

Fair Labor Association

Op Memo: Freedom of Association: Monitoring Against Protection Contracts in Mexico

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Background

The use of “protection contracts” in Mexico to limit workers’ right to freedom of association and collective bargaining is an endemic practice that contravenes ILO’s Conventions 87 and 98 and FLA Workplace Code of Conduct and Monitoring Benchmarks.¹

An employer protection collective agreement (generally known as a protection contract) typically takes the form of an agreement between an employer and either the representative of a “ghost” (or yellow) union or a lawyer who has created such a union that purports to be a collective bargaining agreement (CBA). These agreements typically are done without the knowledge or consent of workers. In some instances, protection contracts are drawn up prior to the hiring of any workers at a facility, and are intended to prevent the negotiation of a CBA in the future by an independent union.² Protection contracts generally reproduce requirements of the labor law and do not contain additional benefits to workers that would be expected from a collective negotiation.

An added element of protection contracts are “exclusion clauses.” Exclusion clauses are roughly akin to closed shop agreements, but in the Mexico context, union membership is required for workers to obtain employment at the facility and membership must be maintained. In other words, workers may be fired for establishing or joining an organization that is not the union holding title to the (protection) contract.

In February 2009, the International Metalworkers’ Federation (IMF), with backing from the International Trade Union Confederation (ITUC) and five Mexican union confederations, filed a complaint before the ILO Committee on Freedom of Association challenging the compatibility of the Mexican practice of protection contracts with the principles of ILO Convention 87. In March 2011, said Committee issued an interim report recommending, inter alia, that the Government of Mexico engage in a dialogue with worker and employer representatives on a number of issues regarding Freedom of Association and requesting response to direct allegations regarding the prevalence and scope of protection contracts.³

In its *Annual Survey of Trade Union Violations, 2011*, the ITUC reported that protection contracts in Mexico are most common in the following five sectors of the economy: the auto industry, supermarket chains, cleaning services, low cost airlines and maquilas. With respect to

¹ Mexico has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), but not the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

² While Mexican law permits more than one union in an enterprise, the existence of a “ghost” union for all practical purposes prevents the creation and recognition of an independent union.

³ http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_153533.pdf, paragraphs 727-903.

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the maquila sector, it stated: “The maquilas, located on Mexico’s northern border, often sign “protection contracts” before a multinational has even launched its operations. These contracts are agreements concluded between a company and a union that only exists on paper, as it has not been chosen by the workers, most of whom are women. As a result, the workers are not informed that they have a union and collective bargaining rights. The workers organizing to improve their pay and working conditions find themselves faced with intimidation and repression at the hands of the “paper unions” and the government. Those attempting to defend their rights are labeled troublemakers and risk being blacklisted by the company.”⁴

With respect to the prevalence of protection contracts, a Mexican trade union leader has stated that 90% of the CBAs in effect in Mexico are protection contracts.⁵

FLA Findings of FOA Noncompliance in Mexico

Since 2008, the FLA has conducted 27 IEMs/IEVs in Mexico. Eleven (41%) of the audits cited Freedom of Association (FOA) noncompliances; 9 of the cases where noncompliance was cited (82%) related to protection contracts and exclusion clauses. In particular, the findings included:

- Hiring contingent on workers’ affiliating to the union holding title to the CBA;
- Exclusion clause in the CBA allowing the factory to fire any worker that disaffiliates or is expelled by the union;
- A CBA is in place but there is no union representative at the facility;
- Workers are not aware that they are covered under a CBA, who their union representative is, and union dues are not deducted or collected from their earnings.

Guidance for FLA-Affiliated Companies

The FLA would like to remind company affiliates of their obligation to apply the FLA Workplace Code of Conduct in supplier facilities. While “protection contracts” and related practices have been considered violations of FOA under the FLA Workplace Code of Conduct, the Monitoring Benchmarks approved by the FLA Board in conjunction with the 2011 Workplace Code of Conduct add specificity and clarity to the standards that affiliated companies are expected to monitor against with respect to FOA and protection contracts.

⁴ <http://survey.ituc-csi.org/Mexico.html?lang=en#tabs-4>.

⁵ Cited in http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_153533.pdf, paragraph 735.

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With regard to protection contracts and exclusion clauses, the FLA would like to highlight the following Benchmarks under the code elements of Employment Relationship and Freedom of Association:

EMPLOYMENT RELATIONSHIP

- **ER.3. Recruitment and Hiring/Employment Decisions.** All employment decisions shall be made solely on the basis of a person's qualifications. Employment decisions shall not be made on the basis of union affiliation or sympathy.
- **ER.15. Terms and Conditions/New Employee Orientation.** Employers shall provide an orientation to new employees at the time of hiring which explains employers' policies for industrial relations, including respect to freedom of association.
- **ER. 16. Terms and Conditions/Communication.** Where a union exists in the workplace, employers shall make available a copy of the collective bargaining agreement to all workers and other interested parties.
- **ER. 26. Industrial Relations/Right to Organize, Bargain and Participate in Legal Strikes.** Employers shall respect all laws, rules and procedures protecting the rights of workers to organize, bargain collectively, and participate in strikes consistent with ILO principles and jurisprudence.
- **ER. 30. Skills Development/Promotion, Demotion and Job Reassignment.** Policies and procedures should outline the criteria for promotion, demotion, and job reassignment scheme and prohibit discrimination or use of demotion or job reassignment as a form of penalty or punishment.
- **ER. 32. Termination and Retrenchment/General Policies and Procedure.** Employers shall have in place a formal written policy governing all aspects and modes of termination and retrenchment.

FREEDOM OF ASSOCIATION

- **FOA.2. Right to Freely Associate.** Workers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing, subject only to the rules of the organization concerned, without previous authorization.
- **FOA.4. Anti-Union Violence/Harassment or Abuse.** Employers shall not use any form of physical or psychological violence, threats, intimidation, retaliation, harassment or abuse against union representatives and workers seeking to form or join an organization of their own choosing.

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- **FOA.5. Anti-Union Discrimination/Dismissal, Other Loss of Rights, and Blacklisting.** Employers shall not engage in any acts of anti-union discrimination or retaliation, i.e. shall not make any employment decisions which negatively affect workers based wholly or in part on a workers' union membership or participation in union activity, including the formation of a union, previous employment in a unionized facility, participation in collective bargaining efforts or participation in a legal strike.
- **FOA.13. Employer Interference/Favoritism.** Employers shall not interfere with the right to freedom of association by favoring one workers' organization over another. In cases where a single union represents workers, employers shall not attempt to influence or interfere in any way in workers' ability to form other organizations that represent workers.
- **FOA.20. Right to Collective Bargaining/Validity of Collective Bargaining Agreement.** Collective bargaining agreements that have not been negotiated freely, voluntarily and in good faith shall be considered not applicable. Provisions in collective bargaining agreements that contradict national laws, rules and procedures or offer less protection to workers than provisions of the FLA Workplace Code shall also be considered not applicable.

In conducting internal monitoring of suppliers in Mexico, FLA affiliated companies should be mindful of the high potential for protection contracts and exclusion clauses.

Additional Resources

Maquila Solidarity Network (MSN) has been working with local and international stakeholders around this issue and has developed a Freedom of Association in Mexico Tool Kit⁶ to help brands and auditors better identify the issue related to protection contracts and exclusion clauses, thereby allowing for appropriate remediation action to occur. To learn more about MSN's Tool Kit, go to their website at <http://en.maquilasolidarity.org/node/969>.

The FLA recognizes that auditors require training on this issue, as well as guidance on appropriate remediation steps. In the coming weeks, the FLA will announce dates for auditor training on Freedom of Association, and, in particular, on protection contracts and exclusion clauses.

⁶ Appended to this memo include MSN's Freedom of Association in Mexico Tool Kit, which include:

1. Freedom of Association in Mexico: the context – which describes the particular barriers to freedom of association in Mexico that inhibit workers' ability to exercise their associational rights.
2. What brands can do to ensure respect for freedom of association in Mexico – which sets out the specific steps brands can take to help overcome these barriers and create a positive climate for freedom of association in their Mexican supply chain.
3. FOA in Mexico: Audit checklist – which outlines the specific issues and practices auditors need to be attentive to in order to better identify protection contracts and other barriers to freedom of association, as well as specific FOA violations.