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USMCA: Labor Provisions

Overview

The proposed U.S.-Mexico-Canada Agreement (USMCA), signed in late 2018, requires implementing legislation that must be approved by Congress before it can enter into force. Implementing legislation for USMCA was introduced in the House of Representatives (H.R. 5430) on December 13, 2019, and in the Senate on December 16, 2019 (S. 3052). The House approved the bill on December 19, 2019. The Senate Finance Committee reported the bill out of committee on January 7, 2020. Upon ratification, the USMCA would replace the 1994 North American Free Trade Agreement (NAFTA).

Labor issues were a major congressional concern throughout the USMCA negotiations and remained an issue after the three countries concluded the agreement in September 2018. In response, the U.S. Trade Representative (USTR) and some Members of the House of Representatives negotiated changes to the USMCA; most of the changes were dedicated to labor modifications. USTR then negotiated the amendments with Canada and Mexico.

Historically, U.S. labor advocates have expressed concern over free trade agreements (FTAs) with developing countries, due to those countries' relatively lower wages and labor standards, and have sought stronger labor provisions in U.S. FTAs. Proponents of FTAs such as NAFTA argue that they help improve standards, build capacity to support worker rights in developing countries, and enhance economic development and growth. In the long run, FTAs help reallocate resources to more efficient industries, support higher-paying U.S. jobs, and, according to most economists, have a net positive effect on the U.S. economy. At the same time, trade liberalization can have adjustment costs in certain industries and regions of the country. The U.S. International Trade Commission estimates that, if implemented, the collective bargaining commitments made by Mexico in USMCA would increase Mexican union wages and help reduce wage disparity.

NAFTA

NAFTA's labor provisions are in a side agreement containing 11 "guiding principles" pertaining to worker rights. Other provisions involve technical assistance, capacity building, and separate dispute procedures, along with a labor cooperation mechanism. Full dispute resolution procedures apply only to a country's "persistent pattern of failure" in trade-related cases to enforce its own laws regarding child labor, minimum wage, and occupational safety and health. Issues such as freedom of association and the right to organize are limited to ministerial consultations.

USMCA

The proposed USMCA includes components of more recent U.S. FTAs that strengthen labor provisions and provide

recourse to the same dispute settlement mechanism as other parts of the agreement. Unlike NAFTA, it requires parties not only to enforce their own laws, but also to adopt and maintain laws on core worker rights related to the International Labor Organization (ILO) 1998 Declaration on Fundamental Principles and Rights at Work. The USMCA also commits parties to:

- not waive or otherwise derogate from labor statutes or regulations to promote trade and investment;
- not fail to effectively enforce labor laws through a "sustained or recurring course of action or inaction" (with the exception of worker violence) in a manner affecting trade or investment between parties; and
- promote compliance with labor laws through appropriate government action, such as appointing and training inspectors or monitoring compliance and investigating suspected violations.

The USMCA also prohibits imports of goods made by forced labor, and adds new commitments related to violence against workers, migrant worker protections, and workplace discrimination. It maintains standard U.S. FTA language that each party would retain the right to "exercise reasonable enforcement discretion and to make bona fide decisions" on the allocation of enforcement resources. Additionally, it specifies that the labor chapter shall not be construed to empower another party to undertake labor law enforcement in the territory of another party.

USMCA Protocol of Amendment: Key Labor Changes

Some Members of Congress criticized the original text of the USMCA chapters on labor and dispute settlement (DS) and negotiated with the Administration to amend the agreement. Key changes include the following:

- Prevention of panel blocking in dispute settlement. Ensures the formation of a panel in dispute cases where a party refuses to participate in the selection of panelists.
 - "In a Manner Affecting Trade and Investment." Shifts the burden of proof by stating that an alleged violation affects trade and investment, unless otherwise demonstrated.
 - Rapid Response Mechanism. Adds a new rapid response mechanism to provide for an independent panel investigation of denial of certain labor rights at "covered facilities," as opposed to a government inspection.
 - Mexico's Labor Reform Monitoring. USMCA implementing legislation creates a new interagency committee, labor attachés, and reporting requirements to Congress on Mexico's implementation of labor reforms.
 - New or amended provisions on Rules of Procedure for DS, forced labor, and violence against workers.
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Mexican Labor Reforms

After several years of domestic debate and constitutional reforms in 2017, on May 1, 2019, Mexican President

Andrés Manuel López Obrador signed into law a labor reform bill aimed at enhancing Mexican worker rights by ensuring that workers can vote for union representatives by secret ballot, establishing the right to join unions of choice, and creating an independent labor court to resolve disputes between union workers and employers and register contracts, among other measures.

USMCA Annex 23-A in the labor chapter commits Mexico to enact legislative action in regard to its labor laws, similar to the May 2019 reforms, specifying that absent such action a delay in USMCA's entry into force could be possible. Specifically, Annex-23A commits Mexico to:

- eliminate all forms of forced or compulsory labor;
- protect the right of workers to organize, form, and join the union of their choice;
- prohibit employer interference in union activities, discrimination, or coercion against workers;
- provide for the exercise of a personal, free, and secret vote of workers for union elections and agreements;
- establish and maintain independent and impartial bodies to register union elections and resolve disputes relating to collective bargaining agreements; and
- establish independent labor courts.

While Mexico has enacted these labor law reforms, and undertook constitutional reforms in the past, several Members of Congress remain concerned about Mexico's ability to fully implement and enforce its laws.

Mexico's Federal Labor Law: Key Articles

- **Article 47.2:** Protects workers from any form of violence or forced labor.
 - **Article 133:** Prohibits any form of retaliation or harassment by the government, union leadership, or companies of workers exercising their rights.
 - **Article 386:** Protects workers' rights to vote for independent unions through a secret ballot process, allowing workers to form their own unions and pick their own representatives.
 - **Article 387:** Imposes legal obligations on firms to recognize workers' right to strike.
 - **Article 604:** Replaces existing Conciliation and Arbitration Labor Boards that currently deal with employment law altercations with independent labor courts to resolve disputes and register contracts to ensure worker representation in unions.
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U.S. Trade Representative (USTR) Robert Lighthizer described Mexico's reforms as a win for labor advocates, claiming that the new laws "will greatly improve Mexico's system of labor justice and are exactly what labor leaders in the United States and Mexico have sought for decades." Labor experts and advocates view the reforms as a major improvement and are hopeful of a renewed commitment to transform labor rights and justice in Mexico, but many remain concerned about implementation challenges.

Mexico's Implementation Plan

Mexico has outlined an ambitious roadmap with annual benchmarks to implement reforms over four years. Mexican officials contend that replacing the conciliation and arbitration board with independent labor tribunals and

courts run by the judicial branch over the next three years will ensure effective enforcement. Mexico's president submitted his budget proposals to Mexico's Congress on September 1. The budget request includes \$523 million for the first stage of the labor reforms, with approximately \$267 million in additional funding from other government agencies. Critics question whether the 2020 budget and plan will be sufficient to carry out the reforms.

This skepticism was echoed by some Members of Congress who proposed adding a labor inspection system within USMCA to ensure stronger enforcement by Mexico. The rapid response mechanism in the amended USMCA provides for an independent panel investigation at "covered facilities" for the suspected denial of the right of free association and collective bargaining. For the United States, covered facilities would be limited to those that have previously been proven to have violated U.S. law. For Mexico, a claim can be brought only with respect to an alleged violation under Mexico's USMCA labor reform commitments in Annex 23-A.

Issues for Congress

The debate over USMCA labor provisions revisited similar issues raised during NAFTA negotiations and its implementation. Some policymakers contend that FTAs help raise labor standards and wages in lower income countries; others are concerned about worker rights protection. Numerous Members welcomed the amended agreement, which, they argue, includes stronger and more enforceable labor provisions. While major U.S. labor unions endorsed the revised agreement, other stakeholders question how the untested rapid response enforcement mechanism will operate in practice. Some Members are concerned about Mexico's ability to carry out its labor obligations and view U.S. commitment to capacity building as key to strengthening enforcement in Mexico. In moving forward, Congress may consider:

- **Mexico's enforcement ability and labor reform:** Reforms in Mexico have potential to be transformative but face challenges. Do Mexico's recent actions demonstrate new political will to address concerns?
- **Resources:** Some stakeholders point to limited capacity in Mexico, especially at the subnational level, as an issue. USMCA implementing legislation designates funding for the Department of Labor to support reform efforts in Mexico and worker-focused capacity building. Should the United States assist Mexico with resources to implement the new labor standards?
- **Dispute settlement:** Amendments to the USMCA's original DS procedures prevent a disputing party from blocking formation of a panel via lack of consensus over panelist appointments. How effective will USMCA's DS provisions be in resolving labor disputes?
- **Rapid Response Mechanism:** USMCA's new rapid response mechanism provides for an independent panel investigations at covered facilities, with the potential for penalties and blocking of imports from the entities. How can USMCA parties ensure the system's effectiveness?

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