laws.

Lastly, labor rights advocates working together to support maquiladora workers' rights provide hope for improving the situation. Unions and other coalitions supporting the maquiladora workers increase public awareness, educate employees, and create public pressure on the employers. Efforts by maquiladora support groups have resulted in some employers discontinuing their discriminatory practices.

This paper is broken down into three sections. Section II outlines the problem of pregnancy discrimination in U.S.-operated maquiladoras in Mexico. Section III discusses potential legal claims against U.S. employers under U.S. and Mexican law for their discriminatory practices in Mexico. Section IV discusses other forms of resolution, and describes in particular a

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3. See infra Part III.B.
4. See infra Part IV.A.
5. See id.
6. See id.
7. See id.
8. See infra Part IV.B.
recent submission to the U.S. NAO alleging pregnancy discrimination in Mexico's maquiladora sector.9

II. THE PROBLEM OF PREGNANCY DISCRIMINATION BY U.S. EMPLOYERS OPERATING MAQUILADORAS IN MEXICO

In the 1960s, U.S.-based companies started relocating production to northern Mexico to take advantage of the Border Industrialization Program ("BIP" or "maquiladora program").10 The BIP allows U.S. companies to import partially-made goods into Mexico duty-free, finish them in Mexico with Mexican labor, and then export them to the United States without customary tariffs.11 Mexico’s low wages and its abundance of available workers further entice relocation to the country.12 In addition to taking advantage of abysmal wages, maquiladoras prefer female workers because company managers claim that women are less likely than men to complain or to organize in protest of deplorable working conditions.13 In fact, there are approximately 426,112 female production workers in the maquiladoras, comprising fifty-eight percent of all maquiladora production workers.14

Mexican women working in maquiladoras routinely suffer pregnancy discrimination, which takes several forms. As in most Mexican work sectors, job applications ask whether the applicant is pregnant.15 Maquiladoras generally do not hire those women who indicate that they are pregnant.16 Employers also require applicants to undergo pregnancy testing as a condition of employment and then deny them work if they

9. In this paper I focus on the legal and extralegal labor problems resulting from the discriminatory practices. I realize that human rights issues are also involved. For more information on these issues, see, for example, Laura Ho et al., (Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry, 31 HARV. C.R.-C.L. L. REV. 383 (1996).
13. See Catherine T. Barbieri, Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers in Argentina and Chile, 17 COMPL. LAB. LAW J. 526, 559 (1996); see also Tiano, supra note 10 (describing the social background of women that work in maquiladoras).
14. The actual percentage of female workers in the industry may be higher. Mexico only provided gender statistics for production workers. Production workers constitute over 738,000 of the 908,000 workers in the maquiladora industry. See NAO REPORT, supra note 1, at 13 (citing Instituto Nacional de Estadística, Geografía e Informática, Industria Maquiladora de Exportación, Mexico, (Sept. 1997) at 13).
15. See HUMAN RIGHTS WATCH, supra note 2, at 14–15.
16. See id. at 15; NAO REPORT, supra note 1, at 36–37.
are pregnant. As part of the pregnancy screening, maquiladoras ask the applicant invasive questions such as when she had her last menstruation, what birth control methods she uses, how many children she has, and the extent of her sexual activity. Thereafter, women are commonly forced to take pregnancy tests every three months. If a woman becomes pregnant after gaining employment at a maquiladora, she may be harassed, compelled to work more hours without breaks, assigned more strenuous work, or she may be forced to resign because of her pregnancy. For example, when supervisors discover that one of their workers is pregnant, standard practice is to change the woman’s working conditions, sometimes forcing her to lift heavy boxes, or moving her into a smaller, less ventilated room so she becomes nauseous from inhaling chemical fumes. By placing the woman in a more hazardous environment, the managers hope to force her to resign so they will not have to pay maternity leave.

In 1995, Human Rights Watch interviewed women’s rights activists, maquiladora supervisors and doctors, labor rights advocates, Mexican government officials, community organizers, and maquiladora workers who were victims or witnesses of pregnancy discrimination in five Mexican cities. Human Rights Watch detailed the results of its interviews, including the following account of one worker:

A pregnant woman requested, and was denied, an accommodation for seated work. A month later, the supervisor refused to reassign the woman, from packing hangers into boxes and putting boxes on a conveyor belt, to a less strenuous position. She was responsible for packing about 75 to 90 boxes a shift. That same day the woman started bleeding soon after her shift began. The woman’s husband, who also worked at the maquiladora, asked the supervisor if he could take his wife to the hospital. The supervisor said no. When the woman left the plant at 6:30 a.m., when her shift ended, she went to the doctor but had hemorrhaged so much that she lost the baby.

The above story is not uncommon. In another case at the same plant, Plásticos Bajacal in Tijuana, a woman was similarly forced to work until she had a miscarriage on the assembly line in front of all her coworkers.

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17. Human Rights Watch investigations revealed that pregnancy tests are often conducted at the workplace by doctors hired by the employer for the specific purpose of administering pregnancy tests on applicants. See Human Rights Watch, supra note 2, at 15.
20. See id.
21. See id.
24. Id. The mere denial of seated work and scheduling during the night shift (any shift lasting seven hours between 8:00 p.m. and 6:00 a.m.) violates Title 5 of the Mexican Labor Law. See Ley Federal del Trabajo [L.F.T.] art. 166, 167, 172.
In addition to high miscarriage rates, working conditions have led to astronomically high rates of anencephaly—a medical disorder which results in babies born without a brain—among maquiladora workers.\(^2\) Anencephaly is associated with a number of industrial solvents that women are exposed to from working directly with the chemicals and from living in areas where lead and heavy-metal deposit measurements show concentrations 40,000 times above the safe levels.\(^2\) Both company and government officials claim that the higher rates of anencephaly among maquiladora workers are a result of the mothers' folic acid deficiency, which causes anencephalic births.\(^2\) However, the women's diets consist mainly of corn and beans, which are high in folic acid.\(^3\)

With the help of the Support Committee for Maquiladora Workers ("SCMW"), workers began documenting health and safety violations in their plants, as well as the health repercussions of the violations. This effort began in the summer of 1996, when SCMW began a Border Occupational Health Documentation Project that involved over 160 workers from 70 maquiladoras.\(^1\) In one of the worst cases, in a Tabuchi circuit-board factory that employs about 200 women, workers documented that during one three-month period in 1996, four employees had anencephalic births, and between eight and ten women suffered miscarriages each month.\(^2\) An earlier door-to-door survey, among the 2,000 residents of one town situated in a canyon below Tijuana's largest industrial park, found nine anencephalic births in 1993 and thirteen the following year.\(^3\)

In an attempt to provide an alternative for maquiladora workers, the Border Projects Foundation in Tijuana is working with Planned Parenthood to provide contraceptives in workers' communities as well as within the maquiladoras themselves.\(^4\) The Foundation has set up six neighborhood clinics, and has started a center for performing sterilization surger-

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27. *See* Tijuana Maquilas: Televisions, Toxics and Poverty, *Working Together: Lab. Rep. on Am.* (Lab. Project, Resource Center Am., Minneapolis, Minn.), Jan.–Feb. 1997, at 3 [hereinafter *Tijuana Maquilas*]. In a Japanese-owned maquiladora called Tocabi, a female worker was placed in a soldering room with no ventilation when managers discovered she was pregnant. Although the managers figured that the worker would quit because she would not be able to stand the fumes, the woman needed money and was determined to keep working as long as she could. The baby was born with anencephaly. *See* Shields, *supra* note 22, at 22.
30. *See* id.
32. *See* id. Although the factory is a Japanese-owned company, it provides an indication of what may be happening in the U.S.-owned companies.
34. *See* Shields, *supra* note 22, at 22.
In 1995, Planned Parenthood and the Foundation were working on establishing fifty additional maquiladora clinics.\textsuperscript{36} The problem with the maquiladora clinics is that they are staffed by doctors or nurses employed by the maquiladora. As a result, women may be coerced to take birth control pills or agree to a sterilization.\textsuperscript{37} Females working in Korean companies in Honduras give gruesome accounts of how their employers require them to take birth control pills as a condition of employment.\textsuperscript{38} Heaps of garbage outside the Korean-owned factories in Honduras reveal hundreds of empty birth control pill containers.\textsuperscript{39} In addition, women may fear retaliation or be misinformed by employers about the nature of the treatment provided. For example, in the video entitled "When Children Do the Work," Charles Kernaghan of the National Labor Committee describes how Korean companies in Honduras tell women that shots to abort babies are given to prevent malaria.\textsuperscript{40} Given the egregious nature of the U.S. maquiladoras treatment of pregnant women to date, it takes no stretch of the imagination to envision the potential for abuse in the maquiladora clinics in Mexico.

In summary, the maquiladoras commit several legally objectionable practices: pregnancy-based hiring, job assignments, termination, and forced resignations; violation of health and safety laws; and violation of privacy interests. Why do companies engage in such practices? Possibly to keep operating costs low. Mexican law guarantees financial and medical support to pregnant workers through the social security system.\textsuperscript{41} However, when workers have been employed for less than thirty weeks, and therefore do not qualify for social security benefits, Mexican law requires employers to provide pregnant workers with six weeks paid leave before delivery and six weeks paid leave after delivery.\textsuperscript{42} Mexican law also entitles new mothers to up to sixty additional days of leave with fifty percent of their salary if needed.\textsuperscript{43} Thereafter, mothers may continue on unpaid leave for up to one year after the birth of their child and subsequently are entitled to return to their positions.\textsuperscript{44} Further, maternity leave periods are included in seniority computations, and under Mexican law, employers

\textsuperscript{35} See id.
\textsuperscript{36} See id.
\textsuperscript{37} See id.
\textsuperscript{38} See Videotape: When Children Do the Work (The Working Group 1996) (on file with author). Though this example refers to Korean companies in Honduras, women working in the U.S.-operated maquiladoras are at a high risk of suffering similar coercion considering their desperate situations and the employers' continuing disregard for their health and freedom of choice to have children while working.
\textsuperscript{39} See id.
\textsuperscript{40} See id.
\textsuperscript{41} See NAO REPORT, supra note 1, at 2.
\textsuperscript{42} See L.F.T. art. 170; see also NAO REPORT, supra note 1, at 3.
\textsuperscript{43} See L.F.T. art. 170.
\textsuperscript{44} See id.
must pay a severance premium based on seniority when the work relationship ends.\textsuperscript{45}

How do U.S. maquiladora employers get away with pregnancy discrimination? The Mexican government has economic incentives to avoid regulating the conduct of maquiladoras, given the number of people the maquiladora industry employs and the amount of foreign currency earnings it produces. Maquiladoras account for the U.S. equivalent of over $29 billion annually in export earnings for Mexico and employ approximately 908,000 Mexican workers.\textsuperscript{46} These economic incentives, coupled with political corruption within the enforcement agencies, result in Mexico’s consistent failure to enforce the labor laws.

The maquiladora workers’ economic desperation and lack of education further exacerbate the problem. Workers average about ninety-eight cents an hour in wages and benefits; they live in cardboard hovels with no running water or sanitation facilities; and they drink, and use for recreation, water from rivers where raw sewage and industrial toxins are dumped.\textsuperscript{47} Many of the women have not finished elementary school and have little work experience outside the manufacturing sector.\textsuperscript{48} Consequently, these women have only one other alternative to working in the maquiladoras—working in domestic service, which pays even less than the maquiladoras and provides no health insurance or social security.\textsuperscript{49} As a result, many of the women working in maquiladoras have expressed unwillingness to challenge the discriminatory practices of their employers.\textsuperscript{50}

In addition, they consider filing a claim against their employers pointless because of the government agencies’ ineffective enforcement of Mexican law.\textsuperscript{51} For those women who do consider filing a claim against their employer, many do not know where to go for help.\textsuperscript{52}

Despite their general reluctance to challenge the pervasive discrimination, maquiladora workers have several options: filing legal claims

\textsuperscript{45.} See id. Also, once an employee accrues 20 years seniority, that employee can only be dismissed for egregious or recurrent misconduct. See L.F.T. art. 161; DR. NESTOR DE BUEN LOZANO & LICENCIADO CARLOS E. BUEN UNNA, A PRIMER ON MEXICAN LABOR LAW 10 (Lynn Martin & Shellyn G. McCaffrey, eds., trans., 1991).

\textsuperscript{46.} See Compa, supra note 2, at 2; NAO REPORT, supra note 1, at 13.

\textsuperscript{47.} See Janine Schollnick Benton, Extraterritorial Application of the Americans with Disabilities Act Under the North American Free Trade Agreement, 2 GEO. MASON INDEP. L. REV. 209, 219–20 (1993) (describing the maquiladora workers’ standard of living); see also Tijuana Maquilas, supra note 27, at 3 (describing the maquiladora sectors where “most of the workers live in shantytown colonias without electricity, running water, sewers or paved roads”).

\textsuperscript{48.} See HUMAN RIGHTS WATCH, supra note 2, at 14. Based on data from 1990 on Mexican women age 25 and above, 21.4% had no schooling and 29% had not completed elementary school. See UNESCO, STATISTICAL YEARBOOK 1994 1–43 (1994).

\textsuperscript{49.} See HUMAN RIGHTS WATCH, supra note 2, at 9.

\textsuperscript{50.} See id.

\textsuperscript{51.} See id.

\textsuperscript{52.} See id.
against employers in U.S. or Mexican courts, filing submissions with the U.S. NAO under NAALC, and working together with support groups.

III. POTENTIAL LEGAL CLAIMS AGAINST U.S. EMPLOYERS

A. Under U.S. Law

1. Title VII

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination based on pregnancy. However, Title VII clearly excludes aliens employed by U.S. employers in foreign countries from coverage. By writing the “alien exemption” into Title VII, the legislature intended “to remove conflicts of law which might otherwise exist between the U.S. and a foreign nation in the employment of aliens outside the U.S. by an American enterprise.” Thus, non-U.S. citizen maquiladora workers in Mexico have no cause of action against a U.S. employer under Title VII.

However unlikely it may seem, it is possible that some of the women being discriminated against are U.S. citizens. In 1991, Congress amended

53. NAACL established the Commission for Labor Cooperation comprised of a ministerial Council and Secretariat, and assisted by the NAO of each Party (United States, Canada, and Mexico). The NAOs are established at the federal government level of each member country. Each NAO is a strictly domestic agency, housed in each country’s ministry. The U.S. NAO, housed in the U.S. Department of Labor, investigates alleged labor law violations in Mexico and Canada, whereas the Mexican NAO investigates violations in the United States and Canada. See Compa, supra note 12, at 352; see also infra Part IV.A.

54. This is not an exclusive list of viable claims, but is meant to provide examples of potential claims. I recommend further research before filing claims under any of the following suggested legal theories.


56. See 42 U.S.C. § 2000e-1(a). Similarly, the Fair Employment and Housing Act (“FEHA”), Cal. Gov’t. Code §§ 12900–12996 (West 1992), the California anti-discrimination statute prohibiting pregnancy discrimination, may not apply to non-citizens or non-residents. Recently, a California Court of Appeals held that the FEHA does not apply to non-residents where the tortious conduct, in this case sexual harassment, took place outside the state’s territorial boundaries. See Campbell v. Arco Marine, Inc., 50 Cal. Rptr. 2d 626 (1996). While the court found that the California statute did not explicitly impose a residency requirement on the employer or person aggrieved, the court relied on reasoning in EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), in concluding that the California “legislature did not intend to interfere with the employment relationship between residents of other states being performed wholly in other states.” Campbell, 50 Cal. Rptr. 2d at 632. But see Solidarity Campaign Key to Maquila Workers’ Victory, WORKING TOGETHER: [L.A. REP. ON AM.] (Lab. Project, Resource Center Am., Minneapolis, Minn.), Nov.–Dec. 1995, at 1 [hereinafter Solidarity Campaign] (discussing Aguirre v. American United Global, a case in which a Los Angeles Superior Court judge ruled that a lawsuit by Tijuana Maquiladora workers against a U.S.-based company alleging sexual harassment and violations of U.S. tort and Mexican labor laws could be heard).

57. EEOC v. Arabian Am. Oil Co., 499 U.S. at 269 (quoting H.R. REP. No. 570, at 4 (1963)).

58. A child born in a country that is considered a “possession” of the United States (i.e., Puerto Rico, Guam, etc.), to parents one or both of whom are U.S. citizens, is generally considered a U.S. citizen at birth (subject to the length of time the parent resided in the United States). See 8 U.S.C. § 1401 (1970). I found no Title VII claims brought by maquiladora workers claiming to be U.S. citizens. It is probable that most maquiladora workers are citizens of Mexico or other Central American countries. Support groups working with women in the maquiladora regions might con-
the definition of "employee" under Title VII to include U.S. citizens employed by U.S. companies in foreign countries.⁵⁹

Even assuming that some of the women are U.S. citizens, some of the employers' practices may not be prohibited because Title VII exempts U.S. employers operating in foreign countries from compliance, when compliance would cause the employer to violate the law of the foreign country where the workplace is located.⁶⁰ There is at least one area where compliance with Title VII would conflict with Mexican law. Under Title VII, U.S. employers cannot apply protective rules differently to women than they do to men,⁶¹ whereas in Mexico, the Constitution and L.F.T. prohibit a pregnant woman from working jobs that could be hazardous to her health or to the health of her fetus.⁶² For example, pregnant women in Mexico are prohibited from lifting heavy objects, working overtime, working the nightshift, working with hazardous materials, or otherwise performing any work which could put them or their fetuses at risk.⁶³ Thus, while protective rules for pregnant women are generally prohibited in the United States, they are mandatory in Mexico.

Despite the limitations on Title VII enforcement that these differences engender, maquiladora workers who are U.S. citizens can bring Title VII claims against U.S. employers for hiring contingent on negative pregnancy tests, failing to accommodate pregnant women, and terminating workers because of pregnancy since compliance would not conflict with Mexican law.

2. Tort claims

Mexican workers can sue U.S.-based companies in U.S. federal or state courts for torts committed in Mexico. As recently as 1993, the

⁶¹. Recently, the U.S. Supreme Court struck down a fetal protection policy instituted by an employer that excluded women who could not medically document their infertility from working in a battery manufacturing plant. See International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187 (1991). Justice Blackmun, writing for the majority in Johnson, framed the issue as whether the employer could exclude a fertile female employee from certain jobs because of the employer's concern for the health of a fetus the woman might conceive. See id. at 190–92. Despite evidence about the effect of lead exposure on the male reproductive system, the employer chose only to apply exclusionary policies to fertile females. See id. at 192. Thus, all women were treated as potentially pregnant, and no men were treated as at risk. The Court determined that such an exclusion violated the Pregnancy Discrimination Act and constituted sex discrimination under Title VII. It thus found that the employer's fetal protection policy facially discriminated against women on the basis of sex and potential for childbearing. See id. at 197.
⁶². See L.F.T. art. 170.
⁶³. See id.
⁶⁴. Jurisdiction for federal tort claims may be based on diversity of citizenship or questions of federal law. Mexican maquiladora workers suing U.S.-based companies will have no problem meeting the diversity of citizenship requirement so long as the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332 (1998). Maquiladora workers might also gain access to federal
Ninth Circuit permitted a California resident to sue her employer for sexual harassment that occurred during her employ at a French resort. In addition, a Los Angeles Superior Court recently entertained a lawsuit brought by a group of Tijuana maquiladora workers against American United Global ("American"), doing business as National O-Ring. This was the first suit where a U.S. court allowed Mexican workers to sue a transnational company for sexual harassment, violations of Mexican labor laws, and violations of California state tort laws. The complaint against American alleged six causes of action: 1) payment of wages due under Mexican law; 2) sexual harassment; 3) tortious discharge in contravention of public policy; 4) intentional infliction of emotional distress; 5) negligent infliction of emotional distress; and 6) violations of California Labor Code section 970 (on behalf of a California resident and supervisor of the Tijuana plant who was fired for his refusal to follow the CEO’s order to fire women).

The Mexican victims of pregnancy discrimination have several potential U.S. tort law claims against the U.S. companies operating in Mexico: assault, battery, breach of the covenant of good faith and fair dealing, false imprisonment, intentional and negligent infliction of emotional distress, invasion of privacy based on a private employer’s intrusion upon an employee’s affairs or seclusion, loss of consortium (spouse’s claim), wrongful discharge in violation of public policy, and wrongful death (of fetus).
The suggested tort claims raise several legal issues. First, an issue may arise regarding whether the employer is a U.S. or Mexican company. One of the key issues in Aguirre v. American United Global was whether the employer was Mexican or American. In 1989, American opened a plant in Tijuana called Exportadora de Mano de Obra and was listed in Mexican legal documents as a Mexican company. Relying on traditional corporate law principles, the plaintiffs asked the court to determine that the Tijuana company was an extension of the U.S. company, and to hold the U.S. company liable under U.S. law for acts that occurred in Tijuana. The plaintiffs argued that the U.S. company, from its corporate headquarters in Downey, California, entirely controlled the Tijuana subsidiary's operations, from employee hiring, firing, salaries, and personnel policies to production activity. The Tijuana plant did not perform any work for any other customers or companies and never billed American for any work or services. In addition, the U.S.-based company kept all profits generated at the Tijuana plant.

Second, jurisdictional issues may arise. Two issues that may come up under jurisdictional challenges are whether the court has personal jurisdiction over the defendant and whether the U.S. courts are an inconvenient forum (forum non conveniens). Personal jurisdiction should not be a problem if the workers bring claims in the states where the companies are incorporated or have principal places of business. For example, in Aguirre, the Court found that it had personal jurisdiction over American, perhaps because the company's corporate headquarters were located in Downey, California.

A challenge to a worker's claim based on forum non conveniens may be more difficult to overcome, especially if the company is willing to submit to Mexican courts. For example, in Avila v. Chamberlain, the Arizona Court of Appeals upheld the trial court's sua sponte application of forum non conveniens when the U.S. defendant had stipulated to jurisdiction in the Mexican court where the Mexican plaintiffs had already filed their complaint. The Avila Court suggested, however, that Mexican plaintiffs' financial inability to file suit in Mexico, because of state bar regulations disapproving of contingency fee arrangements, may be a fac-

71. See id.
73. See id. at 29; see also David Bacon, Neighborhood Watch: U.S.-Mexican Labor Alliance Helps Workers Fight Environmental Hazards, L.A. VILLAGE VIEW, May 26–June 1, 1995, at 30.
74. See Shields, supra note 22, at 22.
75. See Schuyler, supra note 72, at 29.
76. See id.
tor in considering the availability of an alternate forum.\(^7\) In contrast to the defendant in *Avila*, the defendant in *Aguirre* failed to respond to subpoenas issued by, and refused to appear before, the Mexican administrative agency investigating the maquiladora workers' complaint.\(^8\) Perhaps the defendant's failure to cooperate in *Aguirre* factored into the judge's decision to assert jurisdiction over American.

Finally, choice of law issues need to be considered because Mexican tort law may differ from U.S. tort law in the limits it places on tort-feasor liability and damages.\(^9\) In addition, choice of law concerns may lead U.S. courts to dismiss some claims. For example, in *Avila*, the U.S. court applied the "lex locus" rule, under which a court applies the law where the transaction or tort occurred unless some other state has a more significant relationship to the occurrence and the parties, and ultimately refused to assert jurisdiction over the case.\(^10\)

Despite the delicate issues raised by cross-border legal claims, U.S. employers who continue to abuse Mexican workers can expect claims against their companies to multiply, especially as the economic ties between the United States and Mexico increase.\(^11\)

### B. Under Mexican Law

#### 1. Overview of Mexican labor/employment law

Mexican labor laws are probably among the most comprehensive in the world.\(^12\) Article 123 of the Mexican Constitution serves as the main source of worker protections, while the Ley Federal del Trabajo ("L.F.T.") implements, and elaborates upon, the provisions of the Constitution.\(^13\) The L.F.T. encompasses not only labor law (collective bar-

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79. See id. at 1227.
82. See *Avila*, 580 P.2d at 1225. Note that the U.S. courts differ as to which rule governing choice of law should apply. Compare id. at 1225 (applying lex locus rule) with Arno v. Club Med. Inc., 22 F.3d 1464, 1467 (9th Cir. 1994) (applying three-part governmental interest test).
84. See Leonard Bierman and Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 Conn. J. INT'L L. 533 (Spring 1995). In contrast to U.S. law, which presumes that the employment relationship is "at-will," Mexican law presumes that the employment relationship is indefinite, and official comments to the law suggest that the employer cannot terminate or rescind the relationship without good cause. See L.F.T. art. 35, 46.
85. See Bierman and Gely, supra note 84, at 546. The L.F.T. contains, for example, provisions dealing with when employers can terminate employees without liability. See L.F.T. art. 47. It also establishes regulatory agencies and sets out specific procedures for filing complaints with the agencies. See L.F.T. art. 523–624.
PREGNANCY DISCRIMINATION IN MAQUILADORAS

Unlike Title VII, Mexican law does not specifically prohibit pregnancy discrimination. However, pregnancy discrimination in maquiladoras gives rise to several potential legal claims under Mexican law. Pregnancy-based hiring, assignment of more strenuous and hazardous work to pregnant women, failure to accommodate pregnant women, and termination and forced resignations of pregnant women without good cause, may all lead to employer liability under Mexican law.

Mexico's Constitution and the L.F.T. arguably prohibit pregnancy-based hiring, though government agencies responsible for enforcing the L.F.T. claim that they are not required to consider cases where the complainant has not established an employment relationship with a company. The Mexican government claims that discriminatory hiring practices based on pregnancy fall outside the agencies' mandate because the L.F.T. provides no legal process for bringing forth such cases in the absence of an employment relationship. Despite the Mexican government's argument to the contrary, plaintiffs would have a strong argument that the L.F.T. prohibits pregnancy-based hiring. The L.F.T. prohibits employers from refusing to accept an employee "because of age or sex." While no section in the Mexican Constitution or L.F.T. interprets "because of sex" to include "because of pregnancy," in June 1995, the Commission for Human Rights of Mexico City found that federal agencies' practice of requiring women to undergo pre-employment pregnancy screening violated Articles 4 and 5 of the Mexican Constitution. The Commission recommended that the federal agencies stop the discriminatory practices, and in response most agencies wrote that they would discourage the practice by sending out a notice saying that it was prohibited.

Further evidence that pregnancy-based hiring violates female workers' rights is found in the guidelines issued by Mexico's Alliance for Equality: National Program for Women, 1995-2000 ("the Alliance"). The Alliance recognizes pregnancy screening as a problem and outlines a plan of action to address such discriminatory practices.

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86. See Human Rights Watch, supra note 2, at 38-39.
87. See NAO Report, supra note 1, at 38-39.
88. L.F.T. art. 133.
89. See NAO Report, supra note 1, at 24. Article 4 of the Mexican Constitution provides, in relevant part, that "[m]an and woman are equal before the law...[a]ll persons have the right to decide in a free, responsible and informed manner, on the number and spacing of their children." Mex. Const. art. 4. Article 5 states, in relevant part, that "no person shall be prevented from pursuing any profession, trade, business or work of their choice, provided that it is legal." Mex. Const. art. 5.
90. See Human Rights Watch, supra note 2, at n.7.
91. Mexico's Secretariat of Government designed the Alliance to rectify inequalities that persist in Mexican society between men and women. See NAO Report, supra note 1, at 22.
92. The Alliance specifically addresses pregnancy-based hiring, as well as many other problems. The Alliance calls for mechanisms to ensure respect for female workers' rights, and their access...
Maquiladora practices of assigning pregnant women to more strenuous and hazardous work directly conflict with Mexican law. The Mexican Constitution and the L.F.T. have specific sections dealing with the "Employment of Women," both of which enumerate limitations on the work that women and pregnant women can perform. The L.F.T. provides that women (pregnant or not) may not work in positions which pose a considerable and significant danger for their health. Considerable and significant danger includes lifting, pulling or pushing heavy weights, standing for long periods of time, or other activities that may alter the woman's mental or emotional state. During pregnancy, and while nursing, women may not work: in unhealthy or dangerous jobs, defined as those jobs that have the capacity to affect the life and physical or mental health of the woman or fetus during pregnancy because of the nature of work, the physical, chemical and biological conditions of the workplace, or the composition of raw materials used, or the product itself; in industrial night work (night work is defined as any shift lasting seven hours between 8:00 p.m. and 6:00 a.m.); in commercial establishments after 10 p.m.; or overtime. Thus, when maquiladora managers assign pregnant women to more strenuous work, they violate L.F.T. Articles 166-67.

Failure to accommodate pregnant women also violates other areas of Mexican law. The L.F.T. states that women are not supposed to suffer a wage loss if, because of pregnancy, they cannot work in a particular position. The L.F.T. also requires employers to provide chairs to pregnant women. These L.F.T. provisions indicate legislative intent to compel employers to accommodate pregnant women.

to welfare and social security, on equal footing with men. Such mechanisms are required to comply with the L.F.T.'s prohibition against sex, age, marital status, and pregnancy discrimination. Id. at 23 (citing SECRETARIA DE GOBERNACION, MEXICO, ALIANZA PARA LA IGUALDAD: PROGRAMA NACIONAL DE LA MUJER, 1995-2000 (Mar. 1996) at 88-89).

93. Although the Mexican Constitution and the L.F.T. provide that men and women are equal according to the law, and the Constitution guarantees equal pay for equal work without regard to sex, the L.F.T. specifically approves protective provisions that may create inequalities for women in the workplace. See MEX. CONST. art. 123(V); L.F.T. art. 166-72. The L.F.T. further provides that the legislature may establish special protection for women, which is not considered discriminatory but rather biological and social in nature, to conserve the family. See L.F.T. art. 164 (commentary).

94. See L.F.T. art. 170.

95. See id.

96. See L.F.T. art. 166, 167.

97. See L.F.T. art. 166. The L.F.T. does not say that the employer must accommodate pregnant women by placing them in a less strenuous or hazardous job. It stands to reason, however, that the employer would rather reassign the worker to a legally acceptable position than pay the worker for unearned wages during the term of the pregnancy. Maquiladora workers say that in almost every instance there is a way for maquiladora managers to assign them to different, less strenuous work. See HUMAN RIGHTS WATCH, supra note 2, at 34.

98. See L.F.T. art. 172. Female maquiladora workers who were interviewed felt that in instances where they normally spent their work days standing, they could have done the work equally well seated. See HUMAN RIGHTS WATCH, supra note 2, at 26.
Further, under the L.F.T., an employer cannot end the employment relationship because of the employee's pregnancy.\textsuperscript{99} Under the L.F.T., there are basically three ways the employer can discontinue the employment relationship, including suspension, rescission, or termination, none of which includes pregnancy as "good cause" for such an action.\textsuperscript{100} In addition, suspending, rescinding, or terminating the employment relationship because of pregnancy would violate Article 170, which states that pregnant women shall not suffer wage loss when unable to perform work because of pregnancy.\textsuperscript{101} Moreover, termination or rescission due to pregnancy could further violate Article 170, which also provides that leave needed before or after childbirth may be extended for as long as necessary if the woman is unable to work because of her pregnancy or childbirth.\textsuperscript{102} Thus, it appears that although a woman can be prevented from working in jobs that pose risks to her or the baby's health, her employment cannot be suspended, rescinded, or terminated because of pregnancy.

Workers dismissed because of their pregnancy, or refused their jobs upon return from maternity leave, have the right to claim compensation equal to three months salary or to demand reinstatement.\textsuperscript{103} The worker also has the right to receive the sum she would have received in salary

\textsuperscript{99} See NAO REPORT, supra note 1, at 16; DE BUEN LOZANO, supra note 45, at 18.

\textsuperscript{100} See NAO REPORT, supra note 1, at 16. Suspension is a temporary cessation of the employment relationship that relieves an employer from paying an employee's salary during the suspension. One reason for suspension is an employee's temporary illness or incapacity due to an accident or disease not related to work risks. See L.F.T. art. 42. Rescission of the employment relationship occurs when an employee engages in misconduct. See L.F.T. art. 47. The employer is subsequently relieved from paying the employee's salary or any severance pay that might be available under the termination clause of Article 54. See L.F.T. art. 46. Lying or using false information to obtain a job constitutes misconduct, and an employer can rescind the employment contract if the falsity is discovered within 30 days of the employee's commencement date. See L.F.T. art. 47. Termination is justified when an employee suffers from a permanent physical or mental incapacity, or manifest inability, which makes it impossible for the employee to work. See L.F.T. art. 53. Upon termination, the employer must pay the employee one month and twelve days of salary for each year of work. The employee has the option of taking another job with the employer that fits with the employee's capabilities. See L.F.T. art. 54.

\textsuperscript{101} See L.F.T. art. 170; see also DE BUEN LOZANO, supra note 45, at 18.

\textsuperscript{102} See L.F.T. art. 170.

\textsuperscript{103} See L.F.T. art. 48. In reality, many maquiladora employees end up receiving the former. Since employers know that employees do not have the financial resources to support themselves while going through the entire administrative complaint process, "[t]here appears to be a systemic practice on behalf of employers in giving severance packages to dismissed employees in exchange for withdrawing complaints filed with the CAB." Daniel Friedenzoehn, The Reality Faced by Mexican Employees Who Lose Their Jobs: A Review of the North American Agreement on Labor Cooperation and Two U.S. National Administrative Office Decisions, 22 SYRACUSE J. INT'L. L. & COM. 103, 117 (1996). Employees usually accept the severance packages, which are immediately available, instead of waiting a minimum of seven months for the administrative process to conclude. See id. In addition to the practical limitations of reinstatement, L.F.T. Article 49 exempts employers who are paying certain indemnities to reinstating employees when, for example, the employee has worked less than one year or an arbitration board determines that the employee would have too much direct and permanent contact with the supervisor or other employer agents and a normal relationship with them would be impossible. See L.F.T. art. 49.
payments during the hearing period if a favorable decision is rendered. Further, when the work relationship is terminated due to physical or mental incapacity, employees are entitled to a severance premium equal to twelve days' salary for each year of service.

2. Enforcement agencies and their functions

In addition to being able to file claims in civil court, maquiladora workers subjected to discrimination can file claims with Mexican government agencies whose decisions may be appealed to civil court. The L.F.T. establishes five government agencies responsible for enforcing all labor and employment laws, three of which are relevant for this paper: La Procuraduría de la defensa del trabajo ("Worker Defense"); Inspección del trabajo ("Labor Inspector"); and Juntas de Conciliación y Arbitraje ("CAB").

First, the maquiladora workers can seek assistance from the Worker Defense to file administrative claims against their employers. The Worker Defense is responsible for representing workers and their unions before all authorities in labor and employment law matters. The Worker Defense representation includes helping workers or unions with informal resolution and recording settlement results. There is no cost to the employees or unions for the services provided by the Worker Defense.

Second, maquiladora workers can notify, or make informal complaints to, the Labor Inspector regarding labor law violations. The Labor Inspector is charged with investigating employers to ensure compliance with labor laws, providing technical information and counseling employers and employees on how to effectively comply with the law, notifying the authorities of deficiencies and violations of the law that they observe in factories and establishments, and performing studies and reporting the findings solicited by the authorities.

104. See L.F.T. art. 48.
105. See L.F.T. art. 54, 53. There is no provision allowing for compensatory or punitive damages.
106. See L.F.T., ch. III, V, X. The other two agencies established by the L.F.T. are the National Minimum Wage Commission and the National Service for Employee Job Training. See L.F.T., ch. IV, VI.
107. While the Procuraduría responds to worker and union complaints, it does not affirmatively seek out violations. See L.F.T. art. 530.
108. See id.
109. See id.
110. See L.F.T. art. 534.
111. See L.F.T. art. 540. The individual labor inspectors have the following duties and powers: ensure compliance with labor laws, especially those that establish the rights and obligations of employees and employers; regulate employment of women and minors; determine measures to prevent work, safety, and hygiene hazards; visit factories and establishments during work hours, including day and night shifts; question employees and employers, alone or with witnesses, about any matter related to the application of the labor laws; demand presentation of books, records or other documents required by the labor law; suggest that violations of working conditions be cor-
Third, employees can file an administrative complaint with the CAB. The CAB resolves conflicts between employees and employers, conducts evidentiary hearings, and issues decisions and judgments. The CAB’s administrative procedure starts with the complainant (employee or employer) submitting a written complaint defining the alleged violations of law. After receiving the complaint, the CAB sends notice to the parties indicating the date and time for a hearing.

The CAB hearings consist of three steps: conciliation, arguments by the plaintiff and the defendant, and offering and admission of evidence. During the conciliatory phase, the parties are personally present without attorneys, advisors, or other representatives. The CAB serves as a mediator between the parties to facilitate communication and settlement. If the parties come to an agreement, the CAB approves the agreement, which carries the same legal consequences as a judgment. If the parties fail to reach an agreement, they go forward to the next step of presenting their case. First, the plaintiff presents his or her case, affirming or amending the complaint, and specifying the major points of the allegations. Once the plaintiff has explained the allegations, the defendant proceeds, giving an oral or written answer. Thereafter, parties produce evidence to support their allegations and defenses. If there are no factual disputes after the production of evidence, the CAB issues a summary judgment. If questions of fact remain, the CAB schedules an evidentiary hearing and issues a judgment after the hearing.

112. See L.F.T. art. 600. The CABs are made up of an equal number of employers, employees (or union members if the employee is a union member), and representatives from the government. See L.F.T. art. 593.
113. See L.F.T. art. 871–72. Note that the complainant generally only has two months from her termination date to file a complaint with the CAB before the statute of limitations runs. See L.F.T. art. 48 (commentary).
114. See L.F.T. art. 873.
115. See L.F.T. art. 875.
116. See L.F.T. art. 876.
117. See id.
118. See id.
119. See id.
120. See L.F.T. art. 878.
121. See id.
122. See id.
123. See id.
124. See L.F.T. art. 885–91. Parties may appeal arbitral decisions to Circuit Bar Courts or to the Supreme Court of Justice. If the award is believed to be unconstitutional, the parties can appeal the case to the Supreme Court of Justice of the Nation. See Jill Sanner Ruhnke, The Impact of NAFTA on Labor Arbitration in Mexico, 26 LAW & POL'Y. INT'L. BUS. 917, 923 (1995). Note that “the Mexican government, through various means, maintains significant influence over arbitration decisions. Unlike the United States, where one independent arbitrator usually determines the arbitration award, in Mexico the Mexican Constitution mandates that each arbitration board include
3. Enforcement problems

Labor law violations are regularly ignored, and often condoned, by Mexican labor law enforcement agencies.25 Article 123 of the Constitution containing the labor law provisions is rarely enforced.26 In the maquiladora sector, workers are constantly exposed to hazardous materials such as PCBs, methylene chloride, lead fumes, resin fluxes, and industrial solvents.27 Protective clothing and equipment is a rarity and hazardous materials are usually applied manually.28 For example, a 1991 article in the Wall Street Journal described the working day of a twelve-year-old boy in a maquiladora shoe factory as follows: "He spends most of his time on dirtier work: smearing glue onto the soles of shoes with his hands. The can of glue he dips his fingers into is marked 'toxic substances...prolonged or repeated inhalation cause grave health damage....'"29 Statements by maquiladora workers further illustrate the Mexican government's lack of enforcement of its labor laws: "Here if you have no money, the government won't enforce the law...you can imagine how desperate we are, since we are so poor and without a law to protect us...we really have very good laws in Mexico, but a very bad government."30 Interviews with labor inspectors confirm the workers' beliefs. Inspectors are told to stay away from the maquiladoras because "these industries are a source of employment and hard currency to be left alone."31 Labor Inspector superiors ignore the alleged labor violations in the maquiladora sector as "federal matters which are none of [the local inspector's] business."32

At least two factors contribute to the meager enforcement of workers' rights in Mexico. First, internal factors, arising from the Mexican government's historical affiliation with union leadership, prevent effective enforcement of workers' rights. Second, external factors, stemming
from the Mexican government's desire to encourage foreign investment, provide incentives for lax enforcement.

The Partido Revolucionario Institucional ("PRI"), which has been Mexico's dominant political party since 1929, has long had a mutually supportive relationship with Mexican organized labor. Approximately one-third of Mexico's twenty-six million workers are estimated to belong to unions. Estimates indicate that about seventy percent, or more than six million, of these workers may be affiliated with the Confederación de Trabajadores Mexicanos ("CTM"), Mexico's largest labor group. The relationship between organized labor and the government is symbiotic. The CTM encourages its members to support the PRI government, thereby providing the party's primary labor support. In exchange for its labor support, the CTM receives significant government patronage, with many members in key government positions, including seats in the National Congress. Moreover, the Confederación Regional de Obreros Mexicanos ("CROM"), another large labor union that has had a relationship with PRI since the beginning of the century, actively helps the government contain strikes. Such a relationship results in a union administration whose labor leaders are detached from the workers they claim to represent. The relationship between the PRI and labor leaders provides the setting for continuous deal-making and mutual gain at the expense of workers' rights.

Foreign investors also offer significant incentives for the Mexican government to ignore labor law violations. The Mexican government views the maquiladora program as a way to improve employment and income in the border area, transfer technology to Mexican industry, upgrade workers' skills, and increase demand for Mexican goods. Because the Mexican government is loath to threaten such a valuable program, foreign companies are able to continue to enforce their "flexibility" models of labor relations within the Mexican workforce. The "flexibility"
model, or "flexibilization," occurs when transnational companies implement their own work rules, which supplant the stronger worker protections provided under Mexico's Constitution and labor law. Mexico must then make a choice between enforcing its labor laws and maintaining foreign investment that offers employment to a multitude of the nation's low-skilled, underemployed workers. That the Mexican government chooses the latter is hardly surprising given Mexico's corrupt labor leaders and its need for foreign investment.

In its 1996 report, Human Rights Watch detailed the problems that maquiladora workers confront when trying to challenge sex discrimination in the maquiladora sector. The report stated that Mexican investigative agencies did not have enough resources to effectively enforce workers' rights. For example, the Labor Inspector and Worker Defense offices lacked material resources, such as basic office equipment and reliable telephone service, to conduct investigations. In addition, the local representative responsible for the Worker Defense agencies in Reynosa and Rio Bravo had no known schedule for being in the office and could rarely be found there. The secretaries of the Worker Defense and Labor Inspector agencies seemed unaware of where representatives could be found and when they would be present in the office. Finally, the fact that the Worker Defense representative was the leader of a major business organization associated with corporations and employers suggested that workers' rights were not being adequately protected.

The Human Rights investigation also revealed that the CABs were hostile to women's interests. The CAB president in Tijuana claimed that the L.F.T. allows employers to administer pregnancy tests and to fire an employee if she begins work while she is pregnant. He believed that some women look for work when they are pregnant to avoid medical costs and, if allowed to begin work, are able to take advantage of the benefits. Another CAB president in Chihuahua said women would have a hard time proving that their terminations were pregnancy-based because

144. See id. A 1993 U.S. General Accounting Office ("U.S. GAO") study of worker health and safety at eight U.S.-owned maquiladora auto parts plants reported an assertion by U.S. parent companies that "their corporate-wide policy was to provide a healthy and safe work environment for all employees." Despite this claim, the report suggested that the companies' efforts to comply with health and safety standards in Mexico were significantly less diligent than their efforts to comply with comparable U.S. standards. See Williams, supra note 140, at 372-73.

145. See HUMAN RIGHTS WATCH, supra note 2, at 29-45.

146. See id. at 38.

147. See HUMAN RIGHTS WATCH, supra note 2, at 41. Note that the Human Rights Watch report refers to Worker Defense as Labor Rights Ombudsman. See NAO REPORT, supra note 1, at 5 n.4.

148. See HUMAN RIGHTS WATCH, supra note 2, at 40.

149. See id.

150. See id. at 41.

151. See id. at 44.

152. See id. at 43.

153. See id.
companies could maintain that the employees' job performance or qualifications led to the termination.154

As labor laws are systematically underenforced in Mexico, maquiladora workers need to seek other avenues of redress. In addition to filing administrative complaints, Mexican workers can bring claims in Mexican civil courts.155 Unfortunately, filing a claim in civil court is a practical impossibility for most maquiladora workers since most lack the financial resources to obtain legal counsel.156 Perhaps support groups can gather enough financial support to file suit in Mexican courts on behalf of the maquiladora workers.157 If maquiladora workers obtain a favorable judgment in a Mexican court, they might be able to enforce the judgment in a U.S. court.158 Enforcing the judgment in the United States could be an effective way to dip into the violating employers' pockets and force them to reconsider their discriminatory practices.159

154. See id. at 44.
155. See Jefferson Telephone Interview, supra note 155; Benjamin Rozwood & Andrew R. Walker, Side Agreements, Sidesteps, and Sideshows: Protecting Labor from Free Trade in North America, 34 HARV. INT'L L.J. 333, 352 (1993). Note also that the statute of limitations may be relatively short. According to the L.F.T., an employee who has been terminated must make a demand with the CAB within two months after the termination or the action will be barred. See L.F.T. art. 48 (commentary).
156. See infra Part VI.A. for a list of maquiladora support groups.
157. In a bitter labor dispute involving a U.S. company operating in Guatemala, the U.S. owner of Internacional de Exportaciones fired Guatemalan workers for their efforts to organize. Although the Labor Court of Guatemala ordered the company to reinstate the employees, the owners never complied. Three years after the firings, the workers remained unemployed. Labor rights advocates decided to "enforce the judgment of the Guatemalan courts under established principles of comity rather than a vague claim that still-evolving international labor rights norms were violated. Although a United States court could not enforce a reinstatement order, it could satisfy the judgment of the Guatemalan courts by ordering back pay for the workers from the company assets in the United States." The U.S. legal team drafted pleadings, but the company settled before the claims were heard in court. See Compa, supra note 2, at 146–48; see also Memorandum to Michael Ratner, Terry Collingworth, and Harold Koh (Dec. 11, 1991) (on file with author).
158. Enforcing Mexican judgments in U.S. courts may also prevent "run-across-the-border" employees from closing Mexico operations in an attempt to avoid liability. In Aguirre, the plaintiffs alleged that American, the employer, opened a plant in Tijuana called Exportadora de Mano de Obra ("EMO") and listed EMO as a Mexican company in Mexican legal documents. Once Mexican workers brought claims against EMO, American discontinued the subsidiary's operations. To qualify under L.F.T. Article 53, which excuses employers from making severance payments to workers when the business closes, American allegedly claimed that it was not related to the Tijuana company. See Plaintiffs' Complaint for Damages, Aguirre v. Am. United Global (L.A. Super. Ct., filed Dec. 16, 1994) (on file with author). However, the U.S. court hearing the case apparently refused to accept the argument that American was not the parent of the Tijuana company. See Solidarity Campaign, supra note 56, at 1.
IV. OTHER FORMS OF RESOLUTION

A. The North American Agreement on Labor Cooperation ("NAALC")

1. General procedures for filing a submission under NAALC

Maquiladora workers can also file a submission under NAALC. As noted earlier, NAALC is the labor-side agreement of NAFTA. One purpose of NAALC is to ensure that the signatory countries of Mexico, Canada, and the United States each enforce their own labor laws. As many articles describe NAALC in detail, I will focus instead on how to file a submission with the U.S. NAO.

The U.S. NAO developed specific guidelines for filing a submission. The guidelines enable any person or party to file for U.S. NAO review of labor law matters arising in another NAALC party's country. Article forty-nine of NAALC defines "labor law" to include those laws and regulations that deal with: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards, such as minimum wages and overtime pay; elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds; equal pay for men and women; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers.

The U.S. NAO requires that the submission be in writing, and that it address and explain whether:

(a) the matters complained of appear to demonstrate action inconsistent with another Party's obligations under Part II of the Agreement;

160. See Fuentes Muñiz, supra note 125, at 391. NAALC does not, however, establish international standards that can be enforced under the agreement. In addition, the signatory countries have no authority to set the labor standards of the other member countries. For example, the U.S. cannot force Mexico to raise its minimum wage rate from $3 per day to $5.15 per hour. See id. at 393.
161. See infra Part VI.B. for a list of such articles.
163. The Guidelines define "person" as "one or more individuals, non-governmental organizations, labor organizations, partnerships, associations, corporations or legal representatives." Id.
164. "Party" is defined as "a Party to the Agreement." Id.
165. See Friedenzohn, supra note 103, at 106.
167. See Guidelines, supra note 162, at 16661. Note that there are no special forms to complete.
168. For this factor, the submission should outline the violations of Mexican labor law discussed in Part III.B.1. of this paper. The numerous health and safety violations—such as forcing pregnant women to work in more strenuous and hazardous positions that cause health disorders—leave Mexico vulnerable to sanctions under NAFTA as complaints alleging such violations may go forward to dispute resolution where sanctions are available. See NAALC, supra note 166, at
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(b) there has been harm to the submitter or other persons, and, if so, to what extent;\(^169\)

(c) the matters complained of appear to demonstrate a pattern of non-enforcement of labor law by another Party;\(^170\)

(d) relief has been sought under the domestic laws of another Party, and, if so, the status of any legal proceedings;\(^171\) and

(e) the matters complained of are not pending before an international body.\(^172\)

The U.S. NAO has sixty days to accept or decline review of the submission.\(^173\) Once the U.S. NAO agrees to accept the submission, it has 120 days to review the submission and issue a report.\(^174\) However, the U.S. NAO

\(^{169}\) While the most recent submission alleged that Mexico had failed to enforce pregnancy discrimination laws, the submission did not explicitly assert a violation of Mexico's health and safety laws. However, the facts alleged by the submitters mentioned health and safety issues that could be the basis for future sanctions, depending on the outcome of the U.S. NAO's consultations with Mexico's Secretary of Labor. This would be the first submission under the U.S. NAO involving violations of health and safety law. See infra Part IV.A.2.

\(^{170}\) A debate exists on the extent to which a submission must claim that the matter demonstrates a pattern of non-enforcement of labor law by another Party. The first two submissions to the U.S. NAO alleged anti-union firings of labor organizers by General Electric Company and Honeywell Corporation in their Mexican maquiladora plants. See Lance A. Compa, The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape, 3 U.S.-Mex. L.J. 159, 165 (1995). The U.S. NAO narrowly construed the scope of its review to address only Mexico's enforcement of its domestic labor law. See id. at 175. However, Lance Compa, the former Director of Labor Law & Economic Research at the Secretariat of NAALC, writes that NAO review is not restricted to review of enforcement issues. See id. at 168. It appears from the recent submission regarding pregnancy discrimination that a submission may allege failure to enforce laws, in violation of NAALC Article 3(1), or failure to provide access: to tribunals through which labor rights are protected, in violation of NAALC Articles 4(1) and (2). See NAO REPORT, supra note 1, at ii.

\(^{171}\) Information from Part III.B.3 concerning enforcement problems in Mexico provides some instances of non-enforcement of its labor laws, many of which were described in the recent submission. Also, many articles listed in the appendix discuss Mexico's non-enforcement. Anyone making a submission should include a lengthy list of instances of non-enforcement because such a showing is also a requirement in the dispute resolution stage where sanctions and suspension of benefits are available. See NAALC, supra note 166, at 1509, 1512–13.

\(^{172}\) Prior to filing a submission, the workers will want to have attempted to file complaints under Mexican law so that they can fulfill this element. Even if workers have not filed complaints, they might allege that such efforts would be futile. See supra Part III.B.3.

\(^{173}\) Guidelines, supra note 162, at 16661. The guidelines make the NAO review process an exclusive avenue of recourse among international labor rights regimes, barring review under NAALC if the matter has been brought to another international body. See id.

\(^{174}\) See id. Address submissions to: Irasema Garza, NAO Secretary, U.S. NAO, Bureau of International Labor Affairs, Department of Labor, 200 Constitution Avenue, N.W., Room C-4327, Washington, D.C. 20210. The submission may be hand delivered, mailed, or transmitted by fax to (202) 501-6615. If sending via fax, call Jim Shea, the person responsible for handling submissions, at (202) 501-6653. If you have general questions about filing a submission, you can contact either Jim Shea or Lewis Karesh at (202) 501-6653 or (202) 501-6654. Also, the U.S. NAO provides numerous documents related to NAALC and submissions filed with the agency. An index of documents can be obtained by calling the U.S. NAO in Washington, D.C., at (202) 501-6654. To order and receive the index and/or documents, call (202) 273-3454 or (202) 273-4315.

\(^{174}\) See Guidelines, supra note 162, at 16661–62.
NAO can extend the time for review and issuance of a report for an additional sixty days.\textsuperscript{175}

What can workers expect from filing a submission with the U.S. NAO? First, workers can expect to have the conditions in their workplace publicized through formal reports available to the public and through one or more public hearings.\textsuperscript{176} Second, NAALC also aims to promote public awareness of labor laws by making available, and educating the public about, information concerning labor law enforcement and compliance procedures.\textsuperscript{177} Providing information and educating the public is extremely important because gaining access to such information in Mexico has traditionally been extremely difficult, especially for maquiladora workers. Access is limited because a large majority of people in Mexico do not have telephones,\textsuperscript{178} and maquiladora workers often have to use slow and unreliable public transportation since few own cars.\textsuperscript{179} In addition, those people who manage to get to a labor law enforcement agency to gather information often encounter an empty office or one with scant resources.\textsuperscript{180}

Third, NAALC offers the possibility of sanctions and suspension of NAFTA trade benefits if Mexico continues in a persistent pattern of failing to enforce specified laws, though these remedies are only available where the matter concerns occupational safety and health, child labor, or minimum wage standards.\textsuperscript{181}

In addition to NAALC, labor rights advocates can employ other international forums to bring attention to the discriminatory practices of maquiladoras. For example, under the International Labor Organization ("ILO"), and the Organization for Economic Cooperation and Development ("OECD"), labor rights advocates can file complaints alleging labor rights violations by multinational companies operating in member countries.\textsuperscript{182} These international forums provide a mechanism for forcing companies to answer complaints and explain labor actions and policies.\textsuperscript{183} However, they do not have sanctioning power.\textsuperscript{184} Since remedies under NAALC are not available if a complaint has already been lodged or is

\textsuperscript{175} See id.
\textsuperscript{176} See Friedenzohn, supra note 103, at 107; NAALC, supra note 166, at 1504.
\textsuperscript{177} See NAALC, supra note 166, at 1504.
\textsuperscript{178} See Southwestern Bell Heads Group Purchasing Telefonos de Mexico, 127 Pub. Util. Fort. 45, Jan. 15, 1991, at 45 (stating that "only one in every 100 Mexicans enjoys the luxury of having a phone").
\textsuperscript{180} See HUMAN RIGHTS WATCH, supra note 2, at 40–42.
\textsuperscript{181} See Compa, supra note 170, at 163; NAALC, supra note 166, at 1511–13.
\textsuperscript{182} See Compa, supra note 170, at 159–60.
\textsuperscript{183} See id. at 160.
\textsuperscript{184} See id.
pending before another international organization, a submission should first be made under NAALC if sanctions are desired.\textsuperscript{185} If the desired result is not achieved under NAALC, additional international forums can be pursued.\textsuperscript{186}

2. U.S. NAO submission alleging pregnancy discrimination in Mexico’s maquiladora sector

On May 16, 1997, Human Rights Watch, the International Labor Rights Fund ("ILRF"), and the National Association of Democratic Lawyers ("ANAD") of Mexico filed a submission with the U.S. NAO raising issues of pregnancy discrimination against women applicants and workers in Mexico’s maquiladora industry.\textsuperscript{187} The submission alleged that the Mexican government had failed to enforce anti-discrimination laws or to establish effective judicial remedies for such discrimination, in violation of NAALC Article Three, subsection one, and Article Four, subsections one and two.\textsuperscript{188} The organizations detailed the problem of pregnancy discrimination and Mexico’s failure to enforce its own anti-discrimination laws. On July 14, 1997, the U.S. NAO agreed to accept the submission for review.\textsuperscript{189}

During its review, the U.S. NAO gathered information from Human Rights Watch, ILRF, ANAD, the Mexican NAO, Leticia Cuevas (a legal expert in Mexican labor law and gender issues), and testimony from twelve witnesses presented during a public hearing.\textsuperscript{190} The U.S. NAO extended its time for review for an additional sixty days and issued its report on January 12, 1998. In its report, the U.S. NAO concluded that maquiladoras subject women to post-hire pregnancy discrimination, that such practices are prohibited under Mexican law, and that the women may not be aware of their rights or confident in Mexico’s enforcement mechanisms.\textsuperscript{191} On the issue of pre-employment discrimination, the U.S. NAO encountered differing views on whether Mexican law prohibits such discrimination.\textsuperscript{192} Based on these findings, the U.S. NAO recommended

\textsuperscript{185} See id. at 164.

\textsuperscript{186} See id.


\textsuperscript{188} See id. Article 3(1) requires each signatory country to promote compliance with and effectively enforce its own labor law through appropriate governmental action. Article 4(1) and (2) require that the signatories provide workers with appropriate access to labor tribunals and procedures by which rights arising under labor, health, and safety laws can be enforced. See NAALC, supra note 166, at 1503–04.


\textsuperscript{190} See NAO Report, supra note 1, at i, 10–11. The public hearing was held on November 19, 1997, in Brownsville, Texas. See id. at i.

\textsuperscript{191} See id. at 44.

\textsuperscript{192} See id. at 34–41, 43–44; see also supra Parts III.B.1 and 2 (discussing the issue of whether Mexi-
consultations with Mexico’s Secretary of Labor to clarify the differing views of Mexican government officials on the legality and extent of pregnancy screening and to discuss the extent of relief that should be granted to those who experience post-hire pregnancy discrimination.  

As of publication, the submission is still in the early stages of the NAALC process. Assuming Mexico cooperates with the U.S. NAO’s recommendations, the next step in the process will involve cooperative consultations between Mexico and the U.S. NAO.  

Neither NAALC nor the U.S. NAO guidelines set forth a time limit for consultations.  

If the matter is not resolved through consultations, the U.S. NAO may request that an Evaluation Committee of Experts ("ECE") be established.  

Once an ECE is established, it has 120 days to draft a report and an additional sixty days to present a final report, which is published within thirty days of the presentation.  

The process under NAALC is a slow one and it is unlikely that the submission will produce any substantial changes in the near future.

B. Solidarity Movements and Groups

Non-governmental organizations have played an increasingly important role in the fight for justice in the maquiladora sector.  

Out of concern for workers who face pollution, unsafe working conditions, and low wages, the AFL-CIO and a coalition of religious and environmental groups issued the Maquiladora Standards of Conduct, a behavior code for U.S.-owned maquiladoras.  

The Code proposes the creation of mandatory workplace safety and health committees with training for worker members; seeks to protect the right to organize; seeks to ban discrimination; and encourages fair wages, hours, and working conditions.  

In addition, the United Electrical Workers, International Ladies Garment Workers Union, the Amalgamated Clothing and Textile Workers, and other unions, have joined with independent Mexican unions to support organizing in the maquiladora factories.  

Women’s organizations and environmental groups have created similar movements.

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193. See NAO REPORT, supra note 1, at 45-46.  
194. See NAALC, supra note 166, at 1507-08.  
195. See id.; Guidelines, supra note 162, at 16662.  
196. See NAALC, supra note 166, at 1508.  
197. See id. at 1508-09.  
199. See id.  
200. See id. at 131.  
201. See id. Relocation of U.S. companies to Mexico has motivated U.S.-based unions to unite with Mexican-based unions. U.S. unions believe that if Mexican workers unionize, relocation will be less favorable for U.S. employers, and perhaps fewer jobs will be lost to lower paid workers in Mexico. See Williams, supra note 140, at 391.  
During the suit against American, the plaintiffs and the Support Committee for Maquiladora Workers developed a successful grassroots campaign to pressure American to act responsibly. Demonstrations were held at the American headquarters in Downey, California, with U.S. and Mexican workers and other supporters in attendance. Additionally, a national letter-writing campaign was organized to make the company aware of the fact that the public had knowledge of its conduct. The key, however, seems to have been the actions of the International Labor Solidarity Network (“ILSN”) of the United Auto Workers Region in Michigan. On May 30, 1995, ILSN Chairman Brad Markel wrote to the chair of American’s board of directors, noting that American’s “collective bargaining agreements with the Big Three [auto firms]... contain language which indicated the parties’ mutual concern that all suppliers to the Big Three be good corporate citizens and states that the companies will take steps to change suppliers where such standards are not met.” Thus, as the suit against American drew closer to trial, the company also faced the stark possibility of losing the business of any or all of the Big Three auto manufacturers. American settled out of court nine months after the workers filed suit.

Additionally, Human Rights Watch recently reached an agreement with General Motors and International Telephone and Telegraph (“ITT”) whereby the companies agreed to discontinue their pregnancy-based hiring practices in their Mexican-based maquiladoras. According to LaShawn Jefferson at Human Rights Watch, neither company admitted that the practices were illegal. On the contrary, the companies maintained that their hiring practices were legal pursuant to Mexican law. ITT decided to discontinue the discriminatory hiring practices because they apparently considered the practices to be counter to the company morals, human rights ethics, and corporate culture. General Motors gave way, it seems, because of public concern expressed by several non-governmental organizations that inundated the company with letters and phone calls. Thus, it appears that public pressure, based on facts gathered by organizations such as Human Rights Watch, can yield changes in maquiladora employer practices.
V. CONCLUSION

Many potential solutions exist to the pervasive problem of pregnancy discrimination in maquiladoras, some of which have already encouraged maquiladoras to discontinue such discriminatory practices. The fight for justice in maquiladoras continues to grow, and implementing a combination of strategies will bring us closer to resolution.

Pregnant women subjected to discrimination should first file claims in Mexican civil courts. To enable maquiladora workers to file such claims, various sources of funding can be pursued. For example, law students or attorneys might access funds through fellowships or grants. Also, the extant maquiladora support groups might consider pooling their resources to bring at least one case in Mexican civil court. Pursuing Mexican workers’ rights in Mexican courts might serve as a political statement to the maquiladora firms and to the Mexican government that it is time for a change. Moreover, filing in Mexico, as opposed to filing in the United States, provides the option of suing all violators, not just the companies subject to U.S. jurisdiction.

Second, maquiladora workers subjected to discrimination should file legal claims in U.S. courts to focus attention on U.S. companies’ violations. At the same time, workers and their representatives should closely track the pending U.S. NAO submission to determine what steps can be taken to assist the U.S. NAO and to pressure the Mexican government into enforcing its laws. Finally, solidarity groups should continue to educate and assist maquiladora workers, and to negotiate with maquiladora firms to discontinue abuses. Such groups have successfully created public pressure on maquiladora employers that has proved successful in convincing some companies to abandon their discriminatory practices. Together, the cost of answering complaints and thwarting public pressure may provide enough incentive for maquiladora firms to change their practices.

VI. APPENDIX

A. Organizations Supportive of Maquiladora Workers’ Rights

There are many noteworthy organizations in the United States and Mexico that provide support for the maquiladora workers. The following list provides addresses and phone numbers for a handful of organizations that serve as advocates for maquiladora workers’ rights:

215. Korean, Japanese, and other non-U.S. companies also practice rampant discrimination. See HUMAN RIGHTS WATCH, supra note 2, at 2–3. Thus, if claims are only brought in U.S. courts, discrimination in all maquiladoras will not stop.
In addition, the Comite de Apoyo Fronterizo Obreros Regional ("CAFOR"), or Border Workers Regional Support Committee, provides workshops in Mexico on workers’ rights and health and safety conditions. CAFOR also provides workers with lawyers and advises workers on where to find the necessary resources to accomplish their goals.216 Other organizations working in support of maquiladora workers’ rights include: International Brotherhood of Teamsters (IBT); United Electrical, Radio, and Machine Workers of America (UE); Union of Needletrades, Industrial, and Textile Employees (UNITE); AFL/CIO Border Project; Maquila Soli-

216. See Mora, supra note 19, at 10.
B. Articles Discussing the North American Agreement on Labor Cooperation (NAALC)


