

# PRE-HIRE PREGNANCY SCREENING IN MEXICO'S *MAQUILADORAS*: IS IT DISCRIMINATION?

NATARA WILLIAMS\*

## I. INTRODUCTION

Mexico has been portrayed as a patriarchal society that requires a woman to play the traditional roles of a mother and wife who is not involved in the work force. There has been an increasing incorporation of Mexican women in the labor market in recent decades, though, and particularly an influx of female workers in the *maquiladora*<sup>1</sup> industries.<sup>2</sup> In 1997, the National Institute of Statistics, Geography and Information reported that a total of 2,600 *maquiladoras* employed at least 450,000 women out of a total of 873,748 workers.<sup>3</sup> As a result, the *maquiladoras* have become a main source of employment for Mexican women.<sup>4</sup>

*Maquiladoras* have purportedly sought to recruit women workers because they are perceived as being docile, reliable, and capable of performing monotonous and repetitive work.<sup>5</sup> However, single, childless women are highly preferred and many *maquiladoras* avoid hiring pregnant women.<sup>6</sup> Pregnant women workers are seen as a “drain on [company] resources and as having a potentially

---

\* J.D., Duke University School of Law, expected May 2005; B.B.A. & B.A., Stetson University. This paper is dedicated in memory of my brother, James Carlton Williams II, whose love, sense of humor and constant support is dearly missed. Thank you for teaching me to enjoy life's blessings and to never doubt myself. Also I would like to thank Professor Donald Horowitz, Steve Kessing, and the Journal staff for their guidance and assistance throughout the writing and editing of this article.

1. “A *maquiladora* is a Mexican corporation operating under a special customs regime which allows the corporation to temporarily import duty-free, raw materials, equipment, machinery, replacement parts, and other items needed for the assembly or manufacture of finished goods for subsequent export.” JORGE A. VARGAS ET AL., *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* 182-183 (Jorge A. Vargas ed., 1998). Basically, *maquiladoras* are export-processing factories along Mexico's border with the United States.

2. See IRENE CASIQUE, *POWER, AUTONOMY & DIVISION OF LABOR IN MEXICAN DUAL-EARNER FAMILIES* 29 (2001); see also Marta Lamas, *The Role of Women in the New Mexico, in MEXICO'S POLITICS AND SOCIETY IN TRANSITION* 129 (Joseph S. Tulchin & Andrew D. Selee eds., 2003) (noting that there has been a continuous flow of women workers into the *maquiladora* industry).

3. HUMAN RIGHTS WATCH, *A JOB OR YOUR RIGHTS: CONTINUED SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR BACKGROUND*, (1998) [hereinafter HUMAN RIGHTS WATCH, *A JOB OR YOUR RIGHTS*], [www.hrw.org/reports98/women2/Maqui98d.htm#TopOfPage](http://www.hrw.org/reports98/women2/Maqui98d.htm#TopOfPage).

4. See Lamas *supra* note 2, at 129-130.

5. See *id.*

6. Bob McPhail, *Pregnancy-Free Work*, SAN DIEGO NEWS NOTES, Apr. 1999, <http://www.sdnnewsnotes.com/ed/articles/1999/0499bm.htm>. Several Mexicali *maquiladora* managers maintained that “[S]ingle, childless women make better employees . . . Domestic and child rearing responsibilities . . . often interfere with optimal on-the-job performance.” *Id.*

detrimental effect on production.” Therefore, numerous *maquiladoras* insisted upon testing women applicants for pregnancy and refused to hire those who were pregnant.<sup>7</sup> There have also been reports of women being fired or forced to resign due to pregnancy.<sup>8</sup>

Pregnancy-based discrimination was not seriously criticized or legally examined until Human Rights Watch (HRW) launched an investigation into several allegations of pregnancy discrimination in 1996. Then, in 1997, a petition was filed with the United States National Administrative Office (NAO)<sup>9</sup>, which contended that pregnancy-based discrimination existed in Mexico and violated several provisions of national and international law.<sup>10</sup> This submission was the first case ever to come before the U.S. NAO in which sex discrimination was alleged.<sup>11</sup> Additionally, it sparked closer scrutiny of Mexican law as the U.S. NAO and Mexican government were required to interpret various Mexican legal sources to decide what forms of sex-based discrimination were illegal in Mexico.

This note examines whether Mexican law proscribes, or could be interpreted as proscribing, pre-hire pregnancy discrimination. Part II provides general background information about the NAO submission process, followed by a summary of the HRW Report which alleged that various forms of pregnancy discrimination occur within the *maquiladora* industry. Part III analyzes sources of Mexican law that pertain to the subject of pregnancy discrimination to determine whether pre-hire pregnancy discrimination is proscribed under Mexican law. The sources of Mexican law analyzed include the Mexican Constitution, several international treaties and conventions, and Mexican federal law. Then, in Part IV the author will conduct a more in-depth analysis of a recently promulgated Mexican federal law which appears to prohibit pregnancy-based discrimination. Finally, Part V summarizes the author’s conclusions.

---

7. See HUMAN RIGHTS WATCH, NO GUARANTEES: SEX DISCRIMINATION IN MEXICO’S MAQUILADORA SECTOR (1996) [hereinafter HUMAN RIGHTS WATCH, NO GUARANTEES], at <http://www.hrw.org/reports/1996/Mexi0896.htm>; see also THE CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES [hereinafter WOMEN OF THE WORLD] 67 (2001) (affirming that “in practice many workplaces continue to require a negative pregnancy test from women before giving them a job.”).

8. See HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 7; see also WOMEN OF THE WORLD, *supra* note 7, at 67).

9. An NAO is part of the labor ministry of each North American Free Trade Agreement member country. One of its functions is to accept and review complaints that charge one of the other members with labor abuses. See NORTH AMERICAN AGREEMENT ON LABOR CORPORATION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE GOVERNMENT OF CANADA, AND THE GOVERNMENT OF THE UNITED MEXICAN STATES, Sept. 13, 1999 [hereinafter NAALC], Annex 1, [www.naalc.org/english/agreement.shtml](http://www.naalc.org/english/agreement.shtml).

10. Human Rights Watch Women’s Rights Project, Human Rights Watch/Americas, International Labor Rights Fund, and Asociacion Nacional de Abogados Democraticos, *U.S. NAO Public Submission 9701: Submission Concerning Pregnancy Based Discrimination in Mexico’s Maquiladora Sector to the United States National Administrative Office* (May 15, 1997) [hereinafter Human Rights Watch, *Submission*], [www.dol.gov/ilab/media/reports/nao/submissions/Sub9701.htm](http://www.dol.gov/ilab/media/reports/nao/submissions/Sub9701.htm).

11. See Press Release, Human Rights Watch, U.S. and Mexican Groups Urge the U.S. to Oppose Sex Discrimination in Mexico (Jan. 15, 1998) [hereinafter Human Rights Watch, U.S. and Mexican Groups], <http://hrw.org/english/docs/1998/01/15/mexico1037.htm>.

## II. U.S. NAO FINDS THAT MEXICO VIOLATES ITS DOMESTIC LABOR LAW.

## A. What is an NAO?

An NAO is part of the labor ministry of each North American Free Trade Agreement (NAFTA) member country that was created under the North American Agreement on Labor Cooperation (NAALC) to handle labor abuse complaints. The NAALC is a side accord to NAFTA and represents the labor rights “side agreement” of NAFTA.<sup>12</sup> Generally, the NAALC seeks to eliminate employment discrimination<sup>13</sup> by “promot[ing] compliance with and effective enforcement of each party’s domestic labor laws.”<sup>14</sup> Hence, each NAFTA signatory country<sup>15</sup> is not required to enforce any other country’s laws, but rather, is required to enforce its own domestic labor laws through appropriate government action.<sup>16</sup>

The NAALC created a Commission for Labor Cooperation to monitor the implementation of the obligations agreed upon by the NAFTA signatories.<sup>17</sup> The Commission is composed of a Ministerial Council, Secretariat, and three NAOs at the federal government level in each NAFTA member country.<sup>18</sup> Each NAO accepts citizen submissions or complaints that charge one of the other NAFTA members with labor abuses or a failure to effectively enforce its domestic labor laws.<sup>19</sup> Prior to official acceptance of a complaint, though, the designated NAO determines whether the submission falls within its jurisdiction and whether the submitting party has established that it has standing to sue.<sup>20</sup>

If it appears that the NAALC has been violated, the submission must receive further review and examination.<sup>21</sup> Upon accepting a submission for review, the NAO Secretary issues a public report within 120 days that consists of a review proceedings summary, the NAO findings, and NAO recommendations.<sup>22</sup>

12. ANNA L. TORRIENTE ET AL., *MEXICAN & U.S. LABOR LAW & PRACTICE: A PRACTICAL GUIDE FOR MAQUILAS & OTHER BUSINESSES* 11 (1997); see also Claudio Romano, *Nine Years of the Labor Side Agreements Show the Real Effect of NAFTA on Mexican Workers*, at [www.owcinfo.org/campaign/FTAA/RealEffectNAFTAonMEX.htm](http://www.owcinfo.org/campaign/FTAA/RealEffectNAFTAonMEX.htm) (last visited Mar. 23, 2005).

13. NAALC, *supra* note 9; see also TORRIENTE, *supra* note 12, at 13 (stating that the elimination of employment discrimination is one of the fundamental labor law principles in Annex 1 of the NAALC).

14. NAALC *supra* note 9, art.1; see also TORRIENTE, *supra* note 12, at 13 (summarizing the NAALC’s stated objectives).

15. The signatory countries to NAFTA are the United States, Mexico and Canada. See NAALC *supra* note 9.

16. See *id.* Some examples of appropriate government action include appointing and training labor inspectors, investigating suspected violations, initiating proceedings to correct violations of each country’s domestic labor laws, and providing private parties with the appropriate access to procedures for the enforcement of their country’s domestic labor laws.

17. See *id.*; see also TORRIENTE, *supra* note 12, at 15 (describing the implementation and submission process for the NAALC).

18. See NAALC *supra* note 9, arts. 8 & 15.

19. See *id.*, art. 16(3).

20. See TORRIENTE, *supra* note 12, at 16.

21. See *id.*

22. See *id.* If necessary, the 120 day period may be extended by 60 days. See *id.*

Furthermore, if an NAALC violation is found that has not been sufficiently resolved since the commencement of the proceedings, the NAO Secretary may request that the parties engage in ministerial consultations with the Ministerial Council.<sup>23</sup>

The preceding information represents a brief synopsis of the portion of the NAO submission process that applies to Mexico's situation.<sup>24</sup> In 1997, the U.S. NAO accepted and reviewed a submission which asserted that widespread pregnancy discrimination occurred within the *maquiladora* industry. The submission was based upon an HRW report documenting pre- and post-employment pregnancy discrimination at many *maquiladoras*. While it appears that Mexico explicitly prohibits post-hire pregnancy discrimination, the HRW report and submission challenged the U.S. NAO and Mexico to prohibit pre-hire pregnancy discrimination as well.

#### B. HRW Investigation Reveals Wide-Spread Pregnancy Discrimination in the *Maquiladora* Industry.

On May 15, 1997, the HRW, International Labor Rights Fund ("ILRF") and the National Association of Democratic Lawyers (*Asociación Nacional de Abogados Democráticos*) (collectively referred to as "Petitioners") filed a submission with the U.S. NAO concerning pregnancy-based sex discrimination in Mexico's *maquiladora* sector.<sup>25</sup> The information in the submission, titled Submission No. 9701, was based on an August 1996 HRW Women's Rights Project report, "*Sin Garantías: Discriminación sexual en el sector de maquiladoras de México.*"<sup>26</sup> The report summarized the results of an HRW mission's investigation, in March 1995, of possible pregnancy discrimination in the *maquiladora* sector of several Mexican cities and states such as Tijuana, Baja California State, Chihuahua, Reynosa, Río Bravo, Matamoros, and Tamaulipas State.<sup>27</sup> The mission interviewed numerous women *maquiladora* workers, *maquiladora* personnel, Mexican government officials, labor rights advocates, and women's rights activists to determine whether such discrimination occurred in the industry.<sup>28</sup> Consequently, HRW concluded that pregnancy-based discrimination of *maquiladora* workers was prevalent and manifested itself in three ways: "(1) testing and interviewing of job applicants during the hiring process to determine their pregnancy status; (2) denial of employment to pregnant applicants; and (3) dismissal of pregnant

---

23. See *id.*; see also Romano, *supra* note 12.

24. For further information on the complete NAO submission process, see generally TORRIENTE, *supra* note 12, at 16-20

25. See Human Rights Watch, *Submission*, *supra* note 10.

26. HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 7; see also Human Rights Watch, *Submission* *supra* note 10 at Appendix 1 (containing the Human Rights Watch Women's Rights Project report).

27. See HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 7 (listing companies in Tijuana, Chihuahua, Reynosa, Río Bravo and Matamoros that purportedly engaged in discriminatory practices against pregnant applicants and pregnant workers); see also U.S. NAT'L ADMIN. OFFICE, U.S. DEP'T OF LABOR, PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9701 [hereinafter U.S. NAT'L ADMIN. OFFICE, PUBLIC REPORT], [www.dol.gov/ilab/media/reports/nao/pubrep9701.htm](http://www.dol.gov/ilab/media/reports/nao/pubrep9701.htm).

28. HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 7.

workers or the mistreatment of pregnant workers in an effort to bring about their resignation.”<sup>29</sup>

According to HRW, although the most common methods of pregnancy testing were medical exams and urine samples,<sup>30</sup> some *maquiladoras* employed a series of methods to determine whether women applicants were pregnant. Along with or in lieu of urine analyses, personnel officers either questioned women directly on their pregnancy status, the extent of their sexual activity, the regularity of their menstrual cycles, the type of contraceptive(s) used, or required women to answer questions about their pregnancy status on application forms and sign forms indicating that they were not pregnant.<sup>31</sup> The women applicants who admitted to being pregnant or with positive pregnancy tests were denied employment.<sup>32</sup>

HRW also found that, once employed, women who became pregnant were harassed, mistreated, forced to resign, or terminated without cause.<sup>33</sup> In some cases, employers reassigned pregnant women to tasks that required strenuous physical activity or exposed them to hazardous conditions to make them quit.<sup>34</sup> Other employers used short-term contracts of thirty to ninety days so as not to be obligated to offer permanent positions to pregnant workers.<sup>35</sup> Altogether, the report documents the cases of approximately fifty-three women at various *maquiladoras* who were either subject to pregnancy testing during the hiring process or subject to discrimination on the basis of their pregnancy after being employed.<sup>36</sup>

Based on the HRW findings, petitioners filed Submission No. 9701 with the U.S. NAO alleging “(1) employment discrimination on the basis of gender in violation of the obligation of Mexico to enforce its labor law, including obligations related to international conventions under Article 3(1) of the NAALC; and (2) failure to ensure appropriate access to . . . tribunals . . . in violation of Articles 4(1) and 4(2) of the NAALC.”<sup>37</sup> Petitioners argued that pregnancy-based discrimination violated the Mexican Constitution, international treaties ratified by Mexico, and federal labor law.<sup>38</sup> Also, petitioners claimed that no suitable institutions existed to address gender discrimination issues effectively.<sup>39</sup>

29. *Id.*

30. *See id.*

31. *Id.* (summarizing the experiences of thirty-seven women who sought jobs at *maquiladoras* that routinely engaged in pregnancy-based discrimination throughout the hiring process).

32. *Id.*

33. *Id.*

34. *Id.*; see also McPhail, *supra* note 6.

35. See HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 7; see also McPhail, *supra* note 6.

36. See HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 7. The majority of the companies cited in the HRW report denied engaging in pregnancy-based discrimination or claimed to be in conformity with the local law. Only one company, United Solar Systems of Troy, Michigan, candidly admitted to discriminating against pregnant women in the hiring process by asking whether women were pregnant on applications for work, requiring pre-employment pregnancy testing and then denying employment to women who were pregnant. The company promised HRW that it would discontinue discriminatory practices. See McPhail, *supra* note 6, at 5.

37. See Human Rights Watch, *Submission*, *supra* note 10.

38. *Id.*

39. *Id.*

After accepting and reviewing petitioners' submission, the U.S. NAO found that pre-employment pregnancy screening did in fact occur in the *maquiladora* industry and on January 12, 1998, it issued a report regarding the prevalence of gender discrimination in Mexico's *maquiladoras*.<sup>40</sup> Although Mexico conceded that Mexican law prohibits post-hire pregnancy discrimination, the Mexican NAO stated "that there is no explicit prohibition in Mexican law against pre-employment discrimination. Mexican law reaches discrimination only where there is an existing employment relationship."<sup>41</sup> Also, the Mexican NAO disputed the allegation that pre-hire discrimination violated obligations under international treaties ratified by Mexico.<sup>42</sup>

The Mexican NAO position that Mexican law and international law did not prohibit pre-employment pregnancy screening raised issues concerning the interpretation of the Mexican Constitution (Constitution), Mexican Federal Labor Law (FLL) and international treaties ratified by Mexico that address gender discrimination. Is testing women job applicants for pregnancy or pregnancy-based discrimination prohibited by any or all of these sources of Mexican law? If such a prohibition is not stated explicitly, could the Mexican Constitution, Mexican federal law, or treaties ratified by Mexico be interpreted as prohibiting such discrimination? Answering these questions requires an analysis of Mexican law and international treaties ratified by Mexico.

### C. The Mexican Hierarchy of Law

The Mexican hierarchy of laws is a subject of debate. The Mexican Supreme Court noted that since "Constitutional Article 133 establishes the supremacy of Constitutional laws and international treaties, all other Mexican laws must be subordinate to them, regardless of their federal or state nature, if a conflict arises upon their application."<sup>43</sup> However, while the Constitution is accepted as being the highest level under the Mexican hierarchy of law,<sup>44</sup> there is some controversy as to whether federal law and international law are of equal

---

40. *Id.*; see also Tina Faulkner, *U.S. NAO Confirms Discrimination Against Pregnant Maquila Workers*, BORDERLINES UPDATER, at [www.americaspolicy.org/updater/1998/march2nao\\_body.htm](http://www.americaspolicy.org/updater/1998/march2nao_body.htm) (Mar. 1998).

41. See Human Rights Watch, U.S. and Mexican Groups, *supra* note 11 (stating that the Mexican NAO asserted "that there is no explicit prohibition in Mexican law against pre-employment pregnancy screening and that there is no legal mechanism by which a person may pursue a claim of pre-employment gender discrimination prior to the establishment of the employment relationship."); see also U.S. NAT'L ADMIN. OFFICE, PUBLIC REPORT, *supra* note 27, at 7 (stating same).

42. See Human Rights Watch, U.S. and Mexican Groups, *supra* note 11; see also U.S. NAT'L ADMIN. OFFICE, PUBLIC REPORT, *supra* note 27, at 7.

43. TORRIENTE, *supra* note 12, at 34 (citing *Petroleos Mexicanos, Está Obligado a Otorgar Fianza En El Amparo. (Leyes Reglamentarias de la Constitución, Supremacía de las) Suprema Corte de Justicia de la Nación. Queja No. 286/49. Cerda, Juan. Unanimidad 5 votos. Pdte. Vicente Santos Guajardo. 3ra. Sala. S.J.F. 22 de Octubre de 1949. V Epoca, Tomo CII, p. 653.*); see also VARGAS, *supra* note 1, at 23 (stating that Article 133 of the Constitution recognizes the principle of supremacy, giving the Constitution, along with the laws of Congress and treaties made by the President of the Republic with approval by the Senate, the status of "Supreme Law throughout the union.").

44. TORRIENTE, *supra* note 12, at 27-32; see also Vargas, *supra* note 1, at 38 (characterizing the Mexican Constitution as the fundamental law that guides Mexico's national policies).

importance, or whether federal law supersedes treaties and conventions.<sup>45</sup> The prevalent view of the Mexican hierarchy of law, which will be the order adhered to in this note, is that of Professor Eduardo García Maynez.<sup>46</sup> Professor Maynez assembles the laws in the following order of importance: “a) the Constitution; b) federal laws and international treaties; c) ordinary laws; d) regulatory laws; and e) individual norms.”<sup>47</sup> Thus, federal law and international treaties are considered to be of equal importance. Due to the novelty and uncertainty surrounding the impact of a recently promulgated federal antidiscrimination law in Mexico, after examining the Mexican Constitution, this note will provide a cursory review of international treaties relevant to pregnancy-based discrimination, followed by a more in-depth inquiry into the applicable Mexican federal law, specifically the new law.

### III. DOES MEXICAN LAW PROHIBIT PREGNANCY DISCRIMINATION IN THE HIRING PROCESS?

#### A. The Mexican Constitution Could Be Interpreted as Preventing Pregnancy Testing During the Hiring Process

Although the Mexican NAO conceded that post-hire pregnancy discrimination is unlawful, it asserted that pre-employment discrimination is permitted because it is not explicitly prohibited under Mexican law.<sup>48</sup> For instance, the Mexican Constitution does not specifically address the issue of pre- or post-hire pregnancy discrimination, and is not deemed to proscribe discriminatory practices against pregnant women in the hiring process.<sup>49</sup> However, the language of the Mexican Constitution could be interpreted as implicitly prohibiting pregnancy-based discrimination.

Article IV of the Constitution states: “Man and woman are equal before the law. This will protect the organization and development of the family. Every person has the right to decide in a free, responsible and informed manner, the number and spacing of his or her children . . . .”<sup>50</sup> While Article IV does not explicitly prohibit pre-employment pregnancy screening, it could be interpreted as forbidding pregnancy-based discrimination since such discrimination does not treat men and women equally before the law; only women can become pregnant and be denied employment on the basis of pregnancy status.

Furthermore, pre-hire pregnancy discrimination arguably impinges upon a woman’s right to freely decide the number and spacing of her children. A woman is placed in the position of deciding between exercising her constitu-

45. See TORRIENTE, *supra* note 12, at 34.

46. *Id.* Professor Eduardo García Maynez is regarded as “one of Mexico’s foremost legal theorists.” *Id.*

47. *Id.*

48. See U.S. NAT’L ADMIN. OFFICE, PUBLIC REPORT, *supra* note 27, at 7.

49. See generally MEX. CONST., available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93> (providing an English translation of the Mexican Constitution by Ron Pamachena). The original Spanish version can be found at [www.cddhcu.gob.mx/leyinfo/pdf/1.pdf](http://www.cddhcu.gob.mx/leyinfo/pdf/1.pdf).

50. *Id.*, art. 4.

tional right to determine when to freely and responsibly bear children or obtaining employment to maintain economic subsistence. Article IV suggests that no such determination should have to be made.

Additionally, Article V of the Mexican Constitution states that, "No person shall be impeded from practicing a lawful profession, industry, commerce, or labor. . ."<sup>51</sup> Denying employment to a qualified applicant in the *maquiladora* industry solely because she is pregnant could be regarded as impeding a person from practicing within a lawful industry.<sup>52</sup>

On the other hand, employers may use the Mexican Constitution to their advantage to defend the assertion that obliging women to undergo pregnancy screening as a condition of employment is necessary to ensure compliance with the law.<sup>53</sup> Article 123 of the Mexican Constitution establishes the rights and duties of employers and employees in Mexico, and Mexican federal labor law derives directly from Article 123.<sup>54</sup> Section A of Article 123 governs relations between employers and employees in the private sector and Section B applies to employees in the public sector.<sup>55</sup> Article 123 is viewed as a protective legal regime for workers,<sup>56</sup> but section V of Article 123 can be construed as not only permitting, but encouraging pregnancy screening during the hiring process in certain situations.

Article 123, Section V of the Mexican Constitution states,

"Women during pregnancy will not receive work that requires considerable effort, and signifies a danger to their health in relation to their pregnancy. They will get a break of six weeks before the birth, and six weeks after it, in which they will receive their entire wages or salary, and keep their position and their benefits. In their nursing period, they will have two special breaks (each day) of one half hour each, to nurse their babies."<sup>57</sup>

It is possible that under Article 123, section V, an employer might oblige all women applicants to undergo pregnancy testing to ensure that pregnant applicants are not assigned work that is dangerous or requires considerable effort to the detriment of pregnancy. Yet, even if section V could be interpreted to allow pre-employment pregnancy screening for certain work environments, it would seem to contravene the spirit of the Mexican Constitution to permit employers to deny women employment solely on the basis of pregnancy. Thus, such an interpretation should only allow pregnancy testing if an employer can demonstrate that the requisite work is particularly dangerous for pregnant women and

---

51. *Id.*

52. *Id.*

53. See McPhail, *supra* note 6 (maintaining that the federal and state labor officials in Mexico said that "[P]re-employment pregnancy testing allows the companies to comply with other labor laws that prohibit placing pregnant women in dangerous work environments").

54. TORRIENTE, *supra* note 12, at 27; see also VARGAS, *supra* note 1, at 41.

55. TORRIENTE, *supra* note 12, at 28. "Section B . . . establishes the rights of employees of the federal government and of the Federal District." *Id.* This Note examines only Section A of Article 123, since the *maquiladora* industry is part of the private sector.

56. VARGAS, *supra* note 1, at 41.

57. MEX. CONST., available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93>.

that no temporary accommodations could possibly be made during the pregnancy period.<sup>58</sup>

The aforementioned interpretation of Article 123, section V could also be limited by, and considered jointly with, Article 1, paragraph 2 of the Constitution. Article 1, paragraph 2 was included in the Constitution in August 2001 and explicitly prohibits certain discriminatory practices. The text of the Constitution states: "All discrimination is prohibited if motivated by ethnic or national origin, gender, age, different capabilities, social condition, state of health, religion, opinions, preferences, marital status or any other condition, in detriment to human dignity and for the purpose of denying or reducing the rights and freedoms of persons."<sup>59</sup> Therefore, Article 1, paragraph 2 could be interpreted as implicitly prohibiting pregnancy-based discrimination in the hiring process because it is discrimination motivated by gender (since only women can become pregnant and be tested for pregnancy) for the purpose of denying the rights and freedoms of women. Consequently, Article 123, section V should probably be construed narrowly to permit pre-employment pregnancy testing in the rare circumstance that a job was particularly dangerous to pregnant women and temporary adjustments could not be made during the pregnancy period.

The latter portion of Article 123, section V, though, which includes maternity protection of twelve weeks paid leave and time off for breastfeeding, illustrates the main reason *maquiladoras* do not want to hire pregnant women. Many employers in the *maquiladora* industry want to avoid paying maternity leave costs or "absorb[ing] the costs of potential disruptions in production schedules due to maternity leave schedules or women workers' reduced capacity to meet physically demanding production quotas."<sup>60</sup> Some employers are willing to cooperate with pregnant women workers, but insist that the women have a proven work record with the company, which does not apply to pregnant women in the hiring processes.<sup>61</sup>

The Mexican government acknowledged the *maquiladoras'* business practice of not hiring pregnant women but insisted that Mexican law does not prohibit pre-employment discrimination.<sup>62</sup> This seems to be a matter of interpretation, though, as the Mexican Constitution can be construed as implicitly prohibiting pre-employment pregnancy testing, except in the rare circumstances of dangerous jobs that can not be modified to accommodate a woman during her pregnancy. Perhaps the addition of Article 1, paragraph 2 will provide the necessary motivation for the Mexican government to reevaluate its determination that pre-

58. For instance, a job that requires standing for long amounts of time could reasonably accommodate a pregnant woman by allowing her to sit or, if feasible, to take more breaks.

59. MEX. CONST., available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93>; see also Gilberto Rincón Gallardo, *Legislation and Public Policies against Discrimination in Mexico*, at <http://www.iadb.org/sds/doc/RGallardoEnglish.pdf> (2003).

60. HUMAN RIGHTS WATCH, *A JOB OR YOUR RIGHTS*, *supra* note 3.

61. *Id.* (quoting an administrative office worker in a Tijuana *maquiladora*, "At times, the managers took the perspective that they must protect a pregnant worker, but only if she had a proven work record. Those pregnant women allowed to stay are accommodated by being changed to less strenuous work.")

62. See U.S. Labor Department Review Finds Sex Bias at Border Plants in Mexico, at <http://www.haleokala.com/NAO.htm>.

hire pregnancy discrimination does not violate the Mexican Constitution. However, as of now, the Mexican Constitution does not explicitly prohibit pregnancy discrimination during the hiring process and is not interpreted as preventing such discrimination.

## B. Pregnancy-Based Discrimination During the Hiring Process Does Not Clearly Violate International Law

As mentioned, Article 133 of the Constitution refers to treaties made by the President as the Supreme Law of the Land,<sup>63</sup> and the prevalent view of the Mexican hierarchy of law places international treaties on at least the same level as federal law, if not higher.<sup>64</sup> Petitioners, in Submission No. 9701, mentioned several international conventions and standards that pregnancy-based discrimination supposedly violated including: Convention 111 of the International Labor Organization (ILO) on Discrimination in Respect of Employment and Occupation, Article 11(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (ACHR). Each international law source will be discussed briefly in the listed order.

### 1. Convention 111 of the ILO<sup>65</sup>

The relevant portions of Article 1 of Convention 111 state:1. For the purpose of this Convention the term discrimination includes—

(a) any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation . . . .

(3) For the purpose of this Convention the terms employment and occupation include . . . access to employment and to particular occupations, and terms and conditions of employment.<sup>66</sup>

Arguably, pregnancy discrimination is not a distinction, exclusion, or preference based upon sex, but a condition that is only coincidentally unique to women. Article 2 of the Convention, however, obliges members to promote “equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”<sup>67</sup> Testing

63. See MEX. CONST., art. 133, available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93>.

64. See TORRIENTE, *supra* note 12, at 34.

65. Mexico became a member of the ILO on September 12, 1931. See TORRIENTE, *supra* note 12, at 29.

66. Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Convention No. 111, adopted June 25, 1958, art. 1, 362 U.N.T.S. 31, 32-34, available at [www.ilo.org/actrav/actrav-english/telearn/global/ilo/law/con111.htm](http://www.ilo.org/actrav/actrav-english/telearn/global/ilo/law/con111.htm) [hereinafter ILO Convention No. 111].

67. Article 2 of the Convention states, “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to

women applicants for pregnancy does not assist in eliminating discrimination in the employment context and promotes unequal treatment amongst men and women. Such a practice may have the effect of “impairing equality of opportunity or treatment” in access to employment because only women can be tested for pregnancy.<sup>68</sup> Thus, Convention 111 of the ILO can be interpreted as proscribing both denial of employment to pregnant women and pre-screening women applicants to determine their pregnancy status.

On the other hand, the Convention does not explicitly refer to pre-employment discrimination and is ambiguous as it can be interpreted in different ways. Therefore, the argument that Convention 111 of the ILO only prohibits post-hire discrimination that results in unequal treatment is not without credence. As pre-hire discrimination does not clearly violate Convention 111 of the ILO, the Mexican government can credibly argue that the Convention only applies in situations of post-hire pregnancy discrimination.

## 2. CEDAW<sup>69</sup>

Submission No. 9701 also cites Article 11(1) of the CEDAW to support the argument that pregnancy-based discrimination violates an international treaty that Mexico has ratified.<sup>70</sup> Article 11(1)(b) states that,

“State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment . . . .”

The CEDAW strongly supports the position that pre-hire pregnancy discrimination is prohibited. Pregnancy-based discrimination does not ensure women the right to the same employment opportunities as men and more importantly, pre-screening women applicants for pregnancy does not apply the same criteria for employment selection to both men and women.

Article 11, though, also requires that State Parties take appropriate measures to ensure that women have safe working conditions<sup>71</sup> and particularly, that pregnant women are provided special protection in types of work proven to be harmful to them<sup>72</sup>. Therefore, the wording of Article 11 provides an opportunity

national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.” ILO Convention No. 111, *supra* note 66, at 34. Article 3 continues by providing guidance on the implementation of the Convention for each Member. *See id.*

68. *Id.*

69. Mexico signed the CEDAW on July 17, 1980 and ratified it March 23, 1981. *See* [www.un.org/womenwatch/daw/cedaw/cedaw/states.htm](http://www.un.org/womenwatch/daw/cedaw/cedaw/states.htm).

70. *See* Human Rights Watch, *Submission*, *supra* note 10.

71. *See* CEDAW, art. 11(1)(f), at [www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm) (stating that, “State Parties shall take all appropriate measures to eliminate discrimination against women. . . in particular: (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”)

72. *See id.*, art. 11(2)(d) (declaring that, “In order to prevent discrimination against women on the grounds of . . . maternity and to ensure their effective right to work, State Parties shall take ap-

for employers to use the CEDAW to validate testing women applicants for pregnancy. However, while employers can claim that it is necessary to screen women applicants for pregnancy to avoid assigning them to harmful tasks, this claim does not support a decision to refuse employment to applicants on the basis of a positive pregnancy test. Alternatively, Article 11 could be interpreted as implicitly maintaining that during pregnancy, employers have a duty to accommodate women assigned to harmful tasks to ensure their safety. Thus, the CEDAW is ambiguous as well, because although testing women applicants for pregnancy does not apply the same criteria for both men and women in the hiring process, pregnancy testing during the hiring process can be regarded as necessary to comply with Article 11. Overall, though, the CEDAW appears to be the best source of international law supporting the argument that pregnancy discrimination during the hiring process in Mexico violates international law.

### 3. ICCPR<sup>73</sup> and the ACHR<sup>74</sup>

Finally, both the ICCPR and the ACHR provide additional bases of international conventions ratified by Mexico, which according to petitioners, forbid sex-based discrimination. Neither the ICCPR nor the ACHR, though, specifically addresses women in employment situations. Article 26 of the ICCPR proclaims, “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex . . . or other status.”<sup>75</sup> While denying employment to pregnant women could be a form of sex-based discrimination that would contravene Article 26 of the ICCPR, the ICCPR does not mention pre-employment discrimination and it is open to interpretation as to whether it even applies in the employment context. Furthermore, the ICCPR is applicable to government action but has not been regarded as regulating private discriminatory actions.<sup>76</sup>

Interestingly, petitioners only used the ACHR as a general source of international law that prohibits discrimination based upon sex within Submission 9701.<sup>77</sup> However, an area of the ACHR that was not explored by petitioners,

---

appropriate measures: (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.”).

73. Mexico ratified the ICCPR on June 23, 1981. See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF THE PRINCIPAL INT’L HUMAN RIGHTS TREATIES (2004), available at [www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf).

74. The American Convention on Human Rights (hereinafter ACHR) was adopted at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica on November 22, 1969. See ACHR, available at [www.cidh.oas.org/Basicos/basic3.htm](http://www.cidh.oas.org/Basicos/basic3.htm). The date of deposit for Mexico’s ratification of the ACHR was April 3, 1982 and Dec. 16, 1998 marks the date of acceptance of the jurisdiction of the Mexican court. See *id.*, at [www.cidh.oas.org/Basicos/basic4.htm](http://www.cidh.oas.org/Basicos/basic4.htm).

75. International Covenant on Civil and Political Rights, art. 26, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

76. Article 5 of the ICCPR, however, states that, “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein . . . .” *Id.* This article seems to incorporate non-State action under the ICCPR.

77. See Human Rights Watch, *Submission*, *supra* note 10. Article 1 of the ACHR obliges State Parties to the Convention to “undertake to respect the rights and freedoms recognized herein and to ensure to all persons. . . full exercise of those rights and freedoms, without any discrimination for reasons of. . . sex. . . .” ACHR, *supra* note 75.

which represents a plausible argument for the prohibition of pregnancy testing during the hiring process, is Article 11. Article 11 of the ACHR affirms a person's right to privacy and a state's obligation to respect that right. It declares that "No one may be the object of arbitrary or abusive interference with his private life, his family, his home. . . ." <sup>78</sup> Arguably, subjecting women to pregnancy tests during the hiring process is an invasion of privacy as it is an arbitrary interference with a woman's private life. <sup>79</sup> Again, though, the ACHR sets forth State obligations and does not address discriminatory practices by private entities.

In sum, none of the mentioned international conventions specifically addresses pre-employment discrimination. Convention 111 of the ILO and the CEDAW are ambiguous and do not explicitly prohibit pre-employment discrimination. Additionally, neither the ICCPR nor the ACHR purports to regulate private entities and neither mentions pre-employment discrimination. Therefore, since pre-hire pregnancy discrimination does not unambiguously violate the preceding sources of international law, the Mexican government can plausibly contend that international law does not forbid pregnancy discrimination during the hiring process.

### C. Mexican Federal Law Establishes a Protective System for Maternity. <sup>80</sup>

The main law that governs labor relationships in Mexico is the Federal Labor Law (FLL), which implements the constitutional protections of Article 123, section A of the Mexican Constitution. <sup>81</sup> The FLL was originally enacted on August 18, 1931, <sup>82</sup> and is applicable in all of the Mexican States. <sup>83</sup> Mexican labor law tends to be protective of the rights of workers. Article 6 of the FLL "provides that all treaties executed and approved in accordance with Article 133 of the Constitution and the respective implementing laws will be applicable to labor relations to the extent that they benefit the worker." <sup>84</sup> The FLL presumably at-

78. See ACHR, *supra* note 75.

79. This argument was probably not asserted because Article 16 of the Constitution is translated to state that, "Nobody can be disturbed in his or her person, family, residence. . . except by virtue of a written order by a competent authority that is founded in and motivated by legal procedural cause." MEX. CONST, available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93> (providing an English translation of the Mexican Constitution by Ron Pamachena). Article 16, however, does not appear to be interpreted as proclaiming a fundamental right to privacy. Furthermore, one author thoroughly discusses the individual guaranties in Mexico without mentioning the guarantee to a right of privacy. See *generally*, ARIEL ALBERTO ROJAS CABALLERO, *LAS GARANTÍAS INDIVIDUALES EN MÉXICO* (2002).

80. While some Mexican scholars consider federal law to be superior to international treaties and conventions, it is generally considered to be on the same level or lower than international law within the Mexican hierarchy of law. See TORRIENTE, *supra* note 12, at 34.

81. See OCTAVIO NOVARO HOLGUIN, *Labor and Employment Laws in Mexico: An Overview, COMPLYING WITH THE LABOR AND EMPLOYMENT LAWS OF THE NAFTA COUNTRIES* 577, 582 (2001). Again, Article 123, section A of the Mexican Constitution regulates labor relations in the private sector.

82. The FLL was repealed and replaced in 1970. It has been amended numerous times throughout the years. See VARGAS, *supra* note 1, at 156.

83. See TORRIENTE, *supra* note 12, at 29.

84. *Id.* at 54. Therefore, the treaties and convention discussed in the previous section would apply to the extent that they benefit women *maquila* workers more than the FLL.

tempts to address the unique needs of women without degrading the principle of equal treatment for equal work.<sup>85</sup> Therefore, Article 3 prohibits discrimination on the basis of sex<sup>86</sup> and Article 164 provides that women have the same rights and obligations as men.<sup>87</sup>

Furthermore, in an attempt to address the special needs of women, Article 166 sets forth a protective system for maternity. During the pregnancy or nursing period, women have the right not to engage in unhealthy or dangerous labor without prejudice or detriment to salaries, benefits and other rights under employment contracts.<sup>88</sup> Pregnant employees are entitled to six weeks paid leave prior to childbirth and to six weeks paid leave thereafter.<sup>89</sup> The Mexican Social Security law regulates maternity leave, and the Mexican Social Security Institute (IMSS) pays for maternity leave.<sup>90</sup> The female worker, however, must be employed with the *maquiladora* for at least thirty weeks prior to going on leave for the IMSS to subsidize the female worker's salary.<sup>91</sup> Otherwise, the IMSS will not pay for maternity leave and the employer must pay the female worker's salary directly.<sup>92</sup>

After the twelve week paid maternity leave, women are entitled to the same position and the rights acquired under their employment contract.<sup>93</sup> Upon returning to work, nursing mothers are entitled to two paid half-hour breaks, for the purpose of nursing their children, along with their regular breaks.<sup>94</sup> Furthermore, Article 172 of the FLL requires employers to supply a sufficient number of chairs for pregnant or working mothers.<sup>95</sup>

#### D. The Mexican NAO Contends that the FLL Does Not Apply to Women Who are Discriminated Against in the Hiring Process

It is evident that the FLL explicitly protects the rights and welfare of pregnant women. In response to the allegation in Submission No. 9701 that pregnancy testing during the hiring process contravened the FLL, however, the Mexican NAO contended that Mexican law does not prohibit pre-employment discrimination because the FLL only applies to discrimination where there is an

---

85. See SANTIAGO BARAJAS MONTES DE OCA, *CONCEPTOS BÁSICOS DEL DERECHO DEL TRABAJO* 68 (1995) (stating the principle in Spanish, “[L]os propios legisladores han reglamentado el trabajo femenino, de manera que las diferencias fisiológicas con el hombre sean tomadas en cuenta, sin desatender por ello el principio de “trato igual para trabajo igual”).

86. See TORRIENTE, *supra* note 12, at 54.

87. See *id.* at 86.

88. *Id.*; see also VARGAS, *supra* note 1, at 171.

89. See TORRIENTE, *supra* note 12, at 87; see also VARGAS, *supra* note 1, at 171.

90. See TORRIENTE, *supra* note 12, at 52; see also VARGAS, *supra* note 1, at 171. The allowable twelve weeks' maternity leave may be extended in cases of illness with an additional leave of up to nine weeks. In cases of extended leave, IMSS pays women fifty percent of the regular wages. TORRIENTE, *supra* note 12, at 87-88.

91. See TORRIENTE, *supra* note 12, at 100.

92. See *id.* Employers assert that this is the main reason for not hiring pregnant women; because they are an economic drain. See McPhail, *supra* note 6.

93. See VARGAS, *supra* note 1, at 220.

94. *Id.*; TORRIENTE, *supra* note 12, at 88.

95. See VARGAS, *supra* note 1 at 220.

existing employment relationship.<sup>96</sup> At the time the petition was filed, existing government mechanisms for enforcing labor rights did not address pre-hire discrimination as part of their existing mandate. Therefore, according to the Mexican NAO, although the FLL clearly proscribes post-hire pregnancy discrimination, pre-hire discrimination is not forbidden because there is no explicit prohibition in Mexican law against pre-employment discrimination.<sup>97</sup>

Even though many Mexican states agreed with the Mexican NAO stance that, at the time, pregnancy-based discrimination during the hiring process was not against Mexican law, initiative was taken and advancement was made toward ending pregnancy discrimination following the HRW investigation. For instance, in October 1999, Mexico City's first female mayor, Rosario Rabies, signed an order to the city's penal code that would fine businesses that engaged in pregnancy-based discrimination.<sup>98</sup> The law also penalized violators with punishments ranging from 100 hours of community service to three years in prison. Conceivably, a business could even be shut down for a violation.<sup>99</sup> It was also reported that General Motors ended its pre-hire pregnancy tests in March 1997 and that Mexico's Education Ministry publicized that teachers would no longer be requested to take pregnancy tests as a condition of employment.<sup>100</sup>

Yet no revisions were made to the federal law that would make it mandatory for businesses to discontinue pre-hire pregnancy discrimination. The official position of the Mexican government was that pre-hire pregnancy testing did not constitute discrimination. Accordingly, *maquiladoras* still had the prerogative to discriminate against prospective job applicants based upon pregnancy.

#### IV. A NEW FEDERAL ANTIDISCRIMINATION LAW HAS BEEN PROMULGATED THAT EXPLICITLY PROHIBITS DISCRIMINATION BASED UPON PREGNANCY

In February 2001, the Citizens' Commission for Studies against Discrimination (Citizens' Commission) was established in Mexico.<sup>101</sup> The Citizens' Commission was composed of numerous political party representatives and proffered two important products.<sup>102</sup> The first was a book called *Discrimination in Mexico: Toward a New Culture of Equality*<sup>103</sup> which represented "the first systematic study of practices of discrimination and social exclusion in Mexico."<sup>104</sup> The second, and more important to this note, was the preliminary draft of the

96. See U.S. NAT'L ADMIN. OFFICE, PUBLIC REPORT, *supra* note 27, at 7.

97. See *id.*

98. See *Mayor Tackles Discrimination of Pregnant Workers*, UN WIRE, at [www.unwire.org/UNWire/19991021/5428\\_story.asp](http://www.unwire.org/UNWire/19991021/5428_story.asp) (Oct. 21, 1999).

99. See *id.*

100. See *id.*

101. See Gallardo, *supra* note 60, at 1.

102. See *id.*

103. See *id.* The actual book title is *Discriminación en México: por una nueva cultura de la igualdad*. The title in the text is the English translation.

104. *Id.*

Federal Law to Prevent and Eliminate Discrimination (Antidiscrimination Law).<sup>105</sup>

In 2002 and 2003, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) asked the Mexican government “to amend the Federal Labor Law to explicitly prohibit discrimination based on sex in recruitment and hiring for employment and in conditions of employment.”<sup>106</sup> Subsequently, on June 9, 2003, Mexican President Vicente Fox signed the new Antidiscrimination Law, which was published in the Federal Official Gazette on June 11, 2003.<sup>107</sup> The Law became effective on June 12, 2003.<sup>108</sup>

The Antidiscrimination Law explicitly prohibits discrimination based upon pregnancy and applies in the context of the private sector. Article 4 of the Antidiscrimination Law specifies that for the purposes of the Law,

discrimination will be understood to be any distinction, exclusion, or restriction that, based on ethnic or national origin, sex, age, disability, social or economic condition, health condition, pregnancy, language, religion, opinions, sexual preferences, marital status or any other reason, has the effect of impeding or annulling the acknowledgment or exercise of rights and the true equality of opportunities for people.<sup>109</sup>

Therefore, it could be concluded that screening women applicants for pregnancy and subsequently denying employment to those women who are pregnant is an exclusion based on pregnancy that has the effect of impairing the equality of opportunity for women. Pre-hire pregnancy testing in general has the effect of impeding equal opportunity since it is a distinction among job applicants based on sex and pregnancy.

Furthermore, Article 6 stipulates that the interpretation of the Antidiscrimination Law, along with the action of the federal authorities will be congruent with applicable international instruments concerning discrimination, of which Mexico is a party, in addition to the recommendations and resolutions adopted by multilateral and regional organisms and other applicable legislation.<sup>110</sup> For the purpose of Article 6, when different interpretations present

---

105. See *id.* “*La Ley Federal para Prevenir y Eliminar la Discriminación*” is translated in various ways that insubstantially differ from the translation that the author has chosen, i.e. Federal Law on the Prevention and Elimination of Discrimination.

106. THE SOLIDARITY CENTER, *Discrimination in the Workplace*, in JUSTICE FOR ALL 22, 23, <http://www.solidaritycenter.org/docUploads/Solidarity%20Mexico%20final%20pdf%2011%2D17%2D03%2Epdf?CFID=12088221&CFTOKEN=53880306> (2003).

107. *Id.* at 26; *Decreto por el que se expide la Ley Federal para Prevenir y Eliminar la Discriminación*, Federal Official Gazette, June 11, 2003 [hereinafter *Ley*], available at <http://cgservicios.df.gob.mx/prontuario/vigente/148.htm>.

108. See *Ley*, *supra* note 108.

109. See *id.* This represents the author’s translation of Article 4, which reads “*Para los efectos de esta Ley se entenderá por discriminación toda distinción, exclusión o restricción que, basada en el origen étnico o nacional, sexo, edad, discapacidad, condición social o económica, condiciones de salud, embarazo, lengua, religión, opiniones, preferencias sexuales, estado civil o cualquier otra, tenga por efecto impedir o anular el reconocimiento o el ejercicio de los derechos y la igualdad real de oportunidades de las personas.*” Cf. Baker & McKenzie, *Discrimination in the companies*, at [www.maquilaportal.com/editorial/editorial277.htm](http://www.maquilaportal.com/editorial/editorial277.htm) (last visited Mar. 23, 2005) (providing an additional translation that slightly differs).

110. See *Ley*, *supra* note 108. All foregoing translations are made by the author.

themselves, the interpretation that most effectively protects the persons or groups that are affected by the discriminatory conduct will be preferred.<sup>111</sup> Thus, Convention 111 of the ILO, the CEDAW, ICCPR, and ACHR would supersede Mexican law in areas that provide women with more protection from discriminatory practices.<sup>112</sup>

Throughout the Antidiscrimination Law, the issue of gender and pregnancy-based discrimination is addressed and prohibited in various ways. Article 9, section III concludes that the prohibition of the free election of employment or restriction against opportunities to access is a discriminatory practice.<sup>113</sup> Pregnancy testing during the hiring process to screen out pregnant applicants should thereby be prohibited since it denies pregnant women employment access opportunities and free election of employment. Article 9, section VI considers the impediment of the free exercise to determine the number and spacing of children to be a discriminatory practice.<sup>114</sup> Article 10, section III requires that public organs and federal authorities ensure that women are guaranteed the right to decide the number and spacing of their children.<sup>115</sup> Article 15 obligates public organs and federal authorities to adopt measures that favor equal opportunity and prevent and eliminate the forms of discrimination articulated in Article 4 of the Antidiscrimination Law.<sup>116</sup> Thus, the Antidiscrimination Law reiterates the fundamental rights provided to women in the Mexican Constitution<sup>117</sup> and requires proper and effective implementation of Article 4 of the Antidiscrimination Law, which incorporates and prohibits other forms of discrimination, most notably, pregnancy discrimination.

Also, the Antidiscrimination Law creates a National Council for the Prevention of Discrimination (Council) to oversee its effective implementation.<sup>118</sup> The Council is a decentralized organ, assigned to the Secretary of State, with juridical personality and its own resources.<sup>119</sup> For the development of its powers, the Council enjoys complete autonomy and has the ability to negotiate independently.<sup>120</sup> In the same manner, to dictate the resolutions that in terms of the Antidiscrimination Law formulate the complaint and claim processes, the Council is not subordinate to any other authority and can adopt its decisions with complete independence.<sup>121</sup>

111. *See id.*, art. 7.

112. For instance, although the Mexican Constitution does not speak of a fundamental right of privacy, Article 11 of ACHR may lend support to the argument that pregnancy testing violates privacy rights. *See ACHR*, at [www.cidh.oas.org/Basicos/basic3.htm](http://www.cidh.oas.org/Basicos/basic3.htm).

113. *See Ley*, *supra* note 108.

114. *See id.*

115. *See id.*

116. *See id.*; *see also* THE SOLIDARITY CENTER, *supra* note 107, at 27 (asserting that, "the law obligates federal authorities to apply all measures and resources in their power to halt discrimination within their own agencies and in the public policy arenas where they have enforcement jurisdiction.").

117. *See* MEX. CONST., available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93>.

118. *See Ley*, *supra* note 108; *see also* THE SOLIDARITY CENTER, *supra* note 107, at 27.

119. *See Ley*, art. 16, *supra* note 108.

120. *See id.*

121. *See id.*

For the fulfillment of its goal to prevent and eliminate discrimination, numerous powers and abilities of the Council are granted in Article 20. These include the power to design strategies and instruments (such as promoting programs, projects and actions for the prevention and elimination of discrimination),<sup>122</sup> to propose and evaluate the implementation of the National Program for the Prevention and Elimination of Discrimination to conform to applicable legislation,<sup>123</sup> to verify the adoption of measures and programs to prevent and eliminate discrimination in public and private institutions and organizations<sup>124</sup>, and to apply the administrative measures established in the Antidiscrimination Law.<sup>125</sup> Altogether, Article 20 lists a total of nineteen measures that the Council may employ to prevent and eliminate discrimination.

The third section of the Antidiscrimination Law breaks down the organs of the Council Administration. The Administration consists of a Government Board and the Council President.<sup>126</sup> Article 23 invites a representative from several groups, including the National Institute of Women, to be a permanent non-voting member of the Government Board<sup>127</sup>. Additionally, a Consultant Assembly will serve as an organ of opinion and assessment of the actions, public politics, programs and projects that the Council develops.<sup>128</sup>

Finally, another important chapter of the Antidiscrimination Law is Chapter VI, titled "The Administrative Measures to Prevent and Eliminate Discrimination." According to Article 83, the Council stipulates the adoption of the following measures to prevent and eliminate discrimination: the education of persons and institutions that are parties to a Council decision or settlement through courses or seminars that promote equal opportunities; the posting of signs on establishments that fail to adhere to the anti-discriminatory requirements of the Law; the presence of Council personnel for the promotion and verification of the adoption of measures that favor equal opportunity and the elimination of all forms of discrimination in any establishment that has been subject to a Council decision, for a time designated by the Council; and the publication of a summary of the Council decisions through various modes of communication.<sup>129</sup> The Council will take into account the following considerations when determining the appropriate administrative measure to apply: the intentional character of the discriminatory conduct, the graveness of the discriminatory act or practice, and the reoccurrence of the incident.<sup>130</sup> Conversely, the Council may

---

122. *See id.*, art. 20, §1.

123. *See id.* art. 20, §2.

124. *See id.*, art. 20 §3.

125. *See id.*, art. 20 §15.

126. *See id.*, art. 22.

127. *See Ley*, art. 23, *supra* note 108 (explaining that members have a right to speak but not to vote).

128. *See id.*, art. 31. The Consultant Assembly will incorporate at least ten and no more than twenty citizens and representatives of the social and private sector and of the academic community that, through their experience in the area of preventing and eliminating discrimination, are able to contribute to the fulfillment of the Council's goals. *See id.*, art.32.

129. *See id.*, art. 83.

130. *See id.*, art. 84. It is considered to be a reoccurrence of a discriminatory incident when the same person incurs a new violation of the prohibition of discrimination.

reward companies that undertake programs and measures to prevent discrimination.<sup>131</sup> Thus, the Council has the power to draft regulations concerning discrimination, to set penalties for those who engage in discriminatory practices and to reward those who abide by and promote antidiscrimination measures and policies.

Although the Antidiscrimination Law is fairly comprehensive and represents a major achievement and advancement in Mexican law, some believe that the law is too weak, broad, and vague.<sup>132</sup> Since the law itself does not create civil or criminal liabilities against those engaging in discriminatory practices, it is viewed as having narrow enforcement options.<sup>133</sup> However, these criticisms may be precipitous and unwarranted.

The Antidiscrimination Law is the first law, national or international, that explicitly prohibits discrimination based upon pregnancy. Testing job applicants for pregnancy as a condition for their employment is now unambiguously considered to be a prohibited form of discrimination. Today, Mexican law openly speaks to pre-hire discriminatory practices that distinguish among job applicants based on pregnancy and restrict pregnant women from obtaining employment. Also, the fact that portions of the Antidiscrimination Law are broad and vague is not necessarily a negative characteristic. The Law authorizes the Council to determine most enforcement measures, which allows the Council to remedy instances of discrimination in a creative manner; the Council can craft unique administrative measures that will most effectively address a given act of discrimination.

Finally, criminal or civil penalties are not the only solution to the problem. According to Gilberto Gallardo,<sup>134</sup> the long-term goal of the fight against discrimination is “to achieve social cohesion and develop a cultural atmosphere of respect for differences.”<sup>135</sup> Therefore, conciliatory measures and actions of an administrative nature promote public awareness, education and persuasion, which attempt to make antidiscrimination ideals part of the foundation of a “more equitable and inclusive” Mexican society.<sup>136</sup> Gallardo concludes his seminar speech with the statement, “Discrimination not only deserves to be condemned, but also requires an alternative.”<sup>137</sup>

131. See *Ley*, art. 85, *supra* note 108; see also Baker & McKenzie, *supra* note 110 (explaining that the Council has to the power to grant awards to companies that adhere to the programs and provisions explicated in the Antidiscrimination Law. Therefore, “companies may strengthen their ethical image before the national and international community.”)

132. See *Mexico Passes Anti-Bias Law*, in OUT IN NEWS, at [www.outintoronto.com/Home/news.asp?articleid=4653](http://www.outintoronto.com/Home/news.asp?articleid=4653) (June 25, 2003) (providing that with regard to the new antidiscrimination law, some human rights groups, gay and women’s activists and indigenous organizations “were concerned about what they termed its broad and vague language.”); see also THE SOLIDARITY CENTER, *supra* note 107 (council true enforcement powers.”)

133. See *Mexico Passes Anti-Bias Law*, *supra* note 133; see also Baker & McKenzie, *supra* note 110.

134. Gilberto Rincón Gallardo is the Past President of the Citizen’s Commission for Studies against Discrimination and the President of the “Contra Discriminación” Civil Association (Civil Association Against Discrimination). See Gallardo, *supra* note 60.

135. *Id.*

136. *Id.*

137. *Id.*

While punishments and sanctions properly condemn discrimination and are necessary to effectively deter employers from engaging in discriminatory practices, some of the Antidiscrimination Law's administrative measures may offer an alternative to discrimination. The Antidiscrimination Law encourages a more positive attitude toward groups vulnerable to discrimination and educates and sensitizes the public about the harmful nature of discriminatory practices.<sup>138</sup> It attempts to provide a comprehensive approach to a complicated issue with deep societal and cultural roots. Therefore, it is too soon to determine that the administrative measures will not be as effective and efficient as the implementation of a system of judicial measures and penalties. The new law may actually be better aimed at the source of the problem and the long-term goal of social cohesion.<sup>139</sup>

#### V. CONCLUSION: MEXICAN LAW NOW PROHIBITS PRE-EMPLOYMENT PREGNANCY DISCRIMINATION.

Mexican law now prohibits pre-employment discrimination based upon pregnancy. Prior to the promulgation of the Antidiscrimination Law, Mexican law was ambiguous and not interpreted as proscribing discrimination unless there was an existing employment relationship. For instance, pregnancy discrimination probably contravenes the spirit of the Mexican Constitution, which grants women the fundamental rights of equality before the law, freely deciding the number and spacing of children, and practicing a lawful profession. However, pre-employment pregnancy discrimination is not explicitly prohibited by the Mexican Constitution and has not been interpreted as preventing such discrimination.

Furthermore, pregnancy discrimination does not clearly violate several international treaties that Mexico has ratified. Both Convention 111 of the ILO and the CEDAW are ambiguous and do not explicitly prohibit pre-employment discrimination. Also, neither the ICCPR nor the ACHR purport to regulate private entities and do not mention pre-employment discrimination.

Nonetheless, pregnancy-based discrimination now violates the new Antidiscrimination Law. The broadness and vagueness allow more flexibility towards providing alternatives to discrimination through creative measures. Although it remains to be seen whether the Antidiscrimination Law will be used to eradicate all forms of pregnancy discrimination within the *maquiladora* industry, the law has the potential to effectively address this problem.

---

138. *See id.*

139. Additionally, this law serves as only the minimum requirements to which companies must adhere, because Mexican states may choose to adopt laws that impose more stringent requirements and penalties. *Cf. Mayor Tackles Discrimination of Pregnant Workers*, *supra* note 100 (creating laws which prohibit pregnancy discrimination and impose relatively harsh penalties for violations). Mexican law does not prevent states from promulgating higher standards, but rather that they at least meet the federal requirements. *See TORRIENTE*, *supra* note 12, at 52 (stating that "States or municipalities are governed by state laws enacted by the legislatures of the individual states. In accordance with the criteria of each state, these laws may be patterned after the FLL . . . and apply only to state . . . workers in the jurisdiction of the state enacting the law").

Screening applicants for pregnancy promotes discriminatory practices and may, in most cases, be unnecessary. Hopefully, the Antidiscrimination Law will encourage the Mexican government to conclude that pre- and post-hire pregnancy discrimination violates all sources of Mexican law including the Mexican Constitution and international law. Until then, it can serve as a catalyst for achieving Mexico's long-term goal of social cohesion.