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Yankee Come Back? Occupational Safety and Health Reform in Mexico

Mark M. Hager

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ARTICLE

YANKEE COME BACK? OCCUPATIONAL SAFETY AND HEALTH REFORM IN MEXICO

BY MARK M. HAGER*

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I. INTRODUCTION

In the past decade, Mexico has been the site of serious reform in occupational safety and health law. The impetus for this change has been threefold: 1) *neoliberalism*—an emergent public philosophy favoring shrinkage of state economic control and authoritarian methods¹; 2) *globalization*—desire to integrate and harmonize Mexico’s economy with that of the U.S. and those of other “normal” market democracies²; and 3) *NAFTA*—pressures stemming from the North American Free Trade Agreement (NAFTA) and its labor “side agreement,” the North American Agreement on Labor Cooperation (NAALC), to improve the quality of labor protections.³

This article aims to describe these reforms, raise questions about their implications, and provide preliminary assessments.

1. Graciela Bensusán Areous, *The Mexican Model of Labor Regulation and Competitive Strategies*, REGIONAL INTEGRATION AND INDUSTRIAL RELATIONS IN NORTH AMERICA, 56, 59, 61 (Maria Lorena Cook & Harry C. Katz eds.) (highlighting trade liberalization and privatization, possible augmentation of “transparency,” “strengthening of the principle of legality,” and reduced role for “state discretion,” in Mexico’s governmental culture); see generally, Graciela Bensusán, *Labor Reform in Mexico for Union Freedom, Democracy, and Transparency: A Minimum Agenda* (unpublished manuscript on file with author) (linking Mexican labor law reform with neoliberalism).

2. Graciela Bensusán Areous, *The Mexican Model of Labor Regulation and Competitive Strategies*, REGIONAL INTEGRATION AND INDUSTRIAL RELATIONS IN NORTH AMERICA, 52-53, 56 (Maria Lorena Cook & Harry C. Katz eds.) (contrasting previous period emphasizing development “based on the internal market” with current strategy more oriented to the “foreign market”).

3. *Id.* at 59 (characterizing recent pressure to improve effectiveness of Mexican labor legislation as originating from U.S. government in context of NAFTA, not from Mexico’s official labor movement; arguing also that NAALC erects a form of “international supervision” of Mexico’s worker protection legislation).

In general the reforms seem to convert Mexico's occupational safety and health law system from one less to one more like that of the U.S. If so, there are two opposed pitfalls for U.S. observers to guard against in description and evaluation: over-praising and over-criticizing. Excessive praise may stem from deficient understanding of Mexico's older and different system and from self-flattering assumptions that our own system is normative and operates properly. Excessive criticism may stem from a romantic, "rose-colored" (pun intended) view of Mexico's older system because of its official self-conception as a worker-friendly regime under the aegis of the PRI ("Party of the Institutionalized Revolution," roughly translated). With these opposed caveats in view, I nevertheless offer a preliminary assessment, which is cautiously optimistic. Mexico may be on its way to exchanging a system of ample but relatively hollow legal promises of workplace safety and health,⁴ characterized by overregulation, waste, and corruption, for one of more modest, realistic, and reliable legal promises offering better protection with less overregulation, waste, and corruption.⁵ If this be neoliberalism, globalization, and NAFTA, it may come time to praise them.⁶ It is important to stress, however, that both this overall assessment and the more particular assessments offered below, though plausible, are highly conjectural.

The remainder of this article proceeds as follows. Part II sets out a static description of Mexico's occupational safety and health legal structure as it exists on paper today. This includes a description of workers' compensation under the assumption that it can be viewed as one component of overall occupational safety and health policy. Part III focuses on the most significant recent reform initiatives represented in this current structure and offers preliminary evaluation. Part IV analyzes and evaluates features from the pre-reform system retained under the current reformed system. Part V identifies and discusses features—some old, some

4. Liberty International Risk Services, *Health and Safety in the Workplace—Mexico—Survey and Summary of Findings 3* (1995) (unpublished manuscript, on file with author) ("In 1992, Mexico was listed in the International Labor Office's Year Book of Labor Statistics as having the second highest accident rate in the world") [hereinafter Liberty Int'l.].

5. Areous, *supra* note 1, at 52, 60 (characterizing Mexico's traditional levels of protection for workers as "formally higher" than in the U.S. but as plagued by "inefficacy").

6. *But see Id.* at 60 (suggesting "it remains to be seen" whether prevailing reform atmosphere will yield improvements or decline in well-being of Mexican workers).

new—in the current system about which there is cause for concern. Part VI concludes.

II. CURRENT (REFORMED) LEGAL STRUCTURE

A. Framework⁷

In content, Mexico's workplace safety and health law is entirely federal.⁸ The Constitution authorizes the Congress to enact laws,⁹ establishes law-making procedures,¹⁰ and empowers the President to issue implementing regulations.¹¹

In enforcement, responsibility is exclusively federal in 21 economic sectors and for employers run by or doing business with the federal government or doing business in federally-administered territory. In other sectors, federal enforcement authorities get assistance from lower-level governments.¹²

Mexico has ratified several International Labor Organization (ILO) conventions pertinent to occupational safety and health. These may, in effect, be regarded as federal labor law under a

7. In referring to Mexican legal provisions, there is a dilemma between plain language English on the one hand and names and abbreviations conventionally used in Mexico on the other. The following text tries to deal with this dilemma in a flexible fashion. Citations adopt titles and abbreviations conventionally used in Mexico. Substantive discussion adopts plain language references, for ease in reading. Correlation between plain language references and conventional Mexican names and abbreviations can be discerned by moving between main text and footnotes.

8. Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L. J. 269, 281(1996).

9. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 73 (Mex.).

10. CONST., art. 72 (Mex.); see also GOVERNMENT OF MEXICO: COMPARISON OF JOB RELATED SAFETY AND SANITATION PROGRAMS IN MEXICO, CANADA, AND THE U.S., *UPDATED INFORMATION FOR MEXICO 4* (1998) [hereinafter MEXICO SAFETY INFORMATION I]; GOVERNMENT OF MEXICO, WHITE PAPER: COMPARISON OF JOB RELATED SAFETY AND SANITATION PROGRAMS IN MEXICO, CANADA, AND THE UNITED STATES, *UPDATED INFORMATION FOR MEXICO 7* (1999) [hereinafter MEXICO SAFETY INFORMATION II].

11. CONST. art. 89 (Mex.); see also DR. NÉSTOR DE BUEN LOZANO & LIC. CARLOS E. BUEN UNNA, U.S. DEP'T OF LABOR, A PRIMER ON MEXICAN LABOR LAW 4 (1991)[hereinafter DE BUEN LOZANO].

12. CONST. art. 123-A § XXI (Mex.); see also Michael Joseph McGuinness, *The Landscape of Labor Law Enforcement in North America: An Examination of Mexico's Labor Regulatory Policy and Practice*, 29 LAW & POL'Y INT'L BUS. 365, 374 (1998); O.S.H. REP., U.S. DEPT. OF LAB., A COMPARISON OF OCCUPATIONAL SAFETY AND HEALTH PROGRAMS IN THE UNITED STATES AND MEXICO: AN OVERVIEW I-5 (1992) [hereinafter OSHA COMPARISON].

constitutional provision incorporating "treaties" into supreme national law.¹³

The Federal Labor Law (LFT), first promulgated in 1931 and amended since then by the Mexican Congress,¹⁴ codifies basic labor law,¹⁵ including requirements for worker compensation and workplace safety and health.¹⁶ It requires employers to ensure workplace safety and health.¹⁷ It authorizes labor authorities to issue regulations, to establish tripartite (employer, employee, and government representatives) advisory commissions, to study problems and recommend solutions, to facilitate operation of enterprise joint committees, and to conduct inspections and ensure compliance.¹⁸

The Federal Regulation for Occupational Safety and Sanitation and the Environment (Safety Regulation), promulgated by the Ministry of Labor and Social Welfare (STPS) in 1997, supplanted a complex of prior regulations.¹⁹ Its objectives are modernization and simplification of the regulatory framework for occupational safety and health, along with better protection of both employee health and safety and employer property rights.²⁰ It was issued pursuant to the Program for Employment, Training and Defense of Labor Rights; 1995-2000 ("Programa de Empleo, Capacitacion y Defensa de los Derechos Laborales: 1995-2000") issued by STPS in 1995 after broad public consultations on labor policy.²¹ It details employer and employee

13. HUMAN RESOURCES DEVELOPMENT CANADA, OFFICE OF INTER-AMERICAN LABOUR COOPERATION, LABOUR BRANCH: REVIEW OF PUBLIC COMMUNICATION CAN 98-1 (PART II), Report issued pursuant to The North American Agreement on Labour Coop., at 13, 16-18. (Conventions ratified by Mexico pertinent to workplace safety and health include Convention 150 (Labour Administration), Convention 155 (Occupational Safety and Health), Convention 161 (Occupational Health Services) and Convention 170 (Chemicals)) [hereinafter REVIEW, CAN 98-1].

14. LEY FEDERAL DEL TRABAJO (Mex.) (as amended through March 1995) (Foreign Tax Law Publishers, Inc., trans., 1995) [hereinafter L.F.T.]; see also OSHA COMPARISON, *supra* note 12, at I-2.

15. MEXICO SAFETY INFORMATION II, *supra* note 10, at 6.

16. L.F.T., *supra* note 14, arts. 472-522.

17. *Id.* arts. 132.XVI, VIII.

18. *Id.*, arts. 511, 541-42; see also MEXICO SAFETY INFORMATION II, *supra* note 10, at 9-10; McGuinness, *supra* note 12, at 371-372; OSHA COMPARISON, *supra* note 12, at I-2.

19. "Reglamento Federal de Seguridad, Higiene y Medio Ambiente de Trabajo," D.O., 21 de enero de 1997 (Mex.) [hereinafter R.F.S.H.M.A.T.]; see also MEXICO SAFETY INFORMATION I, *supra* note 10, at 4-5.

20. *Id.* at 9.

21. *Id.*

duties, sets out various safety and health rules,²² and enacts several new or special initiatives: chiefly, reliance on private firms called "verification units" to investigate compliance and facilitate voluntary prevention programs.²³

Under authority of the Federal Measures and Standards Act (Standards Act), technical standards on specific matters are issued as Official Mexican Standards (NOMs).²⁴ A number of important NOMs pertain to occupational safety and health.²⁵

STPS issued its General Regulation for Inspection and Penalties for Violations of Labor Legislation (Inspections and Penalties Regulations) in 1998.²⁶ Like the Safety Regulation, the Inspections and Penalties Regulation emerged from the 1995 Program for Employment, Training and Defense of Labor Rights: 1995-2000. It supersedes previous rules.²⁷

The Social Security Law (LSS) provides a system of financial protection, including worker compensation benefits for many workers, administered by the Mexican Institute of Social Security (IMSS).²⁸ A significantly amended LSS went into effect in 1997.²⁹

The Federal Fiscal Code, the Federal Law on Administrative Procedure, and law on constitutional appeals play roles in the

22. MEXICO SAFETY INFORMATION II, *supra* note 10, at 15 (Rules cover, among other things: fire prevention; handling of industrial equipment, power tools, and dangerous materials; personal safety gear; environmental hazards, and prevention programs); see also McGuinness, *supra* note 12, at 372-373.

23. R.F.S.H.M.A.T. *supra* note 19, at Intro.; see also MEXICO SAFETY INFORMATION II, *supra* note 10, at 10, 14 (Other initiatives include reducing unneeded licensing and registration requirements; eliminating registration requirements for joint committees in small businesses; expanding protection for minors and for pregnant and nursing women; fostering better training with respect to hazardous jobs and substances; detailing rules on pollutants, toxins, and ergonomics; and launching specified rules for forestry, sawmill, agriculture and other industries).

24. MEXICO SAFETY INFORMATION II, *supra* note 10, at 8.

25. *Id.* at 15-16.

26. Reglamento general para la inspeccion y aplicacion de sanciones por violaciones a la legislacion laboral," D.O., 6 de julio de 1997(Mex.), Introduction [hereinafter R.G.I.A.S.V.L.L.].

27. *Id.*

28. LEY DEL SEGURO SOCIAL [hereinafter L.S.S.](Mex.) 1997; see also OSHA COMPARISON, *supra* note 12, at I-20.

29. See Instituto Mexicano del Seguro Social(visited July 7, 1998) <<http://www.imss.gob.mx/>>(citing text of old and new laws) (The previous L.S.S. had been in effect since 1973).

penalty and penalty-review process.³⁰

Key agencies are STPS, IMSS, and the National Advisory Commission on Occupational Safety and Health (Advisory Commission). STPS drafts technical safety and health standards; performs inspections; sets penalties; promotes operation of joint committees; maintains hazard statistics; promotes research; and disseminates information.³¹ IMSS administers the chief worker compensation program and coordinates with STPS in carrying out prevention programs.³² The Advisory Commission conducts studies, proposes prevention measures, and reviews draft standards.³³ Chaired by the STPS Secretary, it draws its other membership from IMSS, pertinent ministries, employer organizations, and trade union institutions.³⁴

Other institutions play secondary roles. The federal courts hear enforcement appeals and constitutional challenges.³⁵ The Ministry of Trade and Industrial Development (Trade Ministry) assists the Advisory Commission in licensing firms which accredit verification units to perform inspections.³⁶ The National Standard-Setting Commission (Standard-Setting Commission) issues an annual Program covering all regulatory topics, under which technical safety and health standards are developed.³⁷ The Ministry of Environment, Natural Resources, and Fisheries regulates environmental hazards including ones pertinent to workplace safety and health. The Ministry of Health may likewise touch on workplace safety and health in its role of regulating toxic chemicals.³⁸ Conciliation and Arbitration Boards (CABs), chaired by government officials and composed of

30. See Michael J. McGuinness, *The Role of Sanctions and Incentives in Labor Regulation: Mexico's Administrative Sanctioning Procedure* 6 (unpublished manuscript, on file with authors) (quoting Código Fiscal art. 207 (1978), Ley Federal de Procedimiento Administrativo arts. 83, 85 (1992), and Ley de Amparo arts. 114-115).

31. See generally McGuinness, *supra* note 30.

32. See OSHA COMPARISON, *supra* note 12, at IV-3; MEXICO SAFETY INFORMATION I, *supra* note 10, at 7.

33. R.F.S.H.M.A.T., *supra* note 19, arts. 114, 116; see also L.F.T., *supra* note 14, art. 512-A.

34. R.F.S.H.M.A.T., *supra* note 19, at Intro.

35. McGuinness, *supra* note 30, at 6-7, 8-15.

36. LEY FEDERAL SOBRE METROLOGICA Y NORMALIZACION art. 70-A (1997) (Mex.) [hereinafter L.F.M.N.].

37. *Id.*, arts. 60, 61-A.

38. MEXICO SAFETY INFORMATION II, *supra* note 10, at 5; see also McGuinness, *supra* note 12, at 375, n.46.

employer and employee representatives in equal numbers, may hear workplace disputes, including ones involving health and safety and worker compensation payments.³⁹

B. Standard-Setting

Standard-setting for workplace safety and health comports with other forms of regulation under the Standards Act.⁴⁰ The Standards Act was enacted to enhance transparency, uniformity, and efficiency in establishing NOMs and to improve compliance.⁴¹ It sets up the Standard-Setting Commission to coordinate the regulatory efforts of federal agencies, including STPS. The Standards Act aims to promote increased participation by public, private, scientific, and consumer representatives in standard-setting and compliance. It also establishes an accreditation system for testing laboratories, verifications units (private firms monitoring compliance), and standard-setting organizations (which issue voluntary-compliance standards called Mexican norms).⁴²

The Standard-Setting Commission, with members drawn from STPS and other regulatory agencies, develops an annual Program for the establishment, modification, and/or cancellation of NOMs. Except for emergency rule-making, proposed NOMs should comport with the Program.⁴³

NOMs on workplace safety and health fall into three major categories: 1) safety standards, addressing accident risks in processes and facilities; 2) health standards, addressing chronic or acute risks from factors like noise, light, temperature, poor air quality, toxins, and carcinogens; and 3) structural standards, addressing institutions and procedures such as medical care, joint committees, information management, and hazard reporting.⁴⁴

STPS initiates NOM promulgation with a preliminary

39. CONST. art. 123-A, §§ XX, XXXI (Mex.); see also L.F.T., *supra* note 14, arts. 509, 600 § IV; DE BUEN LOZANO, *supra* note 11, at 37; Befort & Cornett, *supra* note 8, at 296.

40. L.F.M.N., *supra* note 36, art. 40.

41. *Id.* art. 2(II)(a), (c); see also MEXICO SAFETY INFORMATION II, *supra* note 10, at 8.

42. L.F.M.N., *supra* note 36, art. 2(II)(b), (d)-(f); see also MEXICO SAFETY INFORMATION II, *supra* note 10, at 8-9.

43. L.F.M.N., *supra* note 36, arts. 60, 61-A.

44. MEXICO SAFETY INFORMATION II, *supra* note 10, at 15.

draft.⁴⁵ It draws on Mexican research and information and on international sources such as the International Labor Organization (ILO), OSHA, the European Community, the American National Standards Institute, and regulations from various countries.⁴⁶

Preliminary drafts are reviewed by experts, pertinent domestic organizations, and/or by international entities as just listed.⁴⁷ Accompanied by regulatory impact statements, they are then submitted to the Advisory Commission for review.⁴⁸ The regulatory impact statement must itemize advantages and disadvantages of the proposal, must explain alternatives considered and reasons for their rejection, must draw comparisons with previous regulations, and must assess compliance feasibility. Where substantial economic impact is anticipated, a monetized cost-benefit analysis, a statement of alternatives, and a comparison of international standards must be presented. Further expert review may also be ordered.⁴⁹

The Advisory Commission posts approved drafts in the Official Federal Gazette (Gazette) for public comment. It reviews comments, including any from STPS, and posts its responses and reasoning.⁵⁰ It then posts the final NOM in the Gazette. Each NOM must be revalidated every five years or else lapse.⁵¹

In addition to governing issuance of NOMs, the Standards Act governs Mexican norms, issued by national standard-setting organizations.⁵² Like NOMs, Mexican norms are promulgated under uniform procedures.⁵³

45. *Id.* at 13.

46. MEXICO SAFETY INFORMATION I, *supra* note 10, at 8; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 13.

47. *Id.*; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 13; L.F.M.N., *supra* note 36, art. 43.

48. L.F.M.N., *supra* note 36, arts. 44, 46(I).

49. *Id.* art. 45.

50. *Id.* arts. 46(II), 47 (II)-(III).

51. *Id.* art. 51; *see also* MEXICO SAFETY INFORMATION I, *supra* note 10, at 8; MEXICO SAFETY INFORMATION II, *supra* note 10, at 13.

52. L.F.M.N., *supra* note 36, arts. 51-A, 65-66.

53. *Id.*, arts. 66-67.

C. Compliance

1. Employer Duties

The Constitution establishes a general employer duty to compensate for work-related death and disability.⁵⁴ It also establishes a general duty to protect employees, roughly equivalent to that of the OSH Act.⁵⁵ In theory, authorities can use it to cite safety and health violations where no specific regulations apply.⁵⁶

Specific duties arise from several laws. A number of duties are referenced repetitively in more than one law. Because sorting the various sources of duty does not appear important, these duties may be summarized together rather than itemized separately. Hence, the LFT, LSS, RFSHMAT, and Standards Act require employers to: obey standards; maintain safety and health programs; maintain compliance and compliance-verification systems; ensure proper equipment and hazardous substance controls; facilitate operation of joint committees; cooperate in studies; provide worker training and information about risks, especially toxins; post rules; allow labor inspections; provide information and reports to authorities; and protect pregnant and lactating women.⁵⁷ Safety and health provisions apply to all employers, though other provisions exempt family enterprises.⁵⁸

2. Employee Duties

Several duties are imposed on employees. They must comply with standards; assist endangered co-workers; cooperate with

54. CONST. art. 123-A §§ XIV-XV (Mex.); see also OSHA COMPARISON, *supra* note 12, at II-2 - II-3.

55. *Id.*

56. *Id.*

57. L.S.S., *supra* note 28, arts. 51, 83; see also L.F.T., *supra* note 14, art. 132, §§ I, XV- XXIV, XXVIII; art.504, §§ I- IV; R.F.S.H.M.A.T., *supra* note 19, at Intro., arts. 17, 130; L.F.M.N., *supra* note 36, art. 58.

58. L.F.T., *supra* note 14, art. 352 (“The provisions of this law (except the safety and health standards) shall not apply to family enterprises”); see also art. 472 (“The provisions of this Title [Title IX - Occupational Injuries] shall apply to all labor relationships, including special work, subject to the limitation made in Article 352.”); The L.F.T. does not specifically define “family enterprises.”

joint committees; participate in training; exercise care; use required protective equipment; undergo medical exams; inform employers of contagious diseases contracted; and report safety breaches to their employer. They must not endanger themselves or others, work while intoxicated or under the influence of drugs without medical certification and notice to the employer, or carry weapons unless required by the job.⁵⁹

Employees have the right to have the joint committee inform them of the workplace safety and health record, to be present and speak freely during inspections, to obtain copies of inspection results, and to participate in legal proceedings.⁶⁰

3. Inspections

The Inspections and Penalties Regulation governs inspections and penalties regarding workplace safety and health throughout Mexico, whether enforcement lies with federal authorities or with state and federal district authorities.⁶¹ It has several aims: to promote regulatory simplicity, transparency, and clarity; to implement deregulation, reduced paperwork burdens and limits on inspector discretion; to harmonize inspection and penalty provisions with each other and with the Federal Law on Administrative Procedure, the Standards Act, and the Safety Regulation; to strengthen a new system of private verification, testing, and certification; and to fortify the government's advisory role.⁶² It decreases the frequency of periodic inspections from a six-month to a one-year interval.⁶³ It imposes a one-day advance notice requirement for inspections and require that this notice specify what the inspection will address, what legal rules are implicated, and what documents must be produced.⁶⁴

59. L.F.T., *supra* note 14, art. 134-5; *see also* R.F.S.H.M.A.T., *supra* note 19, art. 18; MEXICO SAFETY INFORMATION II, *supra* note 10, at 19.

60. OSHA COMPARISON, *supra* note 12, at II-4.

61. R.G.I.A.S.V.L.L., *supra* note 26, arts. 1, 2 §§ II-IV.

62. *Id.* at Intro.

63. McGuinness, *supra* note 12, at 382 (Over 47,000 inspections were performed in 1996, up from some 37,000 in 1990. Prolonging the interval should cut the total number of inspections, unless more employers are subjected to them. As of 1995 and 1996, inspectors performed upwards of 200 inspections per year.). *Id.* at 386.

64. R.G.I.A.S.V.L.L., *supra* note 26, at Intro., art. 17; *see also* McGuinness, *supra* note 12, at 396 (As a matter of policy, three-day advance notice is standard, to afford employers time to gather and arrange pertinent documents); Review CAN 98-1, *supra* note 13, at 7 (As a matter of practice, "special" inspections (explained in text below) may

Employers are given rights to notice on key developments in the enforcement process: abatement deadlines, reporting requirements, summonses, procedural rulings, penalty assessments, acquittals, appeal resolutions, and other orders and requirements.⁶⁵

Workplaces are subject to three regular types of inspection. *Initial* inspections occur when a workplace is opened, expanded, or modified. *Periodic* inspections, normally on a one-year periodic basis, may also be scheduled more or less frequently based on prior record, nature of enterprise, degree of risk, number of employees, and location. *Verification* inspections monitor compliance with previous abatement orders.⁶⁶

Workplaces are also subject to *special* inspections, which can be ordered at any time if authorities have knowledge of violations, accidents, mishaps or imminent dangers, or if they detect irregularities, falsehood or dishonesty in employer acts, reports, or documentation.⁶⁷

Employees, employers, and unions may all report violations to authorities.⁶⁸ Employees may complain individually or through a union about unsafe work, inaccurate reports, and joint committee failures to identify hazards or secure abatements.⁶⁹ Authorities review complaints along with incident reports and other information to determine whether special inspections are warranted.⁷⁰ Criteria include: 1) seriousness of possible hazard; 2) compliance history; and 3) labor-management relations, with an eye toward non-interference with contract negotiations.⁷¹ Priority goes to large and high hazard firms, fatalities, serious accidents, and special hazard programs.⁷²

be performed unannounced. The author has been unable to determine whether such unannounced special inspections are legally authorized. As a matter of practice, advance notice of two to eighteen days may be given for "periodic" and also "verification" inspections (explained in text below). *Id.* at 7-8.

65. R.G.I.A.S.V.L.L., *supra* note 26, art. 6.

66. *Id.*, art. 13; *see also* McGuinness, *supra* note 12, at 385.

67. R.G.I.A.S.V.L.L., *supra* note 26, art. 14; *see also* McGuinness, *supra* note 12, at 379-80.

68. L.F.T., *supra* note 14, art. 1003; *see also* OSHA COMPARISON, *supra* note 12, at II-4; MEXICO SAFETY INFORMATION II, *supra* note 10, at 21.

69. OSHA COMPARISON, *supra* note 12, at II-4, 11.

70. *Id.* at II-4, 5.

71. *Id.* at II-5; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 21.

72. OSHA COMPARISON, *supra* note 12, at II-10.

Inspections and inspection policy are handled by a special STPS bureau. It trains inspectors, promulgates inspection criteria and guidelines, monitors compliance, conducts inspections, sets abatement deadlines, orders closings due to grievous hazards, keeps inspection reports, and advises and monitors joint committees.⁷³ Inspectors must be certified by examination.⁷⁴ Inspectors are expected to review documents (including accident and illness reports), interview workers, and inspect work materials.⁷⁵

Inspectors must abide by specified standards of diligence and integrity, on pain of penalty.⁷⁶ Specifically, they may not have a financial or personal interest in workplaces they inspect, nor may they accept gifts or donations from employers or employees.⁷⁷ STPS monitors inspector performance by reviewing reports, investigating complaints, and scrutinizing practices.⁷⁸

At the outset of any inspection, the inspector must provide the employer a written inspection order and a phone number to verify it, along with a statement of employer rights and obligations.⁷⁹ Representatives of both employer and employees should be present.⁸⁰ Employer records and joint committee reports will normally be consulted.⁸¹ A key employer right is to comment and provide evidence on facts reported.⁸² Employee representatives may also submit comments.⁸³ Inspectors may secure assistance from experts or from the joint committee.⁸⁴ In addition to performing inspections, authorities can request information and documentation from employers, employees and joint committees.⁸⁵

73. REVIEW, CAN. 98-1, *supra* note 13, at 19; *see also* McGuinness, *supra* note 12, at 376-380 (The Bureau is called the General Division of Federal Labor Inspection.). *Id.*; R.G.I.A.S.V.L.L., *supra* note 26, art. 7

74. McGuinness, *supra* note 12, at 382 (Training includes classroom, practice, and on-the-job components.). *Id.* at 383-84.

75. *Id.* at 384, 395-96.

76. R.G.I.A.S.V.L.L., *supra* note 26, art. 29.

77. *Id.*, arts. 28-29; *see also* REVIEW, CAN 98-1, *supra* note 13, at 25; L.F.T., *supra* note 14, arts. 547-48.

78. McGuinness, *supra* note 12, at 385.

79. R.G.I.A.S.V.L.L., *supra* note 26, art. 17.

80. MEXICO SAFETY INFORMATION II, *supra* note 10, at 22.

81. *Id.* at 2-3.

82. R.G.I.A.S.V.L.L., *supra* note 26, at Intro., art. 17.

83. *Id.*, art. 22.

84. *Id.*, art. 19.

85. *Id.*, art. 15.

Following each inspection, inspectors must submit reports. Inspection reports are generally prepared on a same-day, on-site basis, so that declarations and signatures from the various parties may be included.⁸⁶ Inspectors have several key additional duties, including: specifying abatement deadlines; monitoring abatement and compliance orders; suggesting immediate abatement measures for imminent dangers; proposing complete or partial workplace closure, where appropriate; promoting cooperation between employers and workforces; ordering substance testing; providing notice of inspections and penalties; and forwarding appropriate reports to the public prosecutor.⁸⁷ In addition to ensuring basic regulatory compliance, inspectors are responsible to monitor legally-required workplace permits along with employee ability certificates and joint committee operations.⁸⁸ They are charged with providing safety and health advice. They must honor trade secrets.⁸⁹

4. Verification Firms

Private verification firms may monitor compliance as a supplement to official inspections.⁹⁰ Employers and STPS can hire verification units to inspect and report on compliance to enforcement authorities.⁹¹ Verification firms operating at STPS's behest must comply with requirements applicable to government inspectors.⁹² Employers have a right to submit evidence, as they do with government inspectors.⁹³

Accreditation lies with special private agencies, themselves overseen by the Trade Ministry and the Advisory Commission. Accreditation requirements and procedures are governed under

86. McGuinness, *supra* note 12, at 399-400, 407-408 (Because preparing a proper report is time-consuming, there is constraint on time for document review, facilities inspection, and interviews).

87. R.G.I.A.S.V.L.L., *supra* note 26, arts. 8, 3; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 23; REVIEW, CAN 98-1, *supra* note 13, at 24.

88. R.G.I.A.S.V.L.L., *supra* note 26, art. 9; *see also* REVIEW CAN 98-1, *supra* note 13, at 24.

89. R.G.I.A.S.V.L.L., *supra* note 26, art. 10.

90. MEXICO SAFETY INFORMATION II, *supra* note 10, at 18.

91. *Id.*, at 13-14, 18; *see also* R.F.S.H.M.A.T., *supra* note 19, at Intro.; R.G.I.A.S.V.L.L., *supra* note 26, art. 16.

92. L.F.M.N., *supra* note 36, art. 86.

93. *Id.*, art. 99.

the Standards Act.⁹⁴ Verification firms and accreditation agencies must comply with professional standards imposed by law or face sanctions, including partial or total suspension of operations, for noncompliance.⁹⁵

Verification reports can be used to prove regulatory compliance, thereby securing exemption from government inspection. It is projected that this private verification program, under the additional authority of the Standards Act and the Safety Regulation, will enhance compliance by adding private inspection resources to the effort. Private verification does not displace governmental inspection and enforcement authority.⁹⁶

5. Joint Committees

Joint committees provide still a third institutionalized compliance mechanism, additional to official and verification firm inspections.⁹⁷ The LFT requires joint committees, with equal labor and management representation, in every workplace where it is "found necessary."⁹⁸ Joint committees are charged not only with monitoring compliance and assisting in government inspections, but also with investigating accident causes, proposing preventive measures, and preparing reports.⁹⁹ They perform follow-up inspections and report on abatement failures.¹⁰⁰ Further, they can tailor rules to workplace situations and needs.¹⁰¹ Collective labor agreements may confer extra duties and decision-making power.¹⁰²

94. *Id.*, arts. 68-73.

95. *Id.*, arts. 118, 119, 120-A, 122.

96. *Id.*, arts. 85, 96; see also R.G.I.A.S.V.L.L., *supra* note 26, art. 16; MEXICO SAFETY INFORMATION II, *supra* note 10, at 13-14, 18.

97. MEXICO SAFETY INFORMATION II, *supra* note 10, at 18.

98. *Id.* at 11; see also OSHA COMPARISON, *supra* note 12, at xi, IV-5 (Joint committees are actually found mainly in workplaces with more than ten workers, which represent 20 percent of enterprises, employing 80 percent of workers. In 1992, approximately 114,000 workplaces had registered committees).

99. L.F.T., *supra* note 14, art. 509; see also MEXICO SAFETY INFORMATION II, *supra* note 10, at 11, 24; DE BUEN LOZANO, *supra* note 11, at 21.

100. OSHA COMPARISON, *supra* note 12, at II-7.

101. *Id.*, at I-19.

102. L.F.T., *supra* note 14, art. 392; see also Befort & Cornett, *supra* note 8, at 296.

6. Penalties

Penalty recommendations are forwarded from inspection authorities to a special STPS bureau, which set penalties, even where the inspection authority is non-federal.¹⁰³ The Regulations for Inspections and Penalties set parameters for penalty proceedings. Accordingly, summonses must specify charges and explain how information was analyzed in formulating them.¹⁰⁴ Employers have a right of reply to charges—including assertion of defenses, request for exceptions, and proffering of evidence—and the right to legal representation.¹⁰⁵ Rulings must specify legal authority and reasoning.¹⁰⁶

In contrast with the United States, Mexico rarely imposes first-violation penalties.¹⁰⁷ Penalties normally lie only for imminent dangers or failure to abate problems previously highlighted by inspectors or joint committees.¹⁰⁸ Sanctions range from fines to partial or full closing of a facility. Size of fines legally turns on gravity of offense, on intentional or repeated nature of violations, and on company financial capacity.¹⁰⁹ The Standards Act authorizes penalties for NOM violations apparently far heavier than the maximum previously available.¹¹⁰

103. MEXICO SAFETY INFORMATION II, *supra* note 10, at 17; *see also* McGuinness, *supra* note 12, at 387, n. 124 (The bureau is called the General Division of Legal Affairs); *see generally* McGuinness, *supra* note 30, at 4-5 (In recent years, 85 percent to 90 percent of penalty recommendations from the STPS federal inspection bureau led to penalty orders.). *Id.*, at 7, n.19.

104. R.G.I.A.S.V.L.L., *supra* note 26, art. 32.

105. McGuinness, *supra* note 30, at 4-5; *see also* R.G.I.A.S.V.L.L., *supra* note 26, arts. 32-33.

106. R.G.I.A.S.V.L.L., *supra* note 26, art. 37.

107. *Id.* art. 38; *see also* UAW HEALTH AND SAFETY DEPARTMENT, COMPARISON OF MEXICAN AND UNITED STATES OCCUPATIONAL SAFETY AND HEALTH LEGISLATION, REGULATION, AND ENFORCEMENT 1, at 9 (1993) [hereinafter UAW].

108. OSHA COMPARISON, *supra* note 12, at IV-4; *see also* MEXICO SAFETY INFORMATION I, *supra* note 10.

109. L.F.M.N., *supra* note 36, art. 115; *see also* R.G.I.A.S.V.L.L., *supra* note 26, art. 38; OSHA COMPARISON, *supra* note 12, at II-7; L.F.T., *supra* note 14, art. 512-D; R.F.S.H.M.A.T., *supra* note 19, arts. 165-168 (Fines for Safety Regulation violations range between 15 and 315 times the general daily minimum wage in the locality of the workplace in question, with magnitude of penalty turning on nature and severity of violation. Fines may be doubled for employers who flout abatement orders.) No information is available for this study on whether fines can be magnified by counting violations separately per employee or per day.

110. L.F.M.N., *supra* note 36, art. 112-A, 115; *see also* McGuinness, *supra* note 30, at 17 (Fines for Standards Act violations range from 20 times the Federal District (Mexico City) minimum daily wage up to 20,000 times for severe infractions. Repeated incidence

The Safety Regulation stipulates that the Standards Act governs NOM violations. This allows for imposition of the heavier penalties. Penalties specified in the Safety Regulations apparently govern Safety Regulation violations that do not offend any specific NOM. Administrative fines do not preclude criminal penalties.¹¹¹

Both employers and employees may be fined for violations.¹¹² STPS rarely fines employees, perhaps because fear of fines chills worker reporting of violations.¹¹³ Employers may request modified penalties or extensions on abatement deadlines. There are three procedures for challenging citations and penalties. First, there is "right of review" (*Recurso de Revision*) within STPS. Employers have fifteen days after citation to file for review.¹¹⁴ Second, and most importantly, appeal may be taken within 45 days to Mexico's lower federal court (*Tribunal Fiscal*) for reversal (*Juicio de Nulidad*).¹¹⁵ Finally, an employer may challenge the constitutionality of a law applied to him before the federal court of appeals (*Tribunal Colegiado*) in a special procedure called *amparo*.¹¹⁶

The sanctions bureau and the lower federal court are crucial players in setting penalty policy, since the bureau administers penalties in the shadow of the court's jurisprudence.¹¹⁷ Because the court exercises its most active review on determinations of employer financial capacity, sanctions bureau policy has been strongly affected there. The bureau now keys its estimate to the employer profit-share distributions mandated under Mexican law.¹¹⁸ The bureau uses a table to translate an employer's profit-share figure into a standardized percentage of the maximum

may be met with penalty doubling.); L.F.M.N., *supra* note 36, art. 113. (Multiple infractions at a given time may be penalized cumulatively.) *Id.* art. 116.

111. R.G.I.A.S.V.L.L., *supra* note 26, art. 38; *see also* L.F.M.N., *supra* note 36, art. 117.

112. UAW, *supra* note 107, at 10.

113. *See* OSHA COMPARISON, *supra* note 12, at II-6.

114. McGuinness, *supra* note 30, at 6 (Apparently, few challenges under this rubric are successful.) (citing *Ley Federal de Procedimiento Administrativo* arts. 83, 85, (1992); *see also* OSHA COMPARISON, *supra* note 12, at II-7.

115. McGuinness, *supra* note 30, at 6-7 (Significant numbers of sanction orders are modified on appeal.) (citing *Codigo Fiscal* art. 207 (1978).

116. McGuinness, *supra* note 30, at 7.

117. *Id.* at 8.

118. *Id.* at 11.

legal penalty for a given infraction.¹¹⁹ The resulting fine is then adjusted by other penalty-assessment factors, chiefly gravity of offense and special mitigating factors, to arrive at the actual penalty figure.¹²⁰ Gravity of infraction is calibrated to three severity levels: *light*, for technical infractions causing no identifiable harm; *serious*, for infractions causing identifiable harm to employees; *very serious*, for infractions causing harm to the wider community.¹²¹ Two authorized penalty factors, employer intent and recurrence of offense, play little actual role in assessments because violations are presumed to be non-intentional and because records seldom lend themselves to proof of recurrent infractions.¹²²

D. Alternative Prevention and Voluntary Compliance

In 1978 IMSS and STPS created a risk reduction program, augmented in 1985.¹²³ It stressed four initiatives: 1) direct risk reduction; 2) training improvements; 3) public awareness campaigns; and 4) coordination among government, labor, and employer organizations.¹²⁴

Small firms receive information kits on potential hazards and basic prevention.¹²⁵ Middle-size firms receive two-day site visits from multidisciplinary expert teams to recommend prevention measures.¹²⁶ Some 11,000 of these occur annually.¹²⁷ Large firms are targeted according to hazard levels for prevention-engineering audits.¹²⁸ STPS facilitates operation of mandatory safety and health programs in large firms.¹²⁹ Audits are used to design tailored programs for participating firms.¹³⁰

119. *Id.* at 12

120. McGuinness, *supra* note 30, at 14 (Annual profit-share distributions are established by the Commission Nacional del Reparto de Utilidades para los Trabajadores (National Commission on Employee Profit-Sharing)).

121. *Id.*

122. *Id.*

123. OSHA COMPARISON, *supra* note 12, at IV-4.

124. *Id.* at IV-4.

125. Mexico Safety Information II, *supra* note 10, at 34.

126. *Id.*

127. *Id.*

128. *Id.* at 34-35.

129. *Id.* at 36.

130. *Id.*

Participation is voluntary.¹³¹ Recent reforms seek to encourage voluntary compliance. The voluntary compliance initiative counterposes the sharpened penalties authorized by recent reforms. Under the voluntary compliance initiative, employers can request STPS advisory inspections under what is called the advice and orientation program.¹³² No penalties will be imposed pursuant to these advisory inspections aimed at assisting employers in improving their safety and health management.¹³³

E. Information Systems

Employers must give notice of accidents and work-related illnesses to STPS, to the pertinent inspection authority, to IMSS, and to the federal CAB.¹³⁴ STPS, labor inspection authorities, and the federal CAB collect data from employers on job-related accidents, injuries, and illnesses.¹³⁵ IMSS analyzes statistics and uses them to develop prevention strategies for reducing accidents and illnesses.¹³⁶ The Social Security and Services Institute for Civil Service Personnel (ISSSTE) gathers workplace injury and illness statistics in connection with providing workers' compensation and other benefits to government employees.¹³⁷ Petroleos Mexicanos (PEMEX), the state-owned oil company, does likewise in connection with issuing workers' compensation and medical care to its employees.¹³⁸

The National Statistics and Geographic Information Service (INEGI), within the Secretariat of Planning and Budget, creates statistics from death certificates on causes of occupational fatalities.¹³⁹ Information is used for experience-rating of workers' compensation premiums, for targeting compliance inspections, and for identifying workplaces needing hazard reduction

131. MEXICO SAFETY INFORMATION II, *supra* note 10, at 36-37.

132. OSHA COMPARISON, *supra* note 12, at IV-4.

133. McGuinness, *supra* note 30, at 18.

134. L.F.T., *supra* note 14, art. 504, § V; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 18, 26.

135. OSHA COMPARISON, *supra* note 12, at III-9; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 26, 29.

136. L.S.S., *supra* note 28, art. 83.

137. OSHA COMPARISON, *supra* note 12, at III-10; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 30.

138. MEXICO SAFETY INFORMATION II, *supra* note 10, at 30.

139. OSHA COMPARISON, *supra* note 12, at III-10.

assistance.¹⁴⁰

The National Advisory Commission evaluates and proposes rules for records and reporting.¹⁴¹ It also studies ways to harmonize data collection from different record-keeping systems, comply with the ILO's Labour Statistics Convention,¹⁴² and incorporate data on workers not covered by any system.¹⁴³

F. Training

IMSS, STPS, and joint committees offer numerous courses for workers, joint committees, and specialists.¹⁴³ IMSS and STPS also offer training for middle management on specific topics and counsel employers on developing prevention cultures.¹⁴⁴

STPS runs a forensic medicine department, focused on industrial medicine.¹⁴⁵ Its physician staff intervenes in safety and health disputes and conducts technical studies in industrial medicine, rehabilitation, and related fields. STPS also operates a degree program for training occupational physicians to work within particular firms.¹⁴⁶

IMSS offers regional research and education programs, and certain universities offer programs and degrees.¹⁴⁷ IMSS employs medical experts, runs a residency program to train industrial medicine specialists, and offers courses in occupational medicine through several universities.¹⁴⁸ Industrial medicine specialists are certified by the National Academy of Medicine.¹⁴⁹ PEMEX has its own training system.¹⁵⁰ State safety and health advisory commissions offer informational programs.¹⁵¹

140. MEXICO SAFETY INFORMATION II, *supra* note 10, at 31.

141. OSHA COMPARISON, *supra* note 12, at III-10, 11; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 30-31.

142. *Id.*

143. OSHA COMPARISON, *supra* note 12, at IV-8 (For example, from 1985 to 1990, IMSS offered 5000 courses for joint committees, 620 courses for technicians, and 120 courses leading to a diploma for physicians and engineers. Other programs had 250,000 participants.); MEXICO SAFETY INFORMATION II, *supra* note 10, at 16, 25.

144. MEXICO SAFETY INFORMATION II, *supra* note 10, at 35.

145. OSHA COMPARISON, *supra* note 12, at IV-10.

146. *Id.*; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 38.

147. OSHA COMPARISON, *supra* note 12, at IV-9.

148. *Id.* at IV-9, 10; *see also* MEXICO SAFETY INFORMATION II, *supra* note 10, at 38.

149. MEXICO SAFETY INFORMATION II, *supra* note 10, at 38.

150. OSHA COMPARISON, *supra* note 12, at IV-5.

151. *Id.*; *see also* L.F.T., *supra* note 14, arts. 487-503.

G. Workers' Compensation

The Constitution and LFT establish a general employer duty to compensate for work-related death and disability.¹⁵² Workers injured or made ill by their jobs commonly receive compensation under the LSS, which provides various benefits for pregnancy and maternity leave, childcare, illness, accidents, disability, and death.¹⁵³ The LSS, Mexico's chief system of compensating work-related injuries and illnesses, covers the private sector, plus some public employers, especially state-owned companies.¹⁵⁴ In addition to these general schemes, there are specialized compensation systems for government and PEMEX workers administered by the ISSSTE and PEMEX, respectively.¹⁵⁵

The IMSS manages workers' compensation under the LSS and issues benefits.¹⁵⁶ Covered employers register employees with and pay premiums to IMSS, which delivers indemnity to injured or ill workers, even those indirectly employed through intermediaries.¹⁵⁷ The premiums that fund benefits vary with job risk and with number and seriousness of prior accidents and illnesses.¹⁵⁸ They are adjusted to reward good safety and health performance and to punish poor performance.¹⁵⁹ Firms may move among fee categories, depending on risk factors.¹⁶⁰

The 1997 LSS revises premium-setting policy. It places less emphasis on sector risk classifications, more on a particular firm's individual performance. In theory, even firms in the highest risk sectors can be rewarded with premiums reduced to the level of lowest-risk sectors.¹⁶¹ Increased emphasis on employer record enhances performance incentives. On the other hand, it de-emphasizes making whole sectors at divergent risk

152. See, e.g., CONST. art. 123-A § XIV(Mex.).

153. ANNA L. TORRIENTE ET AL., MEXICAN & U.S. LABOR LAW & PRACTICE: A PRACTICAL GUIDE FOR MAQUILAS AND OTHER BUSINESSES 52 (1997).

154. OSHA COMPARISON, *supra* note 12, at III-3.

155. OSHA COMPARISON, *supra* note 12, at III-3, III-10.

156. Renee L. Camacho, *A Comparison of Workers' Compensation in the United States and Mexico*, 26 N.M. L. REV. 133, 135 (1996) (IMSS covers approximately 600,000 workplaces.).

157. CONST. art. 123, §. XXIX (Mex.); see also L.S.S., *supra* note 28, art. 11; TORRIENTE, *supra* note 153, at 82 - 83.

158. Camacho, *supra* note 156, at 136.

159. MEXICO SAFETY INFORMATION II, *supra* note 10, at 32.

160. OSHA COMPARISON, *supra* note 12, at III-12.

161. MEXICO SAFETY INFORMATION II, *supra* note 10, at 32.

levels bear their proportionate "shares" of aggregate compensation costs.

Employers who default on premiums owed to IMSS are subject to financial penalties.¹⁶² Employers who comply with LSS obligations have satisfied the LFT's worker compensation obligations.¹⁶³ If an employer who caused an injury or illness has defaulted on its LSS obligations, IMSS will nevertheless provide compensation.¹⁶⁴ The employer will be relieved of LFT obligations but subject to additional penalties under the LSS.¹⁶⁵ Employers causing intentional harms must indemnify IMSS for compensation paid.¹⁶⁶

Benefits cover medical expenses and income indemnity for disability.¹⁶⁷ Under the IMSS, claimants receive benefits despite pre-existing conditions that increase the likelihood of harm.¹⁶⁸ Eligibility is defeated if the claimant was intoxicated at the time of the accident, or under the influence of non-prescribed drugs.¹⁶⁹ Eligibility is also defeated if the claimant purposely caused the accident, or it resulted from a fight or suicide attempt.¹⁷⁰

A CAB may increase an indemnity for inexcusable employer conduct, like flouting health and safety laws, failing to take steps against repeat accidents, failing to follow joint committee prevention recommendations, and failing to address risks identified by workers.¹⁷¹ An employer's liability for registered workers ends once it pays its fee to IMSS. Disputes over compensation are then between the employee or survivors and IMSS.¹⁷² They may be heard before a CAB.¹⁷³ Employer

162. L.S.S., *supra* note 28, art. 304.

163. *Id.* art. 53.

164. *Id.* art. 77.

165. *Id.* art. 78.

166. *Id.* art. 48.

167. *Id.* art. 56; *see also* L.F.T., *supra* note 14, art. 487; TORRIENTE, *supra* note 153, at 83.

168. L.S.S., *supra* note 28, art. 45; *see also* L.F.T., *supra* note 14, art. 481; Camacho, *supra* note 156, at 139.

169. Camacho, *supra* note 156, at 139.

170. L.S.S., *supra* note 28, art. 46.

171. L.F.T., *supra* note 14, art. 490; *see also* L.S.S., *supra* note 28, art. 49; Camacho, *supra* note 156, at 147 (If a worker (or survivors in case of death) believes his or her compensation is not correct under the LFT., then he or she can file a complaint with the CAB up to two years after the accident.); L.F.T., *supra* note 14, arts. 519, 871-890; Camacho, *supra* note 156, at 147-148 (If a conciliation meeting does not produce an agreement, the process continues to a hearing.).

172. L.S.S., *supra* note 28, art. 53; *see also* Camacho, *supra* note 156, at 147.

grievances with IMSS can be heard before tripartite bodies created under LSS authority.¹⁷⁴

III. EVALUATION OF PROMINENT REFORMS

A. *Verification Firms*

Perhaps the most striking reform is the inauguration of a system of inspection by private firms. Inspections by private verification firms can be commissioned by STPS to execute its enforcement responsibilities by proxy or else by employers to certify compliance, identify noncompliance, and avoid penalties. STPS is likely to rely increasingly on this device, meaning that proportionately fewer inspections will be performed directly by government.

This new approach may represent a positive development for compliance. Government inspectors have sometimes been criticized for incompetence, arrogance, and corruption.¹⁷⁵ Moreover, government inspections could be thought too infrequent to provide adequate enforcement. If it ameliorates substandard inspection and if the government devotes sufficient resources to commissioning inspections, the private system could augment the quality and frequency of state-initiated enforcement. At the same time, employer-commissioned inspections could mean the commitment of new resources both from employers and from inspection firms themselves toward quality inspection and improved compliance. Although employers must pay for private inspections, the possibility of avoiding penalties by doing so creates an incentive to commission them. This could increase the number of inspections.

In the United States, Congress has considered a comparable private inspection system.¹⁷⁶ A proposed bill would bar OSHA from inspecting worksites whose compliance with regulations has been certified by private inspection. The bill proposes to supplement OSHA's sparse inspection resources, an objective congruent with Mexico's reform policy favoring inspection firms.

173. L.S.S., *supra* note 28, art. 295.

174. *Id.* arts. 270, 294.

175. McGuinness, *supra* note 12, at 403-404.

176. S. 765, 105th Cong. (1997)

Many in the U.S. business community support the bill. However, the Department of Labor and labor unions in the United States both oppose any shift toward private inspection.¹⁷⁷ U.S. enforcement policy is premised on a first-infraction penalty principle. Opponents of private inspections worry about weakening this core principle.¹⁷⁸ This is not itself grounds for criticizing private inspection in Mexico because Mexico has no comparable first-infraction sanction policy to be undermined. Whether Mexico should move to a first-instance penalty policy is explored below.¹⁷⁹ U.S. opponents also note that the proposed bill provides no means of verifying the credentials of private inspectors. That defect is at least apparently cured under the Mexican system by the accreditation requirements and procedures under the Standards Act.¹⁸⁰ U.S. opponents raise concerns also about the independence of professionals whose livelihood depends on gaining repeat business from the industries they inspect. This concern could be raised for Mexico as well, despite the apparent safeguards represented by accreditation and procedural requirements.¹⁸¹

In the United States, an alternative to private firm inspection exists in the form of federally-funded on-site compliance consultations. State safety and health agencies, with funding furnished by OSHA, provide consultations at no cost to employers who request them.¹⁸² Consultations do not constitute enforcement inspections, nor as a rule can they give rise to penalty citations. Nevertheless in "appropriate" circumstances described by OSHA as "extremely rare," consultation reports have been utilized in penalty proceedings.¹⁸³ A recently-enacted regulation limits use of consultations for enforcement purposes to situations where an employer 1) makes false representations to officials during consultation; 2) recreates an identified hazard; or 3) fails, according to an independent OSHA finding, to abate

177. *Proposed amendment to the Occupational Safety and Health Act of 1970: Hearing on S. 765 before the U.S. Senate*, 105th Cong., C.R. S4749-S4750 (1997) (statement of Sen. Michael B. Enzi, sponsor).

178. S. 765.

179. *See infra* Part V.B.

180. *See supra* Part II.C-4 (accreditation procedures previously explained).

181. REVIEW, CAN 98-1, *supra* note 13, at 39.

182. *OSHA Rule Gives Employees More Say in On-Site Safety Compliance Consultations*, 69 U.S.L.W. 2253 (Oct. 31, 2000) (Regulations governing such consultations appear at 29 C.F.R. §1908.).

183. *Id.*

serious hazards identified during consultations.¹⁸⁴ Though the value of this U.S. consultation system is open to question, Mexico might do well to consider some version of it as an alternative or supplement to its recently-initiated private inspection system.

Though private inspection is opposed as potentially weakening the American enforcement approach, it could represent an advance in Mexico. In the context of STPS's perceived inability to enforce regulations fairly in the past, it may herald an improvement in Mexico's enforcement capability.

B. Standard-Setting

Recent Mexican reforms attempt to institutionalize U.S.-style notice-and-comment rulemaking, not only for occupational safety and health, but in all areas of regulation. Proposed regulations are subject to review, criticism, and suggested revision before becoming final. This reform should increase public accountability and, when viewed against Mexico's long-noted weaknesses in democratic transparency, accountability, and pluralistic participation, should be applauded.

Public accountability in the United States is enhanced by two features absent or partially absent in Mexico: judicial review and competitive elections for executive branch offices. In the United States, the judiciary reviews executive branch rules to ensure conformity with statutory and constitutional requirements. Judicial review also guards against arbitrary regulatory policies grounded neither in fact nor in policy. Mexico lacks judicial review of administrative rulemaking, so its standards are not independently assessed to ensure rationality, consistency, and lawfulness. Whether Mexico's courts will assume or be given authority to perform such review is unknown as yet. Further, the U.S. presidency is a matter of open elections. Hence, wayward regulatory policy can in theory be punished by voters, though it may be doubted whether voters actually pay much attention. Mexico has taken major strides toward improved political competition over the past decade and has recently had a fair and competitive presidential election, but there is no guarantee of continued progress toward greater political competition.

184. *Id.* (These new provisions are published at 65 Fed. Reg. 64, 281 (Oct. 26, 2000.)).

Along with notice-and-comment, Mexican reforms institutionalize cost-benefit analysis in rulemaking, again not just for occupational safety and health but across all sectors. Regulatory proposals must include a regulatory impact statement and those with major impact must include monetary cost-benefit comparisons. These reforms roughly parallel the requirements of a U.S. Executive Order, requiring agencies to perform regulatory impact analyses estimating benefits, costs, and cost-effectiveness of proposed rules expected to have at least a \$100 million impact.¹⁸⁵ The U.S. Supreme Court's interpretation of the Occupational Safety and Health Act decision bars exclusive OSHA reliance on cost-benefit analysis to set standards.¹⁸⁶ Instead, OSHA relies on feasibility analysis, making protection of employee health pre-eminent unless doing so is infeasible. Cost-benefit analysis would often require less protection of employees than feasibility analysis.

It remains to be seen whether Mexico will make cost-benefit analysis the decisive regulatory focus. Careful evaluation of health and safety protections may improve standard setting. Cost-benefit analysis is one means. On the other hand, wholesale reliance on cost-benefit analysis may undermine protection for Mexican workers.

C. *Enhanced Penalties*

Mexico's reforms establish enhanced, sometimes sharply enhanced, maximum penalties for occupational safety and health law violations. These seem to signal a renewed commitment to deterring violations. Maximum penalties have little deterrent effect, however, unless violations are detected and penalties imposed. Further, willingness to undertake voluntary compliance may be limited when violations are either improperly cited or ignored, or when penalties do not bear a reasonable relationship to them. It is too early to determine whether, under Mexico's reforms, a reasonable likelihood exists that violations will be found and fairly penalized.¹⁸⁷ If not, increased maximum penalties will do little to deter health and safety violations.

185. Exec. Order No. 12, 866, 3 C.F.R. 638 (1993-1994), reprinted in 5 U.S.C. § 601 *nt.*, 58 Fed. Reg. 51,735.

186. *American Textile Mfrs. v. Donovan*, 452 U.S. 490, 540 (1981).

187. REVIEW, CAN 98-1, *supra* note 13, at 38.

Whatever penalties STPS assesses, CAB panels retain authority to enhance penalties for grievous breaches of safety and health standards. We do not know to what extent and under what circumstances this authority is used. While it may seem anomalous to allocate some penalty-setting authority to quasi-judicial dispute resolution bodies separate from the STPS, the same separation of penalty assessing functions exists between OSHA and the Occupational Safety and Health Review Commission. The differences are that first, OSHRC, in contrast to CAB panels, specializes in health and safety penalty review and, second, OSHRC does not include employer or employee representatives in its official structure or decisionmaking power, though employers do appear before it as parties contesting sanctions.

D. Employer Due Process Rights in Inspection and Penalty Procedures

The reforms strengthen due process protections for employers subject to inspections and penalties. Key protections include: advance notice of inspections; requirement of a written inspection order and notice of employer rights; notice of critical dates and deadlines in the enforcement process; requirement that charges be specified and explained; the right to offer defenses; the right to legal representation; rulings that specify authority and reasoning, the right to seek penalty modification or postponed abatement; the rights to review and appeal of adverse rulings. Due process improvements should be applauded as part of Mexico's move toward replacing authoritarian habits of government with rule of law habits.

The U.S. Constitution's Fourth Amendment protects employers against unreasonable searches. Inspectors cannot gain access without either identifying specific evidence of particular illegality as the objective of the search or else proceeding in accord with an inspection schedule formulated without targeting particular workplaces.¹⁸⁸ Mexican employers are not entitled to bar inspectors without search warrants. On

188. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); see also *See v. Seattle* 387 U.S. 541 (1967); *Camara v. Mun. Court*, 387 U.S. 523 (1967).

the other hand, as noted above, Mexico requires that employers receive 24 hour advance notice of inspections. In the United States, by contrast, it is a crime to provide an employer advance notice of an inspection. Mexico may view advance notice as a due process reform, and advance notice may streamline inspections by allowing employers to prepare documents for review, rearrange work routines, notify joint committees, and take other preliminary steps. On the downside, of course, advance notice may allow an employer to conceal violations.

E. Revised Experience-Rating For Workers' Compensation Premiums

As noted above, Mexico's major workers' compensation apparatus is entirely federal and entirely public sector and is administered out of the social security system. None of these is true of the U.S. system.¹⁸⁹ Nevertheless both systems involve the collection of premiums from employers to fund awards and the two systems have broadly similar compensatory objectives. Broadly speaking both systems are similar also in setting premiums on an experience-rated basis to provide employers a financial incentive for preventing injuries.

However, workers' compensation systems vary among themselves in the intensity of experience-rating on premiums. Experience rating assigns premium levels based on individualized safety records on a firm-to-firm basis. This competes with another objective in premium-setting policy which requires more dangerous industries as a class to pay higher premiums than low-danger industries so that industries causing more or less than average portions of the overall injury and compensation burden pay their proper "fair shares" in contributed premiums. This industry-to-industry "fair share" approach must be balanced against firm-to-firm experience rating because the more a system follows one approach the less it can follow the other. If relatively safer firms in dangerous industries are rewarded with sharply reduced premiums, they come to pay less than their "fair share" portion of overall costs. The opposite is true for the relatively more hazardous firms

189. See generally, C. ARTHUR WILLIAMS, JR. AND PETER S. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION 13-18 (1973) in EMPLOYMENT LAW, CASES AND MATERIALS, Ch. 21 (Steven Willbor et al. eds., 2nd ed. 1993).

within safer industries. Under sharp experience-rating, they come to pay for a share of the overall injury compensation burden higher than the share of that burden they themselves cause.

Mexico's reforms entail revising premium policy toward more intensive firm-by-firm experience rating (more variation in premiums according to safety record). Apparently the shift is intended to be substantial in order to accentuate the financial safety incentives derived from experience rating.¹⁹⁰ It is difficult to predict or assess the effects.

As explained, sharpened experience rating comes at some cost to industry-wide fair shares in burden-bearing. Moreover, viewpoints are mixed on how much safety improvement is actually produced by experience rating. Nevertheless, it is possible that sharper experience-rating will bring down injury rates.

IV. PRE-REFORM FEATURES RETAINED IN THE POST-REFORM SYSTEM

A. *Joint Committees*

Mexico's reforms retain mandated joint committees in occupational safety and health. This may be a praiseworthy policy choice, but a number of questions, all of them difficult to answer, would warrant attention for an adequate evaluation. First, it is difficult to gauge to what extent Mexico's joint committees, mandatory on paper, actually operate.¹⁹¹ Second, there is controversy over how much impact joint committees truly have in reducing workplace injury and illness, even when they do operate actively.¹⁹² Third, some of the available evidence

190. Liberty Int'l, *supra* note 4, at 12 (One study shows a large proportion of Mexican employers aware of the premium-setting process in general. It also shows nearly half of employers both know their own premium ratings and have experienced rate changes within the two previous years.).

191. *Id.* at 11 (One study shows a slight majority of Mexican employers reporting that their joint committees operate effectively.); *but see* REVIEW, CAN 98-1, *supra* note 13.

192. Wayne Lewchuck, et. al., *The Effectiveness of Bill 70 and Joint Health and Safety Committees in Reducing Injuries in the Workplace: The Case of Ontario*, 22:3 CANDIAN PUBLIC POLICY-ANALYSE DE POLITIQUES 225 (1996) (citing Boden, L.I., et. al., *The Impact of Health and Safety Committees*, 26 JOURNAL OF OCCUPATIONAL MEDICINE 829 (1984) (no statistically significant correlation between committees and accident rates) and Cooke, W.N. and F.H. Gautschi, *OSHA Plant Safety Programs and Injury Reduction*, 20

shows that joint safety and health committees work best when employers are voluntarily devoted to them, not when they are mandated.¹⁹³ Fourth, there is also reason to believe that joint committees work best under conditions that may not widely prevail in Mexico: namely that unions be highly committed to joint committee success and that employees who bring safety problems to light be protected against discharge.¹⁹⁴ Fifth, since Mexican unions may often be insufficiently independent from employers and insufficiently responsive to workers, it is unclear how effective joint committees formally incorporating union representation can be.¹⁹⁵ Sixth, joint committees involve costs in terms of operating expenses and perhaps lost productivity if operation and participation in them are meaningful, which must be weighed against the extent to which they succeed in bringing injury rates down.¹⁹⁶ Seventh, how other recent Mexican reforms may affect the operation of joint committees is uncertain. Eighth, it is unclear also how larger forces like neoliberalism, globalization, and NAFTA may affect joint committees operations.¹⁹⁷

It is unwise to assume uncritically that mandatory joint

INDUSTRIAL RELATIONS 245 (1980)); see also Gregory R. Wachtman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 CORNELL J. LAW & PUB. POLICY 65, 85-87 (1994) (Wachtman recounts evidence, ranging from impressionistic to somewhat rigorous, that joint committees reduce workplace injury.) (citing Paul K. Forder & Robert D. McMurdo, WORKPLACE HEALTH & SAFETY AGENCY WORKING TOGETHER ON HEALTH AND SAFETY: THE IMPACT OF JOINT HEALTH AND SAFETY COMMITTEES ON HEALTH AND SAFETY TRENDS IN ONTARIO, CANADA at iii, 27, 29); see also David Weil, *The Impact of Safety and Health Committee Mandates on OSHA Enforcement: Lessons from Oregon*, Economic Policy Institute, Working Paper 112, at 35, 37 (1994) (on file with author) (inconclusive)(hereinafter Weil).

193. Wayne Lewchuck, *supra* note 192, at 226 (concluding that joint committees succeed in reducing accident rates when employers sympathize with committees, but fail to reduce accident rates when employers are unsympathetic).

194. *Id.* (concluding that joint committees fail to bring down accident rates when unions are not sympathetic to their operation); see also Weil, *supra* note 192, at 27.

195. Although union involvement might elsewhere be a plus factor in joint committee effectiveness, this context may not apply with respect to Mexico's official union structures. See generally, Reilly, Barry et. al., *Unions, Safety Committees and Workplace Injuries*, 33:2 BRITISH J. OF INDUS. REL 275 (1975) (finding that joint committees are most effective when employee members are appointed by unions, somewhat effective when not appointed by unions).

196. Wachtman, *supra* note 192, at 91.

197. Liberty Int'l, *supra* note 4, at 5 (Although one survey shows a slight majority of Mexican employers report that NAFTA has had no impact on their safety programs, a substantial minority might be reporting some effect. Increased competition stemming from neoliberalism and globalization could induce Mexican employers to enhance productivity and reduce compensation costs by improving safety.). *Id.* at 5, 7.

committees represent sound workplace safety and health policy. On balance, however, retention of mandatory joint committees under Mexican law may be wise for several reasons. First, Mexico's mandatory committee system already exists and could be crucial where other compliance mechanisms are too weak and may remain so in the foreseeable future. Second, the legal mandate may remove competitive advantages some firms could gain in the absence of a mandate by avoiding both the operating expenses of a joint committee and the costs of abating hazards potentially identifiable by it. Third, the legal mandate may induce employers whose commitment would otherwise be marginal to establish more effective committees. Fourth, committees may serve to enhance transparency and pluralist participation in both decision-making and implementation on workplace safety and health.¹⁹⁸ Fifth, joint committees may facilitate reporting of hazards to enforcement authorities.¹⁹⁹

Though no national mandate for joint committees exists in the United States, several states have adopted such mandates.²⁰⁰ Research indicates that mandated committees enhance union influence in safety and health policy.²⁰¹ This may be desirable from the standpoint of circulating and testing ideas, even if no clear link to reduced injury and illness rates can be proved. But since Mexican unions often may not represent an independent workplace voice, it is unclear how effective joint committees can be and whether enhanced union participation represents a gain. On the other hand, joint committees might themselves promote employee involvement—something Mexican unions have been criticized as lacking.

198. Wachtman, *supra* note 192, at 82 & n.91 (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, NO. OTA-H-56, PREVENTING INJURY AND ILLNESS IN THE WORKPLACE 22 (1985) (referring to avenues for "sharing and conveying information about hazards and controls") and U.S. GENERAL ACCOUNTING OFFICE, GAO/HRD-90-66BR, OCCUPATIONAL SAFETY AND HEALTH IN THE WORKPLACE 49 (referring to "opening lines of communications")).

199. Wachtman, *supra* note 192, at 84-85.

200. *Id.* at 91 (citing N.C. GEN. STAT. §95-252 (1993); MINN. STAT. ANN. §176.231 (West 1993); TENN. CODE ANN. 350-6-501 (a)(Supp. 1994); NEB. REV. STAT. §48-443 (Supp. 1993); W. VA. CODE §23-2B-2 (1994); MONT. CODE ANN. §39-71-1504 to 1505 (Supp. 1993); NEV. REV. STAT. ANN. §618.382(2)(b)(Michie Supp. 1993); CAL. LAB. CODE §6401.7(a)(5)(West Supp. 1994).

201. Weil, *supra* note 192, at 36.

B. Alternative Prevention and Voluntary Compliance

Beyond the new initiative on private inspection firms, Mexico retains its other mechanisms for alternative prevention and voluntary compliance. Though some voices have urged greater U.S. reliance on it, voluntary compliance may have serious shortcomings. It may require more resources to secure safety and health gains than does a penalty-centered system and may actually interfere with proper operation of penalty-centered systems by diverting resources and by overemphasizing consultation at the expense of sanctions.

Though it may be sensible for Mexico to maintain its commitment to alternative prevention and voluntary compliance and to embrace the verification firm system, it is possible that this may divert resources and priority away from imposing the heavier penalties authorized under Mexico's reforms. It is also possible that overemphasizing alternative prevention and voluntary compliance may prevent Mexico from reconsidering its policy against first-infraction penalties. The hard questions concern how much relative emphasis should be given to alternative/voluntary compliance and to penalty-centered compliance and how the two approaches can best be combined.

C. CAB Penalty Enhancement

Under the post-reform system, CAB panels continue to have authority to order enhanced penalties of grievous safety and health breaches. There may be anomaly in allocating some of the penalty-setting authority to these quasi-judicial dispute resolution bodies, separate from STPS. It is difficult to ascertain how and how often this authority is used and what procedures and standards govern. It is also difficult to ascertain whether and how enhanced penalties ordered by a CAB panel may be reviewed within STPS or in the courts.

For several reasons it is hard to evaluate whether CAB penalty-enhancement authority is beneficial, harmful, or neutral. There may be advantages from standpoints of policy, equity, and due process in lodging penalty-enhancement authority in a tripartite body. On the other hand, there may be grounds to doubt that CAB panels actually represent the tripartite pluralism they officially embody. The CAB system has been

described by some critics as essentially a puppet of Mexico's authoritarian PRI party-state system—with governments, business, and union members all sharing a unified and entrenched attitude of indifference to actual worker concerns. Criticism has commonly been directed at established Mexican unions for being undemocratic, monopolistic, non-responsive to worker concerns, and subservient to state power and employer interests.²⁰² The overall accuracy of that jaundiced picture is an elusive matter. Even if CAB's actually do function more as vehicles of state policy than as sites of pluralist evaluation, however, this may not be necessarily negative if the emerging state policy is stronger enforcement of sound occupational safety and health standards. One reform worth considering would be that "union" representation in the tripartite arrangement, traditionally dominated by party-state unions, be dropped and replaced by "employee-interest" representation less tied to allegedly compromised party-state unions.

D. The Role (?) of Tort Law

Nothing in Mexico's reforms directly implicates the role of tort law in regulating workplace safety and health and compensating victims of unsafe employer practices. It is worthwhile to raise questions about the possible role of tort law, though meaningful commentary is greatly hampered by the paucity of literature and other systematic information on Mexican tort law in general and its particular role in workplace accidents. It is difficult to ascertain what role Mexican tort law, practices, and institutions play in regulating and compensating for workplace injury. Mexican tort law does not appear to provide damages for pain and suffering, such that tort law would be substantially more advantageous to claimants than would workers' compensation providing no such damages.²⁰³ A further

202. Lance Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*; 3 U.S.-MEXICO LAW JOURNAL 159, 174-176 nn.113-127 (1995) (citing U.S. NAO, Public Report of Review, Oct. 12, 1994, at 28-30; U.S. NAO, submission No. 940003 Follow-up Report, Dec. 4, 1996; see also Lance Compa, Summary of NAALC Cases 1994-Present (unpublished manuscript on file with author); Areous, *supra* note 1, at 54-57, 61 (characterizing Mexican union structures as "monopolistic," state-dominated, and non-representative).

203. Mexican Civil and Comm. Codes art. 1915 (Abraham Eckstein and Enrique Zepeda, transl., 1995) (In its general provision on tort damages, Mexico's Civil Code provides that damages "shall be determined by the provisions of the Federal Labor Law."

uncertainty is the extent to which workplace tort recovery may be preempted by Mexico's systems of workers' compensation.

Generally speaking, U.S. workers' compensation provisions preempt tort suits by injured workers and their families against employers of workers injured or killed on the job. Such tort suits are disallowed because workers' compensation is the exclusive remedy. The wisdom of this exclusivity/preemption policy law is open to debate.

Neither Mexico federal labor law mandating workplace injury compensation nor the social security law implementing that mandate in detail for the sectors it covers contains the kind of explicit "exclusive remedy" provision found in U.S. workers' compensation statutes. Nevertheless, it may be that Mexico's worker's compensation systems are by implication treated as the exclusive remedy for workplace injury, thereby blocking chances for bringing tort suits, just as with explicit preemption under U.S. law. The question of tort preemption may not matter a great deal because tort recovery in Mexico does not provide itemized enhanced damages for pain and suffering. Because damages under tort law appear substantially similar to those under workers' compensation, tort law offers little potential advantage to claimants as compared with workers' compensation.

On a related point, Mexico's social security law sets out no provision excluding compensation for injuries intentionally inflicted by employers. Such an exclusion is typical for U.S. workers' compensation statutes.²⁰⁴ Though it may seem strange to leave victims of intentional harm uncompensated this way, non-coverage under workers' compensation means that exclusivity and preemption do not apply. Hence, U.S. victims of intentional injury may file tort suits in efforts to recover pain and suffering (and perhaps punitive) damages from employers, over and above any damages for medical care and lost income. If

It formulates the lost-income indemnity as four times the "highest minimum daily wage in the region." *Id.* With specific reference to tort recovery for workplace injury, the Code provides that employers shall pay "the corresponding indemnity." *Id.*, art. 1935. The Code can be taken as representative of Mexican law. It applies formally within the Federal District (Mexico City), which comprises a substantial portion of Mexico's population, applies throughout Mexico on matters where the federal government asserts exclusive jurisdiction, and serves as a model for civil codes in the several Mexican states.) *Id.* at V; see also *The Mexican Civil Code*, at xix, (Michael Wallace Gordon, trans., 1980).

204. *Millison v. E.I. du Pont de Nemours & Co.*, 501 A. 2d 505, 514-515 (N.J. 1985) (citing N.J.S.A. 34: 15-8).

Mexican tort law is meaningful in the workplace context (a matter of doubt, as noted above) and if Mexican workers' compensation systems by implication or effectively preempt any such role for tort law, such preemption of tort law remedies would seem to cover even harms intentionally-inflicted by employers because such harms are not explicitly excluded from Mexico's workers' compensation. Mexico's main workers' compensation system apparently covers "intentional" harms, not just "accidental" harms since the relevant provisions make no distinction. Hence, in contrast with U.S. coverage, Mexican workers' compensation ameliorates whatever hardship may lie in affording no tort remedies for intentional injury.

Mexico's system could be criticized on grounds that intentional injuries should be handled through a U.S.-style tort system not through workers' compensation. Arguably, the enhanced damages recoverable in a tort system—and the fact that these damages fall directly against the employer rather than against a workers' compensation fund—provide augmented deterrence against intentionally-inflicted injuries, deterrence that is lost if intentional injuries are simply covered by workers' compensation.

On the other hand, there are problems in the U.S. system of covering intentional injuries under tort rather than workers' compensation. Excluding intentional injuries from workers' compensation makes victims take their chances on tort recovery. It also gives rise to extensive litigation over whether particular injuries were "intentional" or not. This litigation compromises the basic workers' compensation goal of delivering relief to injured employees in the most low-cost feasible fashion. The game may not be worth the candle. Most U.S. states allow tort suits to go forward, escaping workers' compensation coverage and exclusivity, only if there was deliberate intent to injure.²⁰⁵ Although this kind of deliberate employer-inflicted injury is appalling, it is also rare. Maintaining tort law deterrence against it may not justify the social costs of litigating the issue.

True, the deterrence rationale takes on enhanced relevance

205. *Millison v. E.I. du Pont de Nemours & Co.*, 501 A. 2d at 514-515; see also 6 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKER'S COMPENSATION*, §103 (2000); Joseph H. King, *The Exclusiveness of an Employee's Workers' Compensation Remedy Against its Employer*, 55 TENN. L. REV. 405 (1988).

in the minority of U.S. states where “intentional” injury is construed broadly to cover injuries where the employer knew of a serious hazard and failed to abate it, thereby deliberately endangering life and limb though not deliberately inflicting injury.²⁰⁶ This kind of deliberate endangerment is far more common than outright deliberate injury and might seem to warrant tort action in the name of deterrence. The problem, though, is that deliberate endangerment often becomes difficult to distinguish from routine employer negligence. As more negligence becomes actionable in tort rather than covered by workers’ compensation, the basic goal of delivering relief for workplace injury on a routine, low-cost basis gets increasingly compromised. If substituting workers’ compensation for tort is a wise policy to start with, this compromising effect is troubling.

In sum, under either the deliberate intent or the deliberate endangerment interpretation, the U.S.- style intentional tort exception from workers’ compensation coverage may not be wise policy. It might therefore be unwise for Mexico to adopt it in place of its current policy of covering international injuries under workers’ compensation. This position is fortified by a further consideration. As indicated above, Mexican employers who cause intentional injury must indemnify IMSS for compensation it pays out to victims. This approach seems to harmonize the objective of maximizing deterrence against gross employer misconduct with the objective of guaranteeing financial support to injured workers.

V. RESERVATIONS AND CONCERNS

This part raises reservations and concerns about Mexico’s post-reform system, from the standpoint of sound workplace safety and health policy. By and large, features examined here are carried over from the pre-reform system. On each point mentioned, new reforms should be considered.

A. “Whistleblower” Protection

Mexico does not appear to have any legal system for protecting employees who “blow the whistle” on workplace

206. See, e.g., *Beauchamp v. Dow Chem. Co.*, 398 N.W.2d 882 (Mich. 1986).

dangers from retaliation by their employers. A sound system for promoting workplace safety and health should include legal protection for those who report hazards either to inspectors or to other parties who may hasten abatement of hazards. Employees with on-the-spot knowledge are often better placed than anyone else to identify hazards. Active employee involvement can therefore augment hazard reporting at nominal cost. In a developing economy like Mexico's these advantages and efficiencies may be especially key. Hence, well-conceived legal protection for whistleblowers may be the most important reform Mexico could consider by way of improving its workplace safety and health system. At minimum, those who reliably report serious hazards should be protected against retaliatory discharge.

Some workers may be protected by collective bargaining agreements from dismissal without good business reason and whistleblowers may sometimes be able to report to joint committees while maintaining anonymity. Still, whistleblower protection probably needs strengthening. A variety of issues would need attention. What sanctions should apply against employers who impermissibly punish whistleblowers? Should enforcement of whistleblower protection lie in the hands of public officials, unions, individual complainants, or some combination? What level of severity in hazard and accuracy in reporting should be required to qualify for whistleblower protection? Should protection apply only for reports to public officials? To media? To in-house parties like superiors or joint committees?

The United States is no model for whistleblower protection. U.S. whistleblowers essentially depend on self-initiated legal action under state statutes and court decisions which vary widely from state to state,²⁰⁷ and on enforcement proceedings by the Secretary of Labor,²⁰⁸ which are criticized as rare and ineffective.²⁰⁹ But because Mexico may need whistleblower protection even more than the United States, it should consider instituting it formally.

207. See generally, Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51:2 ADMIN. L. REV. 581 (1999)

208. 29 U.S.C. 660 (c) (1), §11 (c) (1).

209. Vaughn, *supra* note 207; see also *Safer Workplaces Act of 1999; A bill to amend the Occupational Safety & Health Act of 1970*; "Safety & Health Whistleblower Protection Act," *Hearing on S. 653 before the U.S. Senate*, 106th Cong., C.R. S2856 - S2857 (1999) (statement of Sen. Paul D. Wellstone).

B. First-Infraction Penalties

Mexico's post-reform system appears to preserve the pre-reform policy against first-infraction penalties. This policy may unwisely encourage a relaxed attitude toward compliance. Compliance expenditures can be postponed without sanction until infractions come to the repeated attention of authorities. Mexico should consider replacing this current policy with one of regularized first-infraction penalties, at least for serious hazards. Post-reform due process protections for employers may be ample enough to keep such a first-infraction penalty policy from becoming unduly arbitrary or intrusive.

There would be no strong contradiction between a first-infraction penalty policy and Mexico's old and new initiatives on voluntary compliance. Indeed, a first-infraction penalty regime imparts compliance incentives in the absence of which voluntary compliance programs may lack adequate levels of commitment, substance, and effectiveness.²¹⁰

It could be that a first-infraction penalty policy would impede Mexico's new initiative on employer-commissioned inspections. One objective of voluntary inspection is encouraging employers to enlist experts in identifying hazards. Employers might hesitate to commission inspections that would result in penalties. This would compromise the objective of better identifying hazards. One response to this would be to apply first-infraction penalties only with involuntary inspections, not with voluntary ones. Or there could be lighter penalties when the inspection is voluntary. Voluntary inspection incentives would be sharpened if first-infraction penalties were more likely or more harsh from involuntary inspections than from voluntary ones.

Yet there is a potential disadvantage: that employers might use the penalty differential between voluntary and involuntary inspections to game the system. They could commission voluntary inspections in hopes of getting compliance certification while avoiding any immediate prospect of penalty. They could then use inspection firm reports as a chart toward safe harbor

210. Brett R. Gordon, *Employee Involvement in The Enforcement of the Occupational Safety and Health Laws of Canada and the United States*, 15 COMP. LAB. L.J. 527, 552-553 (1994).

from penalties at minimum cost. Though this scenario has a certain efficiency logic in promoting compliance, it may also divert resources potentially available for health and safety improvements into a compliance game. Such a system is perhaps well-designed against overspending on safety and health due to regulatory uncertainty, but may subtly encourage diversion of resources and reduced allocations for actual improvements. The acceptability of this trade-off turns on whether most employers are able to understand their regulatory obligations without informational assistance from inspection firms.

C. Under-Staffing on Inspection

The United States is widely suspected of devoting inadequate resources to workplace safety and health inspection, despite its considerable wealth.²¹¹ Mexico may be as bad or worse.

Inadequate inspection may be especially troublesome in a system lacking routine first-infraction penalties. First-infraction penalties, by imparting a meaningful fear of financial loss, may partly compensate for infrequency of inspection. If, as one source contends, STPS inspectors execute 200 inspections per year, the pace is nearly one per working day. Even for small enterprises, such a pace is speedy. Large enterprises would seem to require much more attention. Hence, many inspections in Mexico may be cursory and inadequate.²¹² No doubt, Mexico faces tough choices in resource allocation. Competing economic and policy objectives might be undermined by increased expenditures on workplace safety and health. Nevertheless, Mexico's current commitment to inspections may be far below what is needed for substantial progress in workplace safety and health.²¹³

D. Workers' Compensation Ineligibility Based on Claimant Misconduct

As pointed out above, the IMSS denies compensation to

211. S. 765; *see also* S. 575, 103d Cong. (1993) (proposed by Sen. Edward Kennedy).

212. REVIEW, CAN 98-1, *supra* note 13, at 39 (One study questions the efficacy of inspections where employers have received advanced notice.).

213. Liberty Int'l, *supra* note 4, at 3 (Mexico has been listed with the second highest workplace accident rate in the world.).

workers whose injuries arise along with their own misconduct in certain forms: intoxication, drug use, fighting, attempted suicide or self-inflicted injury. Somewhat comparable coverage exclusions may be found under some U.S. workers' compensation statutes.²¹⁴ The wisdom of these coverage exclusions is doubtful, especially where the injuries involved are substantial.

Two rationales might be offered for such exclusions. One is that compensation may encourage unacceptable conduct, while another is that compensating those engaged in unacceptable conduct is morally offensive. These rationales are weak.

Few workers will be persuaded to suicide or serious self-mutilation by the lure of workers' compensation payments and few who are inclined to suicide or self-mutilation will talk themselves out of it for fear they or their families will go uncompensated. Hence, there is little real merit in the incentives/deterrence rationale for coverage exclusion. And though it may seem morally offensive to "reward" unacceptable conduct, self-mutilating or suicidal people must be regarded as deeply troubled. They therefore should not be excluded from the social care embodied in workers' compensation payments. Were coverage extended to them, the number of "offensive" awards would surely be small. Moreover, if coverage is excluded, inaccurate and unjustified benefit denials may occur where self-mutilation or suicide are falsely suspected.

Much the same considerations can be applied to exclusions based on drug and alcohol use. Though such exclusions might be defended as a device for curbing substance abuse, it is doubtful that abuse levels would rise if workers knew compensation would accompany abuse-related injuries: to get the money, the substance abuser would have to experience workplace injury. If compensation does not raise the level of substance abuse, denial of compensation cannot reduce it. Moreover, there are few, if any, workplace injuries where it is possible to say that drug or alcohol use was the only cause. For injury to occur, there must also be a workplace hazard. And if there is workplace hazard,

214. See generally, *Workers' Compensation: Effect of Allegation That Injury Was Caused By Or Occurred During Course of, Workers' Illegal Conduct*, 73 ALR 4th 270; see also "Culpable negligence" or negligence other than "willful" or "serious and willful misconduct" within provision of *Workmen's Compensation Act precluding compensation*, 149 ALR 1004; *Neglect or Improper self-treatment as affecting right to or amount of compensation*, 54 ALR 637.

blaming the injury on drug or alcohol use is confused, because the harm might just as easily have befallen someone who was sober. Hence, the drug-and-alcohol-use exclusion may in reality be no more than an arbitrary form of cost-cutting. Combined with experience-rating on premiums, it may create incentives toward inadequate precaution by employers. True, the exclusion also provides what could be considered proper "punishment" for substance-abusers. But it is questionable whether that punitive objective properly belongs within workers' compensation policy.

All these objections carry less force when it comes to excluding coverage for those injured while fighting. Unlike substance abuse, which merely heightens the likelihood that workplace hazards will produce injury, fighting creates its own separate form of workplace risk. If compensation is denied for its harmful fruits, workers may avoid it. Hence, the incentive and deterrence rationales for coverage exclusion may actually make sense. Elsewhere, they are weak, as noted above. It is especially regrettable if Mexico's retention of such exclusions is inspired by comparable exclusions under U.S. laws.

E. Protection For Pregnant and Lactating Women

Both pre-reform and post-reform Mexican law mandates workplace protection for pregnant and lactating women. These mandates undoubtedly stem in part from concern for the well-being of fetuses and newborns, not just women workers themselves. These are valid concerns of course. But overbroad protection could yield a serious unintended consequence: curtailed work opportunities for women.

Special protection expenses for pregnant and lactating women or penalties for violating mandated protections could raise the costs of employing women or utilizing them in certain posts. This could drive employers to keep women away from employment opportunities with pertinent hazards, rather than incur the expenses and penalties that may go with offering such opportunities to women. This effect may touch women in general, not just pregnant and lactating ones, since employers cannot easily know which women may get pregnant or give birth.

Such employer responses are cause for concern even in the United States where they might be penalized as illegal sex

discrimination, because not all illegal discrimination can be detected and punished. There is even stronger cause to worry for Mexico, where remedies for employment discrimination are not developed. The U.S. Supreme Court has placed legal restraints on employer-initiated "fetal protection" policies.²¹⁵ Mexico, by in effect mandating fetal protection policies, lies at the opposite pole from the United States, which restricts them. Mexico's fetal protection mandates should be assessed carefully in light of their possible effects on equal employment opportunities for women.

F. Right to Refuse Dangerous Work

Mexican law provides employees no explicit right to refuse dangerous work. Such a right might encourage employees to avoid unsafe work circumstances without fear of job loss or sanction and might also promote identification and reporting of job hazards. The apparent absence of such a right could be considered a weakness in Mexico's workplace safety and health law.

U.S. law provides rights to refuse dangerous work, though this U.S. protection has been criticized as too weak to be effectual.²¹⁶

Mexico should consider prohibiting discrimination against employees who refuse dangerous work, at least where there is an objectively reasonable fear of death or serious injury. Review by neutral safety officials could be utilized to determine whether conditions justified the work refusal under such a standard and, in absence of requisite danger, authoritatively order resumption of work under pains of employer sanction for those who continue to refuse. A system not unlike this currently prevails in Canada

215. *UAW v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991).

216. 29 CFR 1977.12 (A regulation under §11(c) of the OSH Act, which prohibits discrimination against employees who exercise rights conferred under the Act, provides that refusing work under a reasonable fear of death or serious injury is a right conferred under the Act.); *see also* *Whirlpool Co. v. Marshall*, 450 U.S. 1 (1980). (Though employees who refuse dangerous work as defined in the regulation are protected from employer discrimination, this protection may not include a right to receive wages for the lost work time. The risk of lost wages under this protective scheme may chill employees in exercising their purported right.); 29 U.S.C. 143(a) (Under the National Labor Relations Act, employees who refuse to perform work where there is objective evidence of an abnormally dangerous condition may not be ordered back to work by a court in enforcement of a collective bargaining agreement no-strike clause); *Gateway Coal Co. v. United Mineworkers of America*, 414 U.S. 368 (1974).

and would probably not create an undue problem of malingering.²¹⁷

G. *Compensation for Work-Related Illness*

Although Mexican law authorizes workers' compensation awards for work-related disease,²¹⁸ one recent study raises questions whether proper awards actually get made in cases of long-term illnesses like asbestosis that may be caused by workplace exposures but not detected for years afterward.²¹⁹ Issues include: determining whether and to what extent a particular claimant's injury was caused by workplace exposure as opposed to other exposures, genetic proclivity, life habits, or other causes; ensuring that potential claimants know they may have grounds to seek awards; and calculating premiums so as to cover workplace-caused damage not manifesting itself until long after the pertinent activities and exposures took place.²²⁰ Mexico's record may not be uniquely bad. The problems raised by work-related illness are perplexing ones that also bedevil workers' compensation systems in the United States and elsewhere. It is for that reason that they should get priority attention.

H. *Specific Weakness Dealing with Problems Raised by Hazardous Substances*

A NAFTA-Commissioned study raises specific concerns about inadequacies in workplaces utilizing hazardous materials, concerns about employee information, labeling (including Spanish language), and personal protective equipment.²²¹ Improved performance on these matters should be deemed a priority.

217. See generally Gordon, *supra* note 210.

218. LFT, *supra* note 14, art. 473.

219. REVIEW, CAN 98-1, *supra* note 13, at v, 40.

220. See generally, Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119 (1994); see also Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation and Information*, 72 GEO. L.J. 1231 (1984).

221. REVIEW, CAN 98-1, *supra* note 13, at 5, 35-37, 40.

VI. CONCLUSION

Recent reforms in Mexico's laws raise a reasonable hope of producing gains in both rule of law and workplace safety. Improvements may emerge from use of private verification firms to enhance compliance; from institutionalized notice-and-comment rulemaking and cost-benefit scrutiny; from enhanced penalties; from fortified due process rights for employers; and from intensified experience rating on workers' compensation premiums. Though positive results may emerge from these reforms, neutral or even negative consequences could emerge as well.

Several prominent pre-reform features—namely, joint committees; alternative prevention and voluntary compliance; CAB penalty-enhancement powers; and an apparently limited role for tort law—appear to be carried over into the current reformed system. All these features pose both potential disadvantages and potential advantages.

Reservations and concerns arise over several aspects of Mexico's post reform system: weakness in whistleblower protection; avoidance of first-infraction penalties; understaffing on inspection; workers' compensation ineligibility based on claimant misconduct; special protections focused on pregnant and lactating women in order to ensure the health of fetuses and newborns that may thwart equal employment opportunity for women; lack of an explicit legal right to refuse dangerous work; possible inadequacies in the workers' compensation system regarding long-term occupational illnesses; and possible weaknesses in dealing with problems, particularly in labeling, information-sharing, and personal protective equipment, raised by hazardous substances. Future reform initiatives in Mexico should address these reservations and concerns.

