

LABOR RELATIONS

Expert Analysis

Labor Law Implications of the United States-Mexico-Canada Agreement

The United States recently ratified the United States-Mexico-Canada Agreement (USMCA), which is intended to replace the North American Free Trade Agreement (NAFTA). The USMCA enjoys broad bipartisan support in the United States, passing 89-10 in the Senate and 385-41 in the House of Representatives. Mexico ratified the trade pact on Dec. 12, 2019, and Canada will likely ratify the agreement this year, although the timing remains uncertain. The USMCA will then come into force “on the first day of the third month” following Canadian ratification. In this article, we examine the significant changes to labor provisions in the USMCA as compared to those in NAFTA. We also highlight changes made following the version negotiated in 2018, reflecting alterations pushed largely by congressional Democrats and labor unions.

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From NAFTA to USMCA: New Labor Rules

The Office of the U.S. Trade Representative describes the USMCA as “modernizing” NAFTA, which has controlled trade among the three nations for more than 25 years. In doing so, the USMCA “includes components of

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more recent U.S. [free trade agreements].” Among other elements, it expands labor rights and enhances dispute resolution mechanisms.

Unlike NAFTA, the USMCA requires the parties to adopt and maintain laws on workers’ rights—not just

enforce existing laws. Core rights that must be recognized by legislation and regulations under the USMCA are the rights addressed in the International Labor Organization Declaration of Fundamental Principles and Rights at Work, a 1998 document. These rights are freedom of association for workers and recognition of the right to collective bargaining; elimination of forced labor; abolition of child labor; acceptable conditions with respect to hours of work, minimum wages and occupational safety; and elimination of discrimination in respect of employment, particularly on the basis of sex. The USMCA further requires that parties adopt and enforce regulations for provision of employee benefits, such as retirement and healthcare.

The obligation to adopt new legislation is not symmetrical among the parties. For instance, while the USMCA obligates each party to “implement policies that it considers appropriate to protect workers against discrimination on the basis of sex,” it also states that, for the United States, no additional legislation—such as amendments to the Civil Rights Act—is necessary to meet its obligations.

In contrast, the trade pact obligates the Mexican federal government to implement several specific labor reforms. Many of these have already been enacted as a result of legislation passed in May 2019. For instance, the newly established Federal Center of Conciliation and Labor Registry will oversee union elections and collective bargaining agreement (CBA) ratifications in Mexico and ensure that votes by workers are conducted by secret ballot. Mexican labor reforms also address another USMCA requirement—that unionized workers be made aware that they work under a CBA and receive a copy of the agreement. CBAs must also be registered with the Mexican government. In contrast, unionized workers in the United States have long been entitled to receive copies of CBAs under §104 of the Labor-Management Reporting and Disclosure Act of 1959, although registration of private sector CBAs with the government is voluntary. In another major reform required of Mexico by the USMCA and already implemented by legislation there, all existing CBAs must be terminated, or re-ratified with majority support of the workers covered by the agreement, by 2023 (four years after the new labor reforms were enacted). New labor courts at the state and federal level were also established by the Mexican legislation, as required by the USMCA.

These reforms are intended to improve transparency in labor negotiations and give workers a say in the bargaining process. Prior to the new law, employers in Mexico could negotiate labor agreements in secret, with

no ratification by the affected workers—many of whom were unaware that an agreement even existed. This resulted in contracts with employer-friendly terms, often allowing wages to remain low despite workers ostensibly being represented by unions. After the reforms, Mexican workers will have increased input in workplace bargaining—presumably leading to higher wages and improved working conditions—with the secondary effect of making Mexico a less attrac-

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tive destination for outsourced jobs from the United States. As the Congressional Research Service noted in a report on the USMCA, some U.S. lawmakers remain concerned about the Mexican government’s ability to implement and enforce these reforms.

New Rules on Automobiles

Special attention was given to automobile production in the USMCA. Like NAFTA, the USMCA sets minimum percentages of a product’s value that must originate in the United States, Canada or Mexico to qualify for tariff-free treatment. This percentage is known as the Regional Value Content (RVC), and it varies depending on the product. The USMCA raises the

RVC for passenger vehicles to 75%, up from 62.5% under NAFTA. The USMCA also introduces new Labor Value Content (LVC) rules, applicable specifically to automobiles. LVC rules require that at least 40% of a passenger car’s contents be made by workers who earn at least \$16 per hour (45% for pickup trucks and cargo vehicles). At least 25% of these high-wage workers must be involved in materials and manufacturing (workers involved in other aspects of production, such as research and development, may make up the balance). The LVC rules will phase in over three years. The Center for Automotive Research predicts that LVC rules will have the greatest effect on vehicles and car parts made in Mexico and could increase the number of “core parts”—like engines and transmissions—made in North America. However, automobiles manufactured and sold in a single country will not be affected by RVC and LVC rules, since they are not subject to import controls.

Several Changes Secured By Congress

While the “original” USMCA was signed by the parties in November 2018, ratification was delayed for more than a year as Democrats in Congress, fresh off their midterm victories, pushed for changes to the agreement—including its labor provisions. Following months of negotiations, both between Congress and the Trump administration, and among the parties, a modified USMCA was signed on Dec. 10, 2019. These changes were enough to win support

from Congressional Democrats and from prominent labor organizations, including the AFL-CIO.

One major change is the creation of a presumption, not found in NAFTA or in the original text of the USMCA, that a violation of labor rules “is in a manner affecting trade or investment.” Thus, a nation appearing before a dispute resolution panel on accusations of labor violations bears the burden of proving that the alleged non-compliance did not affect trade. The presumption also applies to alleged environmental violations under the USMCA. The presumption will encourage signatories to enforce labor regulations and respond to allegations, and will make disputes easier for accusers to pursue.

Monitoring and enforcement mechanisms, particularly with regard to Mexico, were also added to the deal at the behest of Democrats in Congress. The legislation implementing the USMCA in the United States creates an Interagency Labor Committee for Monitoring and Enforcement. Its powers will include monitoring Mexico’s implementation and compliance with labor rules. Among other functions, the Interagency Labor Committee will receive petitions from the public of alleged failures to implement USMCA labor rules, and will create a hotline for workers in USMCA countries—including Mexican workers—to confidentially report labor violations. The legislation also allows the U.S. Department of Labor to hire additional employees, to be based in Mexico, who will monitor compliance with labor regulations and provide technical assistance to the Mexican

government in implementing reforms. Robert Lighthizer, the U.S. Trade Representative, clarified in a December 2019 letter to Mexican trade negotiators that labor attachés will not serve as inspectors, alleviating some concerns from Mexico over national sovereignty.

The USMCA also added the so-called “rapid response mechanism” for disputes between Mexico and the United States. Included as an annex to the dispute settlement chapter, the rapid-response mechanism allows a state party to bring a complaint if it has a good-faith belief that workers at a facility covered by the USMCA are being denied their rights to collective bargaining and free association. After a party makes a complaint, the responding nation will initiate a domestic review to determine whether a denial of rights has occurred. If the complaining party is not satisfied with the results of this domestic investigation, it may then request a review by a three-member rapid response labor arbitration panel. Each panel will consist of one arbitrator appointed by each nation, and a jointly appointed arbitrator. The rapid response panel will then issue a decision within 30 days. If the panel agrees that workers’ rights to collective bargaining or free association have been violated, the complaining party may impose appropriate remedies, including levying penalties on goods produced at the non-compliant facility. Separate rapid-response provisions are also included in the USMCA for disputes between Mexico and Canada.

The rapid-response mechanism takes effect immediately on the entry into force of the USMCA, and it applies to all manufactured goods and services traded between the United States and Mexico. By quickly convening arbitral panels to resolve disputes, allegations will be cleared in a manner of months rather than years. The mechanism also allows the panelists to conduct on-site visits of allegedly non-compliant facilities to verify whether workers are being accorded full labor rights. The rapid-response mechanism represents a victory for labor organizations in the United States and a concession by the Mexican government, where many potential facility inspections are expected to occur.

The Future of Labor Under the USMCA

Certain provisions of the USMCA—including those on labor—represent significant shifts. Some changes, such as reforms to Mexico’s collective-bargaining laws, have already been implemented and represent a new era for labor relations in that country. Other provisions, such as the automotive LVC rules, may result in altered supply chains and higher wages. As they look to adapt to an already-complicated environment, stakeholders are advised to watch for new updates and consult with counsel on compliance.