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ABOGADOS

International Labour Organization Agreement 98

Mexico's Senate on September 20, 2018 ratified the Agreement 98 of the International Labor Organization (ILO) on the right to organize and collective bargaining, which was adopted in Geneva, Switzerland on July 1, 1949 and entered into force on July 18, 1951.

This ratified Agreement 98, together with the political constitution and federal laws, will form part of the Supreme Law of our country, as provided for in Article 133 of the Constitution.

The Agreement has generated expectations about the increase in the right to freedom of union for workers in our country and about the possibility that employers in the future will have to negotiate working conditions with different unions at the same time, which does not correspond to reality.

In this regard, it is important to specify what Agreement 98 modifies or does not modify in the current labor legislation and jurisprudence of our country. The Agreement provides for the freedom of workers to join or not to join a union, and that this right should not be an impediment to entering or remaining in employment or a cause for termination

The rights protected by the Agreement do not conflict with the rights of workers set out in articles 5, 9 and 123 of the Constitution concerning freedom of work, freedom of association in general and freedom of association in particular.

The Supreme Court of Justice of our country, on the reach the exercise of the freedom of union workers, in various theses has considered that the freedom of union implies the right of the worker to: 1) Enter an already existing union or constitute a new one; 2) Not enter a determined union or any union; and 3). To separate from or resign from a union.

Article 358 of the Federal Labor Law (FLL) states that "No one can be forced to join or not join a union.

Therefore, Agreement 98 does not imply an amendment to our country's legislation on the right to freedom of association of our country's workers.

The legal validity or not of the exclusion clause by entry specified in Article 395 of the FLL that indicates the possibility that in the collective labor contracts (CLC) it is agreed that the employer will only admit the workers of the contracting union, has always been questioned academically for being contrary to the right to freedom of association, but in practice the labor courts have never specifically declared it illegal.

In order to terminate the validity of the exclusion clauses for admission agreed in the CLCs, it will be necessary that their illegality be determined by the Supreme Court of Justice or the Collegiate Circuit Courts, or that their celebration be expressly prohibited in the FLL.

Likewise, Convention 98 indicates that there should be protection against acts of interference between workers' and employers' organizations in their constitution, operation or administration. Acts of interference are considered to be those measures that tend to promote the constitution of workers' organizations dominated by an employer or organizations of employers.

This provision coincides with the provisions of Articles 357 and 359 of the FLL, which stipulate that workers and employers have the right to form unions, that any undue interference shall be punished and that unions have the right to draw up their statutes, rules and regulations and to elect their representatives and organise their administration and activities. There is no provision in our legislation to encourage the formation of employer-dominated workers' organizations.

Finally, it is important to specify that Agreement 98 does not modify the regulation of the FLL in its articles 388 and 389, which establish that the majority union will be the holder of the collective labor contract, so there is no reason to think that employers will have to negotiate the working conditions with different minority unions for the same establishment, which would end up with the characteristic of generality of the CCTs.

In accordance with the foregoing, we cannot consider that the ratification of Convention 98 introduces any substantial modification to our current labor legislation on the right to organize and collective bargaining, but the ratification fully coincides with the intention of our country expressed in the addition to Article 123 of the Constitution of Section XXII Bis in the reform published in February 2017, which, in order to ensure the freedom of collective bargaining and the legitimate interests of workers and employers, orders that the FLL proceed to establish the following procedures and requirements to ensure (a) representativeness in trade union organizations, and (b) certainty in the signing, registration and deposit of collective agreements.

This Agreement is the only one of the eight agreements considered "fundamental" of the ILO, which Mexico had not ratified. This Agreement will enter into force one year after the ILO registers it's ratification.

Section XXII Bis mandates that the workers' vote must be personal, free and secret for (i) the resolution of conflicts between unions, (ii) the request for the conclusion of a collective labor contract and (iii) the election of its leaders.

This Section XXII Bis, like the ratification of Agreement 98, seeks to guarantee that not only in theory but also in practice, workers themselves will be the ones who, with their personal, free, and secret vote, without fear of losing their jobs, can elect the leadership of the union to which they are affiliated.

Consequently, the procedures that must ensure freedom of association and collective bargaining must be the subject of the important and forthcoming reform of the FLL, which is currently pending.

If these procedures are incorporated in the next reform to the FLL, the calls to strike for the signing of collective labor contracts without real representation must be eradicated, or at least greatly reduced, as well as the consequent practice of entering into and depositing collective labor contracts to avoid these types of calls, a dynamic that de facto attempts against the legitimate exercise of the right to organize and collective bargaining of the workers.

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