

“Flexibility”: The Labor Strategy of Free Trade

AN EXAMINATION OF SIX  
BASIC **LABOR RIGHTS** IN

# GUATEMALA



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## Prologue

This document about labor rights in Guatemala is the first in the “Anti-Flexibility” series. This series is comprised of seven documents: one for each Central American country and one that gives an analysis of the region. In each document we take a general look at six basic labor rights: Decent Working Conditions; Freedom of Association; The Right to Collective Bargaining; Elimination of Forced Labor and Mandatory Overtime Work; Elimination of Discrimination, and Elimination of Child Labor.

Throughout the past years, we have gained in-depth knowledge of the ways in which labor rights are violated in Central America. The regional and local research investigations are combined with our daily activities that involve training, assistance and communication. Through investigation and actions, we have formed ties with labor organizations in Central America, as well as with other sectors that make up the Central American social movement.

The “Anti-Flexibility Collection” and the document that you have in your hands are the result of ASEPROLA’s efforts to synthesize our research and that of other social and institutional organizations of the Central American region, with which we share the mission of promoting and defending labor rights in our respective countries.

In order to obtain the information—of which we provide an overview—we conducted interviews with union leaders from the public and private sector; workers, especially from the *maquila* and agro industrial sectors; labor judges; official authorities from the Ministry of Labor; as well as with labor lawyers, with the objective of identifying—in practice and from different points of view—the principal obstacles to compliance with the labor rights studied.

Additionally, we have collected related studies and information from government organizations, unions, courts, and the Ministry of Labor, in order to include reports, statistics, denunciations, decisions in cases, etc. We made several visits to documentation centers and public libraries to gather information about labor law reform initiatives. In addition, we also compiled ample bibliographical information about labor norms, on national and international levels (International Labor Organization-ILO-Conventions).

In the development of this research, we have obtained varied information, but also faced limitations. It is important to note the great importance of the lack of systemic information, including inconsistent record keeping of denunciations by institutions charged with overseeing compliance with labor laws. This is one of the challenges in the enforcement of labor laws in Central America—if appropriate records, reports, and statistics do not exist, how can the government ensure the protection of labor rights?

## Introduction

We must start off by noting that Guatemala was a pioneer within Central American nations in creating a Political Constitution and a Labor Code. These laws were created in the 1950s and 60s and reflected a model of the State and society which was guided by certain conceptual and ethical principles about society, economics and politics. The other countries in the region took the Guatemalan example as a model to emulate in creating their own Labor Codes, adapting them to their country-specific needs and characteristics.

The legislation dealt with the beginnings of the solidarity of the Social State, which actively intervenes in favor of social issues (social services), economic issues (public companies), administrative issues, labor issues and others. It is a state that, in the case of labor rights, regulates the relationship between Capital and Labor because it realizes the unequal nature of the relationship, where Capital has the power and Labor needs protection. The Guatemalan Constitution and the Labor Code are a reflection of this view of society, and although both still lack necessary laws, they generally strive towards the protection of the rights of workers.

It is also interesting to note how the Guatemalan Labor Code has been reformed four times over the last ten years. The intent of the Labor Code changes has been not to diminish the rights of workers but instead to amplify them and to enforce stricter regulations on existing labor rights laws. Let's look at the major Labor Code changes:

**1992:** Reforms were enacted under decree No.64-92, which refers to: paid leave; minimum wage; maternity leave; the right to form labor unions and their reintegration. They also deal with labor union activities, the process that unions must follow to be legally recognized, the formation and functionality of the Executive Committee, among others.

**1997:** New reforms were enacted under decrees No. 4-97, 19-97 and 98-97. The first decree dealt with the ways in which labor union leaders assist their unions, federations of confederations, in financial matters whose quantities do not exceed 10 times the minimum wage for the sector in which the unionized laborers work. The second decree reformed matters pertaining to the Tribunal for Arbitration and Conciliation. The third decree added Article 17Bis, which clarified the procedures that should be followed by Resources of Revocation and Replacement

**1998:** Decree No. 9-98 rewrote Article 13, which deals with the percentage of foreign-born workers that can be hired in relation to their Guatemalan counterparts. With Article 35-98, several reforms were incorporated in order to implement the Accord on Socio-Economic Aspects and the Agrarian Situation (part of the Peace Accords) to establish safety assurances for life, health and the integrity of workers. Procedures were also created to promote the right to belong to a labor union and to eliminate obstacles that delayed court resolutions. Article 217, which dealt with the legal recognition of labor unions, was also revised, to indicate that the General Labor Directorate would be the

institution that would decide whether or not to legally register a new labor union. Also, labor unions were allowed to have sessions where they would elect their Executive Committee and their Consultation Council and meetings to gain recognition as a legal entity.

**2001:** The latest reforms were enacted through decrees No.13 and 18, which obligate the Executive Branch to set a minimum wage each year, and limit or prohibit the state's interference in labor union activities (Article 211). These reforms sought to preserve job stability for workers who belong to labor unions and increase the fines faced by those who infringe these rights (Article 209). Furthermore, the reforms eliminated the prohibition against labor strikes for agricultural workers during harvest times (Article 243). The 2001 reforms also establish the general guidelines for collective contracts and collective agreements for all workers of a company and not just the workers who belong to a certain union (Article 214). Labor inspectors are given the option to impose administrative sanctions (Article 269).

International pressures were instrumental in approving these reforms by the Congress. The main international source of pressure was the ILO's Committee on Freedom of Association, which spoke out against the Guatemalan government's repeated violations of labor union freedoms and actions against collective bargaining, and emphasized the need to comply with international labor standards.

The approval of the 2001 reforms was aided by pressure from the United States, which excluded Guatemala from a list of countries benefiting from the Generalized System of Preferences (GSP), due to the constant reports of labor rights abuses.

Recently, the Ministry of Labor and Social Security has been proposing various Labor Code reforms to the Congress. One such proposal would guarantee that labor abuse cases would be resolved in a single session with direct participation by the Labor Judge. Another proposal refers to the money foreigners need to pay in order to obtain work permits, which would become part of the Ministry of Labor and Social Security's fund. Yet another proposal aims to establish Universal Reparations and eradicate of child labor, making it illegal for children under the age of 14 to work. There are also initiatives to include in the Labor Code clauses that would make sexual harassment a cause for dismissal, as well as initiatives regarding domestic worker's labor rights.

As one can see, Guatemalan legislation is rich and has been established to better apply basic human rights, but the reality of the daily lives of Guatemalan workers differs starkly from what the laws indicate.

In general terms, the employers are the ones who violate national and international laws in their daily activities against workers. However, the responsibility is greater for the state, which has the obligation to enforce labor laws. The fundamental problems related to labor law compliance are "flexibility" in practice and the loose interpretation of labor laws by judges, which we call "jurisprudence flexibility."

In many cases, labor laws are violated because the business sector fails to respect the rights of workers, the Ministry of Labor does not keep a close eye on companies and workers usually accept the violations out of fear of losing their jobs. Also, when workers seek recourse with the Ministry of Labor and the different tribunals, they are often faced with negative attitudes from public officials that make it almost impossible for them to demand respect for their labor rights.

“The job of the Judicial Branch of Guatemala is nefarious against workers, as it is the branch of government charged with using its powers to ensure compliance with labor laws, and has in fact done the exact opposite, using principles that are diametrically opposed to those that surround the subject of labor rights. Because of this, the main priority today is not to modify existing legislation, but instead to modify the attitudes of the institutions obligated to enforce them (...). The priority is not to create codes of ethics or moral postulates; it is to identify problems, establish objective responsibilities and to punish those responsible, create mechanisms to constantly improve the Judicial Branch as well as procedures that eliminate the senseless delays in justice.”  
(Comments by UNSITRAGUA, made before the ILO in 2003).

Labor rights violations are common occurrences in Central America, and Guatemala is no exception. Although Guatemalan law was written to protect workers, in practice things work much differently, where the concept of “labor flexibility” is instilled more and more every day.

Let’s now look at some general data about Guatemala that might better show the situation.

## **General information about Guatemala**

Guatemala is located in the northern part of Central America and has a territory of 108,889 square kilometers.

It has a population of 12,209,000 people (2003), of which 53.9% live in rural areas and 46.1% live in urban areas. Women make up 51.1% of the population, and men make up 48.9%.

### **Employment:**

The economically active population (EAP) in Guatemala is made up of 4.9 million people. About twenty-eight percent of employed persons work in the formal sector. Of the total working population, 27.06% are women and 72.94% are men. Six of every ten men and two of every ten women participate in some form of economic activity.

These statistics give us an idea of the unemployment crisis that exists in Guatemala and the discrimination faced by women in the workplace. The problem of discrimination is worse for the indigenous population, especially indigenous women.

The indigenous peoples of Guatemala make up 43% of the total population and speak over 21 different indigenous languages. The Quiché language is spoken by 29% of the indigenous population; 25% speak Kakchiquel, 14% speak Kekchí, 4% speak Mam, 24% speak Pocomchi, Pocomam or Tzutuhil, and 4% speak other languages. Approximately 32% of the indigenous population speaks only one Mayan language.

**Poverty:**

Various studies show that in Guatemala, 85% of families are poor. Of this percentage, 44% live under extreme poverty conditions, which means they cannot afford to obtain the basic basket of goods and services. Women head 21% of the households in marginalized communities. A 1997 study by COINAP-UNICEF showed that approximately 250,000 people who lived in the metropolitan area of Guatemala City lived under extremely precarious conditions.

**Health:**

The infant mortality rate in 1998 was 19 deaths per 1000 births. The mortality of children under 5 years of age is 3.25/1000 and the maternal mortality rate is 58/100,000. In 1998, the complete immunization rate reached 98% (MSPAS-Guatemala, 1999).

**Environment:**

Recent studies have shown that Guatemala City is the most polluted and noisiest city in Central America. The National Environmental Committee declared that 100% of the inhabitants of the city are exposed to noise pollution from traffic and other sources that increase noise levels above those recommended by the World Health Organization (WHO).

**Education:**

In terms of education, the data show the following: The illiteracy rate in 2001 was 30%. The illiteracy rate for those over 15 years of age was approximately 56% for women and 44% for men.

In 2000, the average Guatemalan had 3.5 years of formal education. In 1997, the net enrollment in elementary education was 73.8% and the net enrollment in high school was 34.9%.

**Housing:**

The living situation in Guatemala City is precarious. In 1995, it was estimated that this housing deficit in Guatemala City reached 195,000 units, while the growth of new housing options was 8,000 per year. The poor quality of housing is extreme in urban shantytowns. A survey found that 78% of all housing in marginalized areas was built in

high-risk areas; 62% of these were built near sewers. This same survey reported that 89% of all housing in marginalized areas was built with materials such as trash, cardboard boxes and cans (SEGEPLAN, 1996).

The number of households in marginalized areas with access to basic services is low. Only 52% of all households have running water, 54% have electricity and only 26% of households surveyed reported paying for regular garbage collection removal.

These statistics give us an idea of Guatemala's situation. Now let's take a look at six basic labor rights. With each of these rights, we will begin with a brief summary of relevant national and international legislation; then, we will explain how the different forms of "labor flexibility" are manifested. We then conclude by detailing the main obstacles that workers face in exercising each right.

## **Decent Working Conditions**

### **Legal Recognition of this Labor Right**

Constitution:

- Article 44: Regulates the working conditions that must exist in factories, and all other places of business.
- Article 50: Social security constitutes an obligatory public service. The law regulates its scope, extension and form.
- Article 38, No 5: Employers will provide their workers a bonus for each year they are employed.

Labor Code:

- Article 29: Employers are prohibited from physically and verbally mistreating their employees. Payment of wages must be in full, and must be personal.
- Article 30: Employers are prohibited from discriminating against unionized workers.
- Article 50: The employer is held responsible when workers' health and lives are placed in grave danger.
- Article 58: Right to compensation for workers fired for reasons attributable to the employer.
- Article 175: Right to paid time off.
- Articles 177-189: Workers have the right to take paid annual vacations.
- Articles 196-202: Workers have the right to receive an end-of-year bonus.
- Articles 314 and 315: Every employer is obligated to adopt adequate measures to ensure their workers' safety and hygiene in the workplace.

Criminal Code:

- Article 245: If employers keep the funds that should be contributed towards social security, they will be penalized with fines ranging from 100 to 300 days' pay.

- Article 165: Unwanted sexual harassment will lead to prison time for the perpetrators.

#### Labor sector Law and Social Provisions:

- Article 61: The General Directorate of Social Security proposes and evaluates: well-being, safety, environment, work, recreation and hygiene policies.

#### Social Security Law:

- Article 56: Deals with the employer's infringement of workers' rights regarding health. The employer has the obligation to restitute the Social Security Institute for expenses incurred from accidents or illnesses suffered by the worker.

#### ILO Conventions

##### *Ratified:*

- Convention 99: About the methods for setting fixed minimum wages in agriculture. 1951.
- Convention 131: About setting fixed minimum wages with special reference to developing countries. 1970.

#### Other Ratified International Conventions

- American Convention on Human Rights Regarding Economic, Social and Cultural Rights (San Salvador Protocol). Establishes the right to social security and maternity leave.

## **What Happens in Practice With Decent Working Conditions?**

The concept of decent working conditions includes the characteristics of wages, hours, health and safety, maternity leave, medical care, job protection, etc. In Guatemala, decent working conditions do not exist. Even though Guatemala has extensive legislation protecting the rights of workers, the Ministry of Labor does not consistently enforce the laws, creating flexibility in practice.

The following table shows the working conditions in Guatemalan maquilas.

**Cases Filed before the Ministry of Labor's Inspector General  
by Women Workers Against Maquila Industry Employers  
January-October 2003**

<b>Type of Case</b>	<b>No. of Cases</b>
Suspension of work without pay	182
Refusal to provide Social Security Certificate	134
Lay-offs during maternity leave	80
Mistreatment	65
Illegal retention of wages	43
Changes in working conditions	27
Forced Overtime work	22
Lay-offs during breast feeding period for new mothers	16
Women workers denied time to breast feed their children	15
Overtime pay withheld	13
Illegal suspension due to Social Security assistance	11
Workers denied entrance to workplace	8
Salary reductions due to Social Security assistance	7
Employer does not register workers with Social Security Institute	6
Women workers pressured to resign during breastfeeding period	4
Women workers pressured to resign while pregnant	4
Retaliation against labor unions	4

*Source: Office of the Woman Worker, Ministry of Labor*

If we assume that decent working conditions include every right contained in the legislation, we can rightly affirm that abuses to these rights occur frequently, especially regarding maternity rights, hygiene, health and safety, etc. The Ministry of Labor's deficiencies and failure to enforce the law play an important role in these abuses. Workers also find it difficult to access the Guatemalan justice system.

### **Flexibility in practice**

#### **1. Regarding Wages**

Employers reduce the wages of maquila workers when it comes time to pay their workers for overtime labor and bonuses for achieving production goals.

The production incentives are calculated using as a basis the amount of time the *fastest* worker produces, instead of an average of the speed of all workers. This leads workers to labor intensively to try to secure an end-of-month productivity bonus, but when it comes time to pay, employers simply do not pay the bonuses nor do they pay for any overtime labor, leaving the worker's salary stuck at the minimum wage.

The legal incentives are not given in their totality, as with the bonus that should be given every July.

## **2. Regarding Social Security**

The right of workers to Social Security is seldom applied in Guatemala. Proof of this is the study published by the United Nations in their National Human Development Report, which shows that only 24% of the economically active population was registered with the Social Security Institute of Guatemala (SSIG) in 2002. This means that in that year, 76% of Guatemalan workers did not have access to the services provided by the SSIG. In the years since then, the situation has not improved.

Guatemalan businessmen prefer paying fines for not including their workers in the SSIG over having to pay the actual amount of money they owe SSIG in order to register their employees.

Other actions that show violations regarding Social Security are the following:

- Refusal to extend the Social Security certificate of labor because employers do not register their employees with the SSIG.
- Refusing women worker's requests to seek *private* medical care when they are not enlisted in the SSIG. Also, if women take the day off for medical appointments, they are deducted two days' worth of salary, or sometimes even fired. If they are fired, employers do not pay them the legally required benefits because they claim the workers did not show up for work.
- When they seek medical help using Social Security, workers are often suspended and have salary deductions, even when they bring notes from doctors justifying their absence from the workplace.

## **3. Regarding Maternity Leave, breast feeding and firings:**

The laws that regulate maternity leave establish the right to rest and the reinstatement of women workers who are fired without legal authorization while they are pregnant or breastfeeding their infants. The textile maquila industry frequently violates this right:

- Refusal to provide labor certificates so that workers can belong to the SSIG. Employers do not enroll their employees in the SSIG, even though they deduct the monthly SSIG taxes owed by the workers. Aside from being a crime of illegal appropriation, it prevents pregnant women from accessing proper medical care.
- Salary deductions for seeking the SSIG. Once workers gain the labor certificate and go to the SSIG, women are deducted a day's worth of wages because

- employers claim they were unjustifiably absent from work while they were with the SSIG. This is a clear violation of Guatemalan law.
- Lay-offs during pregnancy and breastfeeding periods. According to Guatemalan labor law, if an employer fires a pregnant worker or a worker who has to breast feed her infant, without specific legal authorization, the worker may go to the Labor Tribunals seeking re-instatement and the wages lost during the lay-off period. However, since workers are often unaware of their rights, and because the justice system works incredibly slowly for those who do know their rights, maquila employers often violate these laws.
  - Women who need to breast feed their children are not allowed to do so.

### **Regarding Safety and Hygiene in the Workplace:**

According to the Labor Code, every employer is obligated to adopt the necessary precautions to protect the life, safety and health of their workers while they are on the job. However, rampant abuse of this law is evident in Guatemala:

- The great majority of maquila companies do not have running water, which leads to infectious diseases and gastritis.
- Factories lack adequate ventilation, which leads workers to suffer extreme heat, and hurts their health.
- There is restricted use of lavatories. Workers are allowed to go to the bathroom a maximum of two times a day, which is a problem during the women workers' menstruation periods.
- Factories lack adequate eating places.
- There is not a single Guatemalan maquila with a day care center.

**Cases:** The following are cases filed in the Legal Clinic from Center for Labor Actions and Human Rights (CLAHR) from 2002 to 2003.

#### **1. Dismissals of pregnant workers:**

Mrs. Eridelia Hernández Ajin is 32, a mother of two boys and three girls. Her children are one and a half, six, eight, fifteen and 18 years of age. She worked in the handling department of a factory called SAE ATEXPIA S.A. for two years. Although she was pregnant, she was fired from her job. Her employers claimed it was because they were over-staffed.

#### **2. Pressures to resign while pregnant, denial of Social Security Certificate, and salary retention:**

Mrs. Vidalia Jiménez González is 25, a mother of two children who are 3 and five years old. She also has a 3-month-old daughter. She worked for the ELITE S.A. factory as a machine operator. She entered the company while she was 5 months pregnant. After working for 4 months, she asked for the labor certificate to go to the SSIG. She was denied this request. Since she was very ill and could not go to the SSIG without the labor certificate, she asked for time off to seek a private doctor. She was also denied permission to leave the factory and in addition was forced to sign a resignation letter, which stated she could collect owed wages in three months. After this time passed, she went to the factory to collect what was hers. They told her to come back one month later.

### **3. Resignation due to mistreatment:**

Mrs. Silvia Noemi Wilhelm Santos is 27 years old, a mother of two boys and one girl. She worked in the packaging department of CARISMA S.A. for 9 months and 23 days from June 16, 2002 to May 9, 2003. She resigned after being mistreated and abused in the factory by the plant managers. One day, a plant manager threw a bottle of water in Silvia's face and told her she was good for nothing. This made Silvia quit her job without collecting her earned wages.

On May 13, 2003, she filed her case with the Inspector General, who only considered her resignation, and not the abuses she suffered which forced her to resign. A hearing was scheduled for June 17, one month and eight days after she resigned. The legal representative for the company did not attend the hearing. The administrative portion of the case was concluded, moving on to the judicial phase. The case is still pending, as it takes an average of one to two years to actually go to court to settle the matter.

## **Obstacles to compliance**

### **Political and Practical Obstacles:**

- One of the loopholes found by employers to pay their workers less money is to deny them overtime and bonus pay. When workers are paid extra wages, they do not keep track of how many overtime hours they worked and how many were paid.
- Employers usually have three different salary spreadsheets. One spreadsheet is given to the Inspector General on their scheduled visits to the factories. Another one is given to the SSIG. The company only uses internally the last spreadsheet, which contains the real numbers.
- The National Wages Committee, made up of government officials, workers and employers has faced difficulties in establishing a consensus for determining a minimum wage each year, as is required by law.
- Employers apply a series of pressures, and threaten to fire workers, to make them accept minimum payments, without overtime wages or bonuses.
- The lack of running water leads to a series of infectious diseases and gastritis. The use of restrooms is also restricted.
- Lack of adequate ventilation in the factories, poor body posture during the workday, lack of adequate eating areas and the cloth residues expelled inside the maquila are all causes of illnesses for workers spending their entire day inside the maquila factories.
- The hierarchical system of management means that there are a series of commands passed down to workers, and instances of violence.
- Very few workers file complaints against their employers while they are still employed. This is mainly due to worker's ignorance of the existing Labor Code laws, their lack of resources and fears of losing their jobs.
- Other common practices in the maquila industry include: verbal and direct firings, indirect firings due to mistreatment and pressures, forced resignations,

firings during pregnancy and breast feeding periods, denial of labor certificates which are necessary to enroll in the SSIG, salary deductions, suspensions without just cause or pay, forced overtime work and sexual harassment.

## **Freedom of Association**

### **Legal Recognition of the Right**

Constitution:

- Article 34: Establishes workers' right to unionize without facing discrimination and without previous authorization. Workers must only make sure to fulfill the legal requirements to be in a labor union. Workers cannot be fired for belonging to a labor union.
- Article 102: Only Guatemalan-born workers may participate in labor unions, their organization, management and assistance.

Labor Code:

- Article 10: It is prohibited to retaliate against workers in order to prevent them from exercising their rights as defined by the Constitution.
- Article 209: Workers may not be fired for belonging to a labor union. They may not be fired once they indicate to the Inspector General that they belong to a union.
- Article 211: The Executive branch, through the Ministry of Labor and Social Security, must enact policies aimed at defending and developing labor unions for workers.

Reforms to the Labor Code (Decrees):

- No. 64-92: This 1992 decree refers to the protection workers have when forming labor unions, and their right to reinstatement when fired. They regulate unions' activities, the procedures that must be followed for them to be recognized as legal entities, and the functioning and integration of the Executive Committee, among things.
- No. 4-97: This 1997 decree deals with the ways in which labor union leaders assist their unions, federations and confederations.
- No. 19-97: Reformed the issues referred to the Tribunal for Arbitration and Conciliation
- No. 35-98: Established procedures aimed at expediting the right to unionize and eliminating obstacles that prevented quick court resolutions. Also established that the Ministry of Labor's General Labor Directorate would be in charge of determining the legal status of labor unions.
- No. 13-18: This 2001 decree limits the influence of the government in labor unions affairs (Art. 211). It also gives greater job security for unionized workers and sets fines for employers who infringe this right. In addition, it eliminates the prohibition on agricultural worker strikes during harvest periods.

## ILO Conventions

### *Ratified:*

- Convention 87: About labor union freedoms and the right to unionize. Ratified on February 13<sup>th</sup>, 1952.
- Convention 98: About the right to unionize and collective bargaining. Ratified on February 13<sup>th</sup>, 1952.

## **What happens in Practice with Freedom of Association?**

One can say that Guatemala has adequate laws regarding the right to unionize, given that they have adopted many of the same parameters established by ILO Conventions, especially after the 2001 reforms. The Constitution establishes the right to associate and unionize without prior authorization (Art. 34 and 102). Guatemala has ratified ILO Conventions 87 and 98 that deal with unionization and collective bargaining.

However positive the legislation, there is fear among labor unions that the government will enact more reforms to the Labor Code as the country moves to sign a free trade agreement with the United States. The union leaders claim that the government will try to relax labor relations, making them more flexible, and at the same time change the protective nature of the current laws, making them benefit corporations and proponents of free trade. The unions fear this will lead to a loss of basic rights that are currently guaranteed by law.

From 1947 to September 2003, the number of unions officially registered was 1,665. In 2003, only 364 unions were active, of which 141 were public sector unions (77 federal labor unions, 64 municipal labor unions) and 223 were from the private sector.

There are 55 registered Federations and Confederations with the General Labor Directorate. However, the Directorate does not have updated registration data on unions by economic activity, nor statistics about strikes or direct arrangements. The Directorate blames lack of resources and time for the scarcity of information regarding labor unions in Guatemala.

During the month of April 2002, the Inspector General from the Labor Ministry created a registration book to record complaints from unions against employers. In 2002, 83 complaints were lodged. Until October 2003, 65 were filed. The main complaints were regarding:

- Notification of intention to negotiate collective bargaining agreements on working conditions;
- Changes in working conditions;
- Retaliation against union workers;
- Unjustified massive lay-offs;
- Salary retention and illegal salary deductions;
- Vacation request denials, part time vacation obligations, and retaliation against workers, forcing them to attend business meetings by threatening them with dismissal if otherwise.

It is worth mentioning that the majority of complaints were related to collective bargaining negotiations and retaliation against union leaders and members.

There were 21 cases of union rights abuses in Guatemala filed before the ILO's Committee on Freedom of Association between 1994 and 2002. The complaints against labor union freedom were, in order of importance:

- The firing of labor union leaders;
- Killings, kidnappings and death threats against union leaders;
- Violations of the right to collective bargaining;
- Violations of the right to freely exercise union rights;
- Violations of the Labor Union Registry;
- Incompatibility between job obligations and international labor norms;
- Illegal detention of labor union leaders and workers.

Although these complaints do not help us quantify the problem with union freedom abuses in Guatemala, they do paint a qualitative picture of the situation.

### **Deregulation**

The Constitution and the Labor Code establish that only Guatemalan-born workers may form or belong to labor unions or their Executive Committees. These dispositions go against Article 2 of ILO Convention 87, which states that there shall be no restrictions or previous authorization required to form or belong to a labor union.

In the case of public sector workers, there is a greater contradiction of the right to unionize and collective bargaining, as the country's law states that public sector workers have the right to strike, so long as their strike does not affect the services they provide.

This same law declares and enumerates the public services deemed essential, which are: education department workers, postal service, fuel transportation and generation services. It defines "essential public services" as every service that, if interrupted, could risk the lives, safety, health and normal living conditions of the population.

There is also a prohibition on strikes motivated by labor union solidarity or by movements created *ad hoc* or by interests that are not related to economic or social vindications.

### **Jurisprudence Flexibility**

One of the most common obstacles to compliance with freedom of association laws is the slowness of judicial processes in resolving conflicts. There is also a restrictive interpretation of laws, which we call "jurisprudence flexibility." This makes judges' sentences not follow the letter of the law, thus reducing the rights of workers.

Another way of abusing this right is to require things not written in the legislation when workers want to form unions.

### **Flexibility in practice**

In practice, there is a permanent obstacle placed on labor union formation by Guatemalan businessmen, with the complicity of government officials who are responsible for protecting this right. The most common obstacle is the firing of workers who try to unionize. At times, this can be more extreme. Some unionized workers have been persecuted and killed.

### **Case of SITREPSTC**

On April 6<sup>th</sup>, 2003, the Union of Workers, Shippers, Stevedores, Loaders, Unloaders and Various Services of the Santo Tomás de Castilla Port Company-SITREPSTC-was formed. The company is owned by the state and is located in Puerto Barrios in the state of Izabal.

The Ministry of Labor and Social Security legally recognized the labor union in resolution 25-2003, and the union was registered on April 17, 2003.

On May 27, 2003, 16 workers belonging to the union filed complaints against the company because they were laid off. Of the fired workers, 14 were told verbally and only 2 were told by written communication; five were fired on April 30 and the rest on May 5. The workers filed these complaints separately. The courts decided, since the cases were similar in nature, to judge them collectively.

The workers in question filed a complaint with the Inspector General asking to be reinstated. However, their employer refused to allow a visit by the Inspector General.

The employer refused to allow the next two visits by the Inspector General. After this, two new conciliatory meetings were scheduled in the offices of the Ministry of Labor. The employer did not attend either of these meetings, indicating he had no intention of reaching a solution to the matter through dialogue. This ended the administrative portion of the complaint. The workers were then told to seek recourse with the corresponding tribunal.

In this case there was a clear violation of Article 102 of the Constitution and Article 209 of the Labor Code. The right to complete and swift justice was violated. This case shows how easy it is for employers to prolong complaints against them for years in the court system, thus making them *de facto* immune to workers' demands.

### **Obstacles to compliance**

In the Ministry of Labor, there is a notorious scheme of political influence made up of lawyers and former inspectors. This leads to the following issues:

- Judges' ignorance of international conventions ratified by;
- Incorrect interpretation of the law by judges, which restricts the right to unionize;
- Judges generally act in favor of employers, particularly in cases of collective conflicts where economic and social interests are involved;
- Traffic of influence;
- Judges demand certain requirements from workers that are not necessary by law. The judge acts as a roadblock rather than a facilitator for workers demanding their rights;
- The lack of action by tribunals in establishing preventive measures aimed at protecting workers' rights;
- Lack of courage by tribunals when enforcing resolutions, especially regarding reinstatement;
- The long delays, well above the amount defined by law, in judicial proceedings;
- Tribunals demand illegal requisites from plaintiffs;
- The general predisposition by judges and members of the Judicial Branch to go against labor unions in legal cases.

## Collective Bargaining

### Legal Recognition of this right

#### Political Constitution:

- Article 106: Establishes the irrevocability of the labor rights mentioned in this section. The State will promote and protect collective bargaining.

#### Labor Code:

- Article 214: Establishes which activities are applicable to unions. This Article was reformed by Article 6 of Decree 18-2001:
  - Signing collective bargaining agreements, collective pacts on working conditions, and other agreements that apply to all workers at a company is the exclusive right of unions. The exceptions are direct agreements, conciliation, and *ad hoc* committees, which are referred to in Articles 374-376.

#### ILO Conventions:

##### *Ratified:*

- Convention 98, on the right to unionize and bargain collectively, 1949. Ratified February 13, 1952.
- Convention 154, on collective bargaining. Ratified October 29, 1996.

## What happens in practice with collective bargaining?

Guatemala has ratified ILO Conventions 98 and 154, which guarantee the right to collectively bargain, both in the private and the public sector. The Constitution also obligates the Guatemalan government to promote and protect collective bargaining (Article 106). At the same time, the Labor Code gives unions the right to negotiate collective agreements on working conditions (Article 214).

However, the law regarding collective bargaining is not well applied. The deficiencies in labor justice do not arise from the laws themselves, but rather from the poor application of these laws by the public institutions that are responsible for enforcing them.

According to the Ministry of Labor's Labor Statistics bulletin from 2001, there were 144 registered collective bargaining agreements, categorized as follows: 39 were registered in 1997, 25 in 1998, 29 in 1999, 29 in 2000, and 22 in 2001. The following table shows how these agreements were distributed by sector:

### Number of collective bargaining agreements, by sector

Sector where agreements were negotiated	Quantity
Social, personal, and communal services	44
Manufacturing industry	43
Agricultural sector	23
Financial and business services	18
Electricity, gas, and water	6
Commerce	6
Transportation and communications	3
Mining	1
<b>TOTAL</b>	<b>144</b>

*Source: Table made by ASEPROLA using Ministry of Labor statistics*

While it is true that Guatemalan laws guarantee the rights of freedom of association and collective bargaining, in practice these laws are not complied with. There is a situation of violence in the country, especially against union leaders, who suffer intimidation, persecution, threats, and dismissals, to prevent them from demanding their economic and social rights.

Due to the unsafe conditions and the unemployment crisis, the exercise of free association and collective bargaining is limited. When companies note even the smallest attempt to organize a union, they threaten to close.

There is no culture of dialogue, reflection, and negotiation between the different actors in the production process (employers, workers, and government authorities). This makes it difficult to create spaces for the resolution of collective conflicts.

The mechanisms and institutions created to facilitate collective bargaining face many limitations when trying to fulfill the role they were created for. Given that they are not permanent, in practice the formation of these mechanisms alone affects the resolution of collective conflicts.

The low percentage of workers organized in unions affects unions' ability to negotiate for better working conditions. This is the result of the country's history of persecution and repression of unions.

In the maquila (textile) sector, there is not even the slightest possibility for exercising labor rights, much less form unions (and therefore collectively bargain). This is due in part to the mobility of the sector and also to the authorities' inability to truly enforce labor rights in that sector.

### **Legal and jurisprudential flexibility**

The administrative and judicial authorities lack knowledge of the international labor conventions that have been ratified by Guatemala. This is evident in their failure to apply these norms, which is apparent in the following ways:

- Abuse in the application of judicial criteria, even contradicting the express text of the regulation.
- Malicious delays in legal processes.
- Amending the process, to the harm of the workers.
- Courts' refusal to order precautionary measures to protect workers' rights.
- Indicating prerequisites that are not dictated by law, in judicial labor processes.
- Judges often have anti-union attitudes.

Legal flexibility occurs because the judicial authorities use a restrictive interpretation of the laws, which is seen below in the cases of the Rafael Landivar University and the DIANA companies.

In the case of public sector workers, there is a legal contradiction on the issue of the rights to unionize and bargain collectively. While the laws recognize the right to strike for workers employed by the State and its decentralized or autonomous divisions, they also say that in no instance should these strikes affect the provision of essential public services.

That is where the problem lies; the same law enumerates the public services that are considered essential: education, mail, transportation, and the distribution of gas. This violates the ILO Conventions, which consider essential public services to be those whose

interruption could endanger the life, safety, or health of people, or the population's normal conditions of existence. By including services that do not fit under the ILO's definition, Guatemala is impeding the exercise of public workers' right to strike.

### **Flexibility in practice**

We see flexibility in practice when collective negotiations are not legalized, or when the terms of a collective bargaining agreement are violated. It is also visible when union leaders are fired as negotiations begin.

The Ministry of Labor also fails to fulfill its responsibility as mediator and conciliator between employers and employees. This is due to the insufficient number of inspectors, but also to inspectors' lack of knowledge of collective bargaining issues.

This also affects cases of reinstatement of fired workers. On many occasions, labor inspectors are prevented from entering companies in conflict, and this makes it impossible to reinstate the workers. The inspectors can only draw up the official document, reaffirming what happened and exhausting the administrative process. They do not use the legal powers given to them by Article 281 of the Labor Code, which states that when they are prevented from carrying out their duties, they can ask for support from the police.

### **Cases of noncompliance**

#### **1. Case of workers at the Rafael Landivar University**

On March 25, 2003, the 75 janitors, messengers, security agents, and technicians working at the Rafael Landivar University met in order to study their economic and social conditions at work. As a result, they decided to present a petition to their employer, through the Sixth Labor Court. The complaint was accepted for review and the court warned the parties not to take any measures of retaliation, because they would be punished with corresponding sanctions.

The University responded, arguing that the *Ad Hoc* committee (which was representing all of the involved workers) did not fulfill all of the legal requirements. For example:

- It had not exhausted the direct route (direct negotiation). However, this can only be required of unions, and not *ad hoc* committees.
- It had not sent the petition to the employer.
- It had not proven that it represented 2/3 of the University's workers.
- It did not represent all of the University's workers.

The Labor Court accepted these arguments, without a legal basis, and gave them 10 days to comply with them. If they failed to do so, they would remove the protections against retaliation that were decreed in the first resolution. The *Ad Hoc* committee appealed this decision, and the Appeals Court decided in the workers' favor, saying that

the judge had no legal basis for making them comply with this list of requirements. The committee had in fact fulfilled all requirements when it indicated the number of workers in the initial paperwork; therefore the committee should not have to file a new petition or indicate on which points they had come to an agreement, because they were not obligated to negotiate directly.

The University continued to file arguments, making it clear that it did not want to negotiate or come to conciliation. The complaint was filed on March 27, 2003, but the court still has not issued a ruling on whether or not the *ad hoc* committee is legitimate and able to negotiate working conditions.

## **2. Case of the union at “La Comercial SA” and “Distribuidora de Productos Alimenticios DIANA SA” and related companies**

In April 2003, the Board of Directors of the union announced a collective conflict, presenting the paperwork before the Sixth Labor Court, and indicating that the petition was supported by all of the union members. The papers were accompanied by all of the documents required by law. The Sixth Judge accepted the case for review and warned the companies not to take any measures of retaliation, under penalty of a fine of 10-50 monthly minimum wages and 15-30 days in prison, depending on the type of retaliation and the number of affected workers.

This case was first presented to the Sixth Court, but the Support Center for the Administration of Justice transferred it to the Fifth Labor Court. The Fifth Labor Judge issued a series of resolutions that delayed the process. For example, he indicated that other requirements needed to be fulfilled within a limited time period, and if they were unable to do so it would put at risk the entire process, and remove the protection against retaliation.

In June 2003, the Fifth Labor Judge announced that the protections decreed by the Sixth Labor Judge were no longer in effect, and that the collective conflict was over, because the union did not provide all requested documents (which the law does not require) within the 10 day period.

On September 30, 2003, the Third Chamber of the Court of Appeals declared that the union’s appeal was unfounded, and thereby upheld the Fifth Labor Judge’s decision. The Third Chamber magistrates said that everything that had happened was legal, thereby ending the case. The union is currently discussing the possibility of starting a legal process to be able to continue the collective negotiations.

## **3. Case of the TOMZA Corporation**

On July 8, 2003, 16 propane gas workers started a collective conflict against 14 companies, all belonging to the TOMZA Corporation. The Union of Gas Canning, Transportation, Distribution and Maintenance Workers was present in these companies, though inactive.

On July 15, 2003, 92 workers decided to reorganize the union and elect new leaders. On July 16, the company fired 13 workers, giving them a note and saying that the reason for the dismissals was the reorganization of the company. Six other workers were threatened and forced to resign. This incident was reported to the General Labor Inspectorate, and on July 25 a labor inspector went to the company to reinstate the fired workers, which the company refused to allow.

#### **4. Case of unionized workers at the Retalhuleu Municipality**

These workers suffer constant violations of their collective bargaining agreement. They are not paid on time, and 20 workers are not even paid minimum wage. The violations of the collective bargaining agreement include: retaliation against workers for joining the union; failure to print copies of the collective bargaining agreement for the workers; and refusal to pay legal benefits.

#### **5. Case of the Coca-Cola bottling plant**

The workers at the Coca-Cola bottling plant have been trying to negotiate a collective bargaining agreement for 22 months.

## **Obstacles to Compliance**

### **Political and practical obstacles:**

- Labor Court and Ministry of Labor personnel are inefficient.
- Delays in the processing of workers' complaints.
- The Ministry of Labor also fails to fulfill its responsibility as mediator and conciliator between employers and employees. This is due to the insufficient number of inspectors, but also to inspectors' lack of knowledge of collective bargaining issues.
- Labor inspectors are prevented from entering companies in conflict, and this makes it impossible for them to reinstate fired workers.
- Lack of consistent criteria, and poor interpretations of labor law by labor judges: Labor judges require non-unionized workers to first exhaust the direct negotiation procedure, without taking into account that the law only requires this for unionized workers who want to negotiate a collective bargaining agreement. The judges are therefore imposing requirements that are not established in the law.
- The Conciliation and Arbitration Tribunals should be created in January and function until December. Although Article 293 of the Labor Code indicates that they should be permanent, in practice they are not, because they are only created when necessary. This impermanent nature of the Conciliation and Arbitration Tribunals affects the conflict processes because creating the tribunals takes time and delays the processes. This favors employers, because they have more time to file appeals or counterarguments.

## **Elimination of Forced Labor and Obligatory Overtime**

### **Legal Recognition of this right**

#### Political Constitution:

- Article 101: “Work is a person’s right and a social obligation. The country’s labor regime should be organized according to the principles of social justice.” It recognizes the right to freely choose one’s job and to satisfactory economic conditions that guarantee a dignified existence for a worker and his or her family.
- Article 102: Establishes that the normal daytime work shift cannot exceed 8 hours per day or 44 hours per week (equivalent to 48 hours for the exclusive purpose of salary payment). The nighttime work shift cannot exceed 6 hours per day or 36 hours per week. The mixed shift cannot exceed 7 hours per day.

#### Labor Code:

- Article 121: Establishes what is considered to be overtime work, and that it should be paid at a rate at least 50% higher than minimum wage or higher wages stipulated by the parties. Overtime shifts cannot exceed a total of 12 hours per day.
- Article 122: Prohibits employers from ordering or permitting workers to work overtime at jobs that are unhealthy or dangerous.
- Article 130: Workers should enjoy uninterrupted vacations. They may be required their vacation time in two parts, but not more, when the type of job does not permit prolonged absences.
- Article 164: Domestic work is not subject to the limitations on working hours. Articles 126 and 127 are also inapplicable to domestic work.

#### ILO Conventions:

- Convention 1, on working hours, 1919. Ratified June 14, 1988.
- Convention 29, on forced labor, 1928. Ratified on June 13, 1989.
- Convention 105, on the abolition of forced labor, 1957. Ratified on December 9, 1959.

## **What happens in practice with forced labor and overtime?**

Guatemala has ratified ILO Conventions 29 and 105, which prohibit all forms of forced labor. The first Convention proposes the elimination of all forced labor in all of its forms, with the exception of military service, controlled prison work, and obligatory work in emergency situations.

The Constitution also prohibits forced labor, and the Labor Code regulates working hours based on this same criteria.

There are no complaints of forced labor in Guatemala, but there are violations of the overtime regulations. There are no official statistics, and there is a short registry of complaints at the Labor Inspectorate. However, in a review of 641 labor complaints presented between January and October 2003, we found 22 cases of women who were forced to work overtime, and 13 women who said that they were not paid for their overtime work. We must clarify that this number does not include all of the women who were fired, forced to resign, or abused for refusing to work overtime.

Violations of labor rights are common in Guatemala, but most of them occur in the companies that do not have unions. One of the sectors that receives the most complaints is the maquila industry, which produces clothing. Due to the lack of unions and the working conditions in this sector, it is hard to present collective complaints, and so they are generally processed as individual complaints. There are numerous obstacles to the processing of these complaints, which also appear in terms of the other labor rights studied here (child labor, discrimination, and decent working conditions).

The data obtained through interviews with maquila workers allows us to affirm the existence of flexibility in terms of labor rights, as well as flexibility in salaries. This same situation is also seen in some agro industries.

### **Deregulation**

Domestic work is deregulated in Guatemala. There are no norms that protect people working in this sector.

Domestic work is not subject to hour/work shift limitations. Domestic workers do not have the right to a full day off per week. The law only gives them a 6-hour paid break on Sundays and holidays (Labor Code Article 164).

Workers in this sector are some of the most unprotected and vulnerable, because there is no law that protects their labor rights. The working conditions often have the characteristics of forced labor.

### **Flexibility in practice**

In practice, labor laws regarding working hours are not applied. Forcing workers to work overtime without paying them according to the law, and firing them if they refuse, is a form of forced labor. It is a common practice in the textile factories in Guatemala, where there are no unions.

### **Cases of noncompliance:**

#### **1. Firing workers for refusing to work overtime**

Irma Yolanda Pineda Alarcón is 33 years old and has 7 children aged 9 months to 16 years. She began working at Elite S.A. on February 10, 2003. She was fired on May

26, 2003, for not staying late at work, having left because her 9 month old daughter was sick. She also mentioned that one of the Korean managers physically mistreated the workers with a broom when the workers protested. The women often lower their heads and look at the floor for fear of being abused by him.

## **2. Case of firing for requesting overtime pay**

Azucena Vail Lux started working at Modas Gala Coreana SA on December 7, 2002, and was fired on July 7, 2003. She was fired for asking for her overtime pay, because the workers were forced to work until late at night. These hours were not paid according to the law, and therefore she complained.

The employer fired her, physically abusing her by forcibly removing her from the factory. She was not paid her normal salary for the last two weeks, nor was she given the legal benefits including compensation, vacations, and the annual bonus.

The worker filed a complaint with the General Labor Inspectorate on July 9, and she was given a conciliation hearing date of August 6, one month after the firing. The company's legal representative did not appear at that hearing, so the labor inspector announced that the administrative process had been exhausted, and the worker had 30 days to file a case with the labor courts.

On August 25, she presented the lawsuit before the labor courts, which set a hearing date for October 15, three months after she was fired. The company's legal representative did not appear at that hearing either, making conciliation impossible. The process therefore became drawn-out because there were more stages in the process to complete before a sentence could be issued.

## **Obstacles to compliance**

### **Legal obstacles:**

- Deregulation of domestic workers' labor rights.

### **Political and practical obstacles:**

- Due to the lack of unions, it is hard to present collective complaints on forced overtime.
- Workers do not trust and feel unsupported by labor inspectors, because they seem to be more interested in helping employers than enforcing the law.
- At conciliation hearings, the labor inspectors do not fulfill their role as mediator and conciliator. They do not propose just solutions, or exercise an active role in the negotiations. In most cases, they simply organize the hearing and end it if the parties do not come to an agreement, sending them then to the judicial branch.
- Those responsible for notifying the Peace Courts in the municipalities show little willingness to go to the companies to give them notice.
- Companies do not register bank accounts in their own names, but instead register them under the names of individuals, in order to avoid embargoes. The

machinery is also rented, not owned, for the same reason. This makes it hard to carry out a court sentence.

- Officials responsible for carrying out an embargo are not given access to companies.
- Company representatives do not appear at the hearings, in order to delay the processes. They hope that this will frustrate the workers and make them give up, or make them willing to accept the unjust quantities offered by the company.
- When company representatives do show up at trials, they do not present the salary books requested as evidence. They do this to avoid showing the salaries that they pay for normal and overtime hours.
- Most workers only file complaints after they have been fired, because they fear losing their jobs and thus their only source of income. They often prefer to work late at night, or on weekends, even if they are sick, and put up with abuse, rather than lose their jobs.

## **Elimination of Discrimination**

### **Legal Recognition of this right**

#### Political Constitution:

- Article 102: Gives preference to Guatemalan workers over foreigners, all else being equal, and in the percentages determined by law.
- Equal salary for workers performing equal work in the same position and with the same efficiency and seniority within the company.

#### Convention on the Elimination of All Forms of Discrimination Against Women:

- Seeks to ensure equal conditions for men and women, including: the same job opportunities; the same selection criteria for job openings; the right to freely choose one's profession and job; the right to be promoted, have job stability, and all of the benefits; the right to access professional training programs; the right to equal pay, equal benefits and equal treatment for work of equal value; equal treatment with respect to the evaluation of the quality of work done; right to social security; right to paid vacations; right to health and safety protection in the workplace.

#### Law Against Discrimination – Criminal Code:

- Considers the exclusion, restriction, or preference made based on gender, race, ethnicity, language, religion, economic situation, or civil status to be an act of discrimination.

#### Law of Dignity and Integral Development of Women:

- Recognizes the multicultural and multilingual nature of Guatemala. Promotes the integral development of women and their participation in all levels of Guatemala's social, economic, and political life. Promotes the development of

women's fundamental rights. Prohibits employers from firing women when they are pregnant.

ILO Conventions:

*Ratified:*

- Convention 100, regarding equality of compensation. Ratified August 2, 1961.
- Convention 111, relating to employment and occupational discrimination. Ratified October 11, 1958.
- Convention 118, on equal treatment (social security), 1962. Ratified November 4, 1963.

## **What Happens in Practice with Discrimination?**

The principle of no discrimination is present in the Constitution and the Labor Code, as well as ILO Conventions 19, 111 and 169, which have been ratified by Guatemala. However, the national laws do not clearly define what should be considered labor discrimination. Only the Criminal Code establishes a sanction for people who commit discriminatory acts, but it does not specifically address discrimination in the workplace.

The anti-discrimination principle is not respected in Guatemala when it comes to women and indigenous peoples. Human Rights Watch studies on labor discrimination against women and indigenous populations show the following situations:

- Guatemalan workers face shameful working conditions and discrimination in the clothing industry and domestic employment.
- Tens of thousands of women and children, primarily indigenous persons with little or no education, work as domestic servants and in more than 250 maquila factories, sewing clothing for export.
- Domestic workers, most of whom are indigenous, work 14 or more hours per day. The law excludes them from the right to a minimum wage, eight-hour workday, and health services.
- Many indigenous women workers experience psychological aggression and insults from their employers. Children in the families that employ these workers are sometimes very aggressive.
- The young indigenous women who work as domestic servants are very vulnerable due to the persistent racism expressed by the non-indigenous population in a country where 39.3% of the population is Mayan.
- The maquilas often refuse to give maternity benefits to workers who become pregnant after being hired, and they hinder their access to the national health system or prohibit them from taking time off work to go to medical appointments.

The problem of discrimination and the climate of impunity regarding this issue will not be resolved through legal reforms. The real problem is that people are unaware of their basic labor rights, and the courts do not enforce the laws.

Due to the lack of information on this issue, most of the working population does not know what the definition of discrimination is, and cannot recognize the abuses they suffer as acts of discrimination. When they do identify an incident as an act of discrimination, they do not report it because they are afraid of losing their job.

The public institutions have little or no information on cases of discrimination, leading us to believe that the government itself is not interested in eliminating the different forms of discrimination suffered by Guatemalan workers.

### **Deregulation**

Guatemalan labor law discriminates against domestic workers, who are mostly indigenous. Article 164 of the Labor Code states that domestic work is not subject to the working hour limits or regulations regarding days off.

As a result, domestic workers do not enjoy one day off per week, nor do they receive the maternity benefits, which violates the ILO Conventions ratified by Guatemala.

### **Flexibility in practice**

Despite the fact that the labor law prohibits discrimination in the workplace, the women who work in the maquilas frequently experience the following forms of discrimination:

- They are not registered with the Social Security Institute (IGSS) and as a result do not have social security coverage, despite the fact that their employers do reduce their salaries for IGSS contributions, as required by law. It is cheaper for employers to pay a fine for not presenting its books, than to have to pay IGSS all of the money it should have paid for several years.
- Women who apply for jobs in the maquilas are forced to submit to pregnancy testing to show that they are not pregnant.
- The job postings published in the press often specify that they want to hire people between ages 18 and 25, which means that people over age 25 do not have the right to apply for these jobs. This constitutes age-based discrimination.

When we inquired about specific cases of labor discrimination, the Labor authorities, labor judges and union leaders said that they had not received any complaints of this sort. This does not mean that these incidents do not occur. Workers do not file complaints because they are afraid of losing their jobs; in many cases, they do not even realize that the abuse they suffer is a form of discrimination.

It is enough to look at the UNDP 2003 Human Development Report to show that there is job discrimination against women, both in the rural area and in urban areas, and that the situation worsens for indigenous populations. Of the people working in the

formal sector, only 17.2% are indigenous women. These statistics confirm that labor discrimination does exist.

### **Cases of noncompliance**

*Case of job discrimination based on nationality; mistreatment, suspension, and dismissal*

Ms. Maria Magdalena Mendoza Morán is 54 years old. She worked as an operator in the Star Fashion SA factory, with a work shift from 7 am until 7 pm. She started working at that factory on August 26, 1996. During the time she worked there, she was refused permission to go to medical appointments, and when she did, her salary was reduced. She filed a complaint. A labor inspector visited the factory, and that same day, at 4 pm on March 8, 2001, she was fired.

### **Obstacles to compliance**

#### **Political and Practical Obstacles:**

- Those at the General Labor Inspectorate in charge of receiving complaints show a lack of interest in these complaints and do not make note of all of the violations mentioned by the workers.
- When calculating job benefits, employers do not do the calculations based on the real salaries earned.
- At conciliation hearings, labor inspectors do not fulfill their responsibility of ensuring strict compliance with the law, or achieving the type of out-of-court conciliation established in the Labor Code.
- There is not a culture of respect for and observance of the right not to suffer discrimination. On the contrary, there is an entrenched culture of racism and discrimination.
- The authorities do not make use of their coercive powers to enforce the labor law.

## **Elimination of Child Labor**

### **Legal Recognition of this right**

Political Constitution, Labor Code, and ILO Convention 138:

- Establish that minors over age 14 may work as long as the jobs are not incompatible with their physical abilities and do not endanger their moral formation. In other words, the work must be appropriate for the child's age, physical condition, and development.

Labor Code:

- Establishes exceptions to the prohibition on hiring children: The hiring must be done through the minor's legal representatives; the legal representatives should receive the monetary compensation for the child's work; if the child does not have

- a legal representative, the General Labor Inspectorate must authorize the work contract.
- Night and overtime shifts are prohibited for child workers. Day shifts are also prohibited at places where alcoholic drinks are sold for immediate consumption. Children under age 14 may only work with the authorization of the General Labor Inspectorate, and their day shifts are reduced by one hour per day and six hours per week.

#### Law for the Integral Protection of Children:

- This law was issued on July 18, 2003. It establishes that boys, girls, and adolescents have the right to be protected against economic exploitation and any job that could be dangerous for their physical or mental health or that will hinder their access to education.
- The work of adolescent workers should be paid at the same rate as adults, and carried out in conditions appropriate for their age, abilities, physical state, intellectual development, cultural and moral values, and it should not interfere with school attendance.

#### ILO Conventions:

##### *Ratified:*

- Convention 138, regarding the minimum working age, 1973. Ratified April 23, 1990.
- Convention 182, prohibiting the worst forms of child labor and establishing immediate actions for its elimination. Ratified June 13, 2001.

## **What Happens in Practice with Child Labor?**

According to the 2002 Census, one in every 10 Guatemalan children between the ages of 7 and 14 was active in the labor market (either working or actively seeking employment). This gives us an idea of the magnitude of the problem, because child labor is not always fully reported in official statistics.

Guatemala has ratified ILO Conventions 58, 59, 112 and 138, which refer to protections for child workers. These Conventions allow for the employment of children under age 14 only as an exception, and do not definitively support such employment.

The Guatemalan Constitution establishes that minors over age 14 may work as long as their jobs are not incompatible with their physical abilities and do not endanger their moral formation. In other words, the work must be appropriate for the child's age, physical condition, and development. Thus the Guatemalan State establishes 14 as the minimum working age. Yet the same Constitution also establishes exceptions to this rule, which are regulated by the Labor Code.

The Law for the Protection of Children and Adolescents lists some very beneficial principles but it does not make profound changes to the labor law, because it does not prohibit work for children under age 14.

In Guatemala, children are the most vulnerable to labor exploitation, because employers take advantage of their needs, making them do jobs that are illegal. That is to say, they ignore the national and international laws that regulate the rights of children in the workforce.

Many companies do not respect the labor laws, much less the ILO Conventions ratified by Guatemala. As a result, children become the perfect target for labor exploitation. Most children are completely unaware of their labor rights. Those who do know their rights do not dare to complain of violations, because they do not want to lose their jobs.

Child labor is seen as “normal” by Guatemalan society, particularly when speaking of indigenous children. The governmental authorities play a decisive role in this, because they do not inspect companies to see if children are working without fulfilling the requirements established by national law.

Lack of knowledge of national laws, and the lack of importance placed on international norms by the government, employers, and children, means that the environment created for working children is not the most appropriate for their educational, moral, psychological, and cultural development.

### **Legal flexibility**

Both the Constitution and the Labor Code allow children under age 14 to work, in violation of ILO Conventions. These Conventions, having been ratified by Guatemala, are incorporated into national law. This creates flexibility in the labor law, because some clauses still allow children under age 14 to work.

The exceptions referred to in the Constitution are detailed in the Labor Code, which says that children under age 14 can be hired as long as certain requirements are fulfilled. The child’s legal representatives must be party to the contract, and receive the pay earned by the child. However, in practice these regulations are not complied with, because the State does not have the capacity to enforce them. Thus, there are children under age 14 working in many companies, without the authorization of the General Labor Inspectorate.

The Law for the Integral Protection of Children and Adolescents, which has been in effect since July 2003, aims to protect children and adolescents from any work that could endanger their physical or mental health, or prevent their access to education. However, it maintains legal flexibility in terms of child labor because it does not prohibit work for children under 14, but instead refers to the exceptions laid out in the Labor Code.

## Flexibility in practice

In practice, norms limiting working hours for child laborers are not respected either. The law limits children's work shifts to 6 hours per day and 32 hours per week, and prohibits night shifts and overtime hours for children. The following cases are evidence of noncompliance with these regulations:

**Brickwork:** Children often help their parents who are employed as bricklayers. In the case of BAYER, bricklayers paid their children to help them; thus the company did not directly pay these children, but did permit them to work. The parents allow their children to work, caring only that the household income increase.

**Stone crushers:** These are children who chip away at big rocks, leaving them the size of river stones. These smaller stones are used to build houses, bridges, or other buildings.

**Fireworks:** Other children work making fireworks, working directly with the explosive powder without any protection. There are many accidents as a result of this work, particularly around Christmastime.

In these cases, several laws are broken, including:

1. The prohibition on hiring minors without permission from the General Labor Inspectorate, stipulated in Article 32 "Contracts related to the work of children under age 14 should be signed with the children's legal representatives, or, in their absence, with authorization from the General Labor Inspectorate."
2. Child labor should be appropriate to the children's age, physical condition, and intellectual and moral development.
3. Prohibition of work for children under 14.

## Cases of noncompliance

### 1. Case of a child working at a maquila factory

Due to the need to help her family, Erika started work on July 21, 2001 as an inspector at a textile factory called Suntex SA. She worked from Monday to Friday, from 7:30 am until 7 pm, and on Saturdays from 7:30 am until 12:30 pm, earning approximately 1,026 quetzales (US\$131) per month.

Erika began working under the name of her older sister, proving her sister's identity with a birth certificate. She worked for one year under that name. Later, the company made employees carry their citizenship card, for unknown reasons, and most workers complied. Those who could not comply were told that they could carry "any kind of ID card".

Since Erika was a minor, and couldn't always carry her sister's citizenship card, she carried her sister-in-law's citizenship card, and used that name to sign the work contract. She kept working until July 13, 2003. In 2003, Erika quit because she got sick, and the company would not give her time off. Almost at the same time, the company closed and paid what it owed most of its workers. Erika, however, was only paid half of her annual bonus and vacations. Currently, the status of the company is being investigated to be able to demand the remaining pay she is owed.

## **2. Case of Nivia Cabrera, an adolescent working at IMPROCSA-INAPSA**

This young woman said: *“Some of my coworkers are from Sumpango. One day we stayed late at night, checking the baskets of finished products, and when we left, the bus was gone. Some women did not have money to pay for transportation...but other workers lent them money. The Supervisor didn't care whether or not the bus left without us, she gave the order to let the bus leave.”*

## **3. Overtime hours**

*“Some of us don't want to work overtime, but they make us stay until 8 or 9 pm. We don't know how much they pay us for overtime work, they say that they pay us 2.50 quetzales per hour, and every day we work 3-4 hours overtime. When we stay late, they don't give us a snack or dinner. Some pay periods we receive 700-800 quetzales [about \$100] but sometimes we get less, even if we worked extra hours.”*

## **4. Insurance**

*“They have a pregnant girl working, who will give birth in just a month. They make her carry baskets of melon and broccoli. She should already be on maternity leave, but since the company is not making the social security payments, she can't go on leave until 2 or 3 days before she gives birth.”* (Testimony from a girl working at IMPROCSA, is located in El Tejar, Chimaltenango).

## **Obstacles to compliance**

### **Political and practical obstacles:**

- Children are not aware of their rights. For example, they don't know that they should work fewer hours per day than adults.
- Since most children's labor contracts do not fulfill all of the legal requirements, they are afraid to file complaints when their rights are violated.
- Companies take advantage of children's need to contribute to the family income.
- The Department of Child Workers in the Ministry of Labor does not have a registry of the child labor complaints that have been filed.
- The General Labor Inspectorate does not have the capacity to enforce regulations on the hiring of children.
- For unions, the issue of child labor is not a priority. The only thing they do is publicly state that they are in favor of eliminating child labor.

- Other institutions address issues related to child labor, and even do investigations on the subject, but they do not keep a record of cases.

## Final Reflections

Now that we have completed this general examination of the basic labor rights, we can make some conclusions about labor rights in Guatemala.

One of the most common obstacles observed in the institutional context is the slowness with which conflicts and cases are resolved. In the Ministry of Labor, labor courts, and other divisions of the government, the administrative processes are unnecessarily prolonged, and they ask for things not required by law.

It is also clear that company lawyers and former labor inspectors take advantage of their relationships and friendships with officials and inspectors in the Ministry of Labor to affect the Ministry's decisions so that they favor the companies.

The deficiencies in labor justice do not stem from the laws themselves, but rather from the poor application or the restrictive interpretation of these laws. This situation is seen in a series of problems such as the following:

- Judges are not aware of the international labor conventions that are in effect in Guatemala, and thus do not apply them.
- Abuse in the application of judicial criteria, even in contradiction of the express text of the regulation.
- Judges give advice to business owners, particularly in the case of collective conflicts.
- Malicious delays in legal processes.
- Amending the process, to the harm of the workers.
- Courts' refusal to order precautionary measures to protect workers' rights.
- Courts' lack of firmness when it comes to enforcing their resolutions, particularly in terms of the reinstatement of fired workers.
- Noncompliance with the legally established time limits for legal processes.
- Indicating prerequisites that are not dictated by law, in judicial labor processes.
- Judges often have anti-union attitudes.

It is also clear that the Ministry of Labor does not fulfill its role as mediator and conciliator between employers and workers. This is due to the low number of inspectors; inspectors' lack of experience in terms of collective bargaining; and a culture that increasingly disrespects labor rights.

Companies, meanwhile, take advantage of the Ministry of Labor and labor courts' indifference to labor rights violations. They use a series of strategies to avoid their responsibilities, including the following:

- In many cases, companies do not appear at the hearings called by the General Labor Inspectorate or labor courts. They do this in order to delay the processes and avoid negotiating an agreement. They hope that this will frustrate the workers and make them give up, or be willing to accept any conditions rather than waiting a long time.
- When the Labor Code was reformed and the General Labor Inspectorate was given the power to fine companies that did not appear at these conciliation hearings, the companies began to appear more frequently, to avoid paying these fines. During the hearings, they almost always argue that they did not violate any regulation and that the conflict is the fault of the worker.
- Another strategy, which they use when the court issues a resolution in favor of the worker and the company is ordered to pay compensation, is to sign an agreement to pay the compensation through a series of monthly payments. Then they often only make the first few payments, and then stop. This means that the worker has to then turn to a different process before the labor courts. Other times, they negotiate to pay the debt in monthly installments, and then the company disappears or changes its name.
- When the companies appear at the hearings or trials, they also use the strategy of not presenting the salary books requested as evidence. They hope to hide the salaries that they pay for normal and overtime hours, and the number of workers that work at the company, because that information could create problems with Social Security. It is cheaper for them to pay a fine for not presenting these books, than to have to pay the Social Security Institute all of the contributions that they should have been paying for years.
- The company's goods and property and bank accounts are not registered under the name of the defendant, but rather under the name of individuals, such as supervisors or workers who are trusted by the companies. This is done to avoid the embargoes that the labor courts could order in the case of a violation.

The irregular situations that we have discussed in this document form part of a general tendency in Central America and in other parts of the world towards deregulation of all labor rights. This change is clearly a reply to a new model of state and society. We speak of the neo-liberal model, the "free trade" model that seeks freedom for companies from all manner of things, including freedom from respecting peoples' labor rights.

In this way, labor rights are simply a hindrance for companies that wish to obtain greater profits at the lowest possible cost. This situation is visible in Costa Rica. One can predict that bills with a tendency towards greater flexibility will begin to be presented, paving the legal way for the interests of big multinational companies. Pressures from international bodies such as the International Monetary Fund and the World Bank have motivated great changes in the labor arena and in the services provided by the state.

The visible consequence of these politics has been the proliferation of precarious and unstable employment, the increase in social inequalities and an increase in the inequality of the poor. It is possible to see the increasing tendency toward greater

deregulation of labor rights due to the conception of labor rights and social rights as “barriers” or obstacles for business. This new conception can be found in public institutions that traditionally had the role of safeguarding these rights. Due to this conception, even though in many cases the law provides sufficient protection and guarantees of rights, the law is not applied due to inefficient public institutions that are indifferent about their protective, controlling role. Because of this, companies are permitted to not comply with the law.

The overview that we have presented has dealt with “labor flexibility,” a seemingly positive term that, in the end, implies the loss of our rights. Flexibility in all of its manifestations (in practice, legal, jurisprudence, deregulation) is the labor strategy employed by the proponents of “free trade,” which is to say the strategy employed by multinationals and world groups that hold power.

Their strategy seeks to achieve one final objective: eliminate all laws, rules and protections that impede “free trade between places.” This is because they consider that in a “free market”, the market itself regulates labor relations, not by labor codes or the State. Bit by bit, they are pushing for this flexibility, not only in practice, but also in labor laws and laws pertaining to commerce, the environment, and all areas of social life.

This is the greatest danger for Guatemala and the rest of Central American countries. If flexibility in practice—despite being illegal—has caused the deterioration of quality of employment and of life in our countries, what can we hope for when the law no longer protects rights?

The flexibility formula imposed on the workers has been seen in our countries for centuries, and has provoked violence. Insisting on continuing in this same direction means refusing to learn from past mistakes. The seed of poverty brings with it the culture of violence. It is crucial to start to promote change, and take firm positions against the institutionalization of injustice.

## **Bibliography**

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