"Flexibility": The Labor Strategy of Free Trade

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

Asociación Servicios de Promoción Laboral (ASEPROLA)
Anti-Flexibility Collection, No. 4

Contents

Prologue

The document presented today regarding labor rights in Nicaragua is the fourth piece in the "Anti-Flexibility Collection." The collection is comprised of seven documents: one dedicated to each country in Central America, and the seventh, which presents a general analysis of the region. All documents provide a general examination of the following six basic labor rights: Acceptable work conditions; Freedom of Association; The right to collectively bargaining; Elimination of forced labor and obligatory overtime; Elimination of discrimination; and Elimination of child labor.

Over the course of several years, we have deepened the understanding of different ways in which labor rights are challenged in Central America. The regional investigations and diverse case studies of countries complement our daily work with training, consulting, advocacy, and communication. Through research and action, we have linked ourselves with Central American workers' organizations and with other social sectors that are part of 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 visited centers that housed legal documents, as well as libraries of public institutions, universities, congress and legislative assemblies, in order to investigate various documents and projects of legal reform. This research was reinforced through a disciplined effort to gather a bibliographical normative framework regarding labor at both a national and international level (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

The labor laws of Nicaragua are based on the country's Constitution. The Constitution establishes the primary rights and guarantees, including the right to work, freedom of association, the right to strike, the right to collective bargaining, and the right to social security. These rights are defined in Articles 80-88 of Chapter V in the Constitution. The Constitution also establishes that no worker is required to belong to a particular union, nor to renounce the one he or she belongs to. It recognizes full union autonomy and union leaders' protection from unjust dismissal.

Nicaragua's first Labor Code was created in 1944, during the Somoza García dictatorship, and the second was passed in 1996. The latter was approved through a consensus between employers' and workers' representatives, with the support of the government, and it is still in effect today. After it was approved, the business sector began to question a series of articles in the Code, and to propose modifications, without coming to a new consensus.

But let us briefly recount some clauses and laws that have been affecting labor rights since 1990, when the Union Nacional Opositora (UNO) came to power in Nicaragua. In that year, the United States lifted the economic embargo and immediately approved a loan of $600 million dollars. But the economic crisis continued to be difficult to overcome, because the World Bank and International Monetary Fund (IMF) conditioned this aid on a promise to begin paying the external debt and following a Structural Adjustment Program (SAP).

The SAP demanded the deregulation of commerce and the labor market, and a reduction in the size of the state. Thousands of public servants were fired, and in the context of the enormous economic crisis, the money paid to compensate these workers silenced union's protests about the dismissals.

To favor this labor policy, the National Assembly reformed the Civil Service Law and eliminated the principle of job stability for public employees. It also reformed the Education Employees Law, turning thousands of school directors into *"empleados de confianza"* in order to be able to cancel their job contracts at any time. Both laws had the support of part of the union movement, which did not see the negative consequences that they could have in the medium and long term, and instead believed that these laws were necessary to build a democracy.

Hundreds of public companies started to be privatized, and many union sectors liked the idea that these workers would have 25% of the shares in different companies where they were organized. The deregulation process in the workforce had begun, making it possible to fire thousands of state workers in order to reduce salary and social security costs, as well as to reduce union activity, which had been strong in that sector.

During the administrations of Violeta Barrios de Chamorro and Arnoldo Alemán Lacayo, ENITEL and ENEL were privatized. In both cases, there was strong opposition

from the workers, since hundreds were fired. They offered compensation to workers who were willing to quit, and eventually singed a collective agreement, ending the conflict.

In 1991, the Minimum Wage Law was passed, setting the minimum wage at a laughable 150 córdobas per month for agricultural workers, 190 córdobas per month for construction workers, and 234 córdobas per month for public sector workers. Along with that, they eliminated the basket of rice, beans, and sugar that public employees received each month.

Since the 1990s, the value of the córdoba with relation to the dollar has decreased by 400%, meaning the loss of 40% of the general salaries of workers. This is also a clear policy of labor flexibility, because it means that it is easier and cheaper for employers to fire workers.

Inequality continues to grow in Nicaragua. While there are a very few millionaires, most of the population survives on less than US$1 per day. There are no policies to industrialize the country's economy, and the agricultural sector, including the coffee, sugar, basic grains, and cattle industries, have not benefited from technological changes. Modernization has happened only in the sense that many sectors, particularly the production of milk, drinks, and clothing, are now in the hands of multinational companies.

There is regression in terms of labor rights in Nicaragua. The principles of social equality and legal protections for the disadvantaged have been put aside, and the country has adopted neoliberal policies based on the laws of the market instead of the protective role of the State. This situation is worsened by corrupt political practices by officials who should enforce the laws and protect workers and by the national and foreign companies' practices that aim to lower salary, social security, and compensation costs.

The tendency in Nicaragua is towards a "labor flexibility," which has been implemented bit by bit over the years and which continues today. This document seeks to expose the different forms in which deregulation and labor flexibility present themselves, and thereby alert the working population so that they can defend the labor rights that remain. But let's go on to look at some general facts about the country, to understand the current socio-economic context.

General facts about Nicaragua

Nicaragua is bordered to the north by Honduras, to the south by Costa Rica, to the east by the Caribbean and to the west by the Pacific Ocean. It encompasses 130,682 square km of land, and in 2003 had a population of about 5.48 million people. Of these, 52.2% are men and 47.8% are women.

In 2001, 71.7% of heads of households were men, and 28.3% were women. The number of women heads of households was slightly higher (34.2%) in urban areas and slightly lower (18.9%) in rural areas.

In terms of health, in 2001 about 8.8% of Nicaragua's population had health insurance, of which 9.6% were men and 8% were women. According to the 2004 Human Development Index, life expectancy at birth increased from 69.1 years in 2001 to 69.4 years in 2003.

With regard to education, the illiteracy rate in Nicaragua in 2001 was 20.5% (20.7% of men and 20.3% of women).

Economy

The Economically Active Population (EAP)[1] was 57.5% in 2001. Of the EAP, which are people of the age and condition to be able to work, 75.6% were men and 40.2% were women. Furthermore, 88.7% of the EAP was employed, and 11.3% was not.

The sexual division of labor, according to sector, showed us the following results for 2001:

- Primary sector: Includes agriculture, hunting, and fishing: 30.6% of men, and 3.6% of women.

- Secondary sector: Mining, quarries, manufacturing, construction: 11.7% of men and 5.1% of women.

- Tertiary sector: This is where the most women workers are found (26.3% of women and 22.6% of men). It includes cafeterias, hotels, and restaurants (12.8% of women and 10.4% of men) and commercial, social, and personal services (12.9% women and 8.1% men).

For that same year, 4.2% of children aged 6-9 years were found to be working (5.2% of boys and 3.2% of girls).

According to the Ministry of Labor, the average salary in Nicaragua in 2002 was $213.70 per month.

Participation in community organizations

Women comprise most of the membership of religious and charity organizations, or groups designed to satisfy their practical needs. In 2001 women participated most in Parenting Associations (75.8%), Savings and Loan cooperatives (57.1%), neighborhood organization (53%), and 37.3% in religious organizations. Men, on the other hand, participate more in Producers' Associations (90%), Regional Committees (74.4%), and

[1] The economically active population comprises all persons of either sex who furnish the supply of labor for the production of goods and services during a specified time-reference period. (UN Statistics Division)

neighborhood committees (40.9%). As we can observe, men are more active in activities related to productive roles.

In 2002, there were 115 unions registered in Nicaragua, a reduction of 33% from 2000 (172 unions).

The number of union affiliates has also decreased since 2000. In 2000, there were 6,226 people affiliated to unions, but this dropped to 4,655 by 2002.

Changes in the type of production being promoted, foreign investment incentives, and a growing culture of disrespect for labor rights, have hurt the working population ever since the neoliberal policies began.

To illustrate this, we will move on to discuss six basic labor rights in Nicaragua, starting with the right to decent working conditions. In each section we will first synthesize the most important national and international labor laws. Then, we will analyze the different forms of flexibility that can be observed, and present some cases as examples. Finally, we will point out the principal obstacles to compliance with each labor right.

Decent Working Conditions

Legal Recognition of this Right

Constitution:

- Article 82 establishes that workers have the right to job stability. Guarantees equal pay for equal work, as well as working conditions that protect workers' health and hygiene and minimize professional risks. Establishes the eight-hour workday, a weekly rest, vacations, and paid holidays. Provides social security protection and means of subsistence in the case of disability, old age, pregnancy, illness, or work-related risks, and provides for family members in the case of death.
- Article 59: Nicaraguans have an equal right to health. The State will establish the basic conditions for the promotion, protection, recuperation, and rehabilitation of their health.
- Article 61: The State guarantees Nicaraguans the right to social security to protect them against eventualities of life and work.
- Article 77: The elderly have the right to be protected by their family, society, and government.

Labor Code:

- Article 46: Gives workers the right to be reinstated when their dismissal goes against the prohibitions in the Labor Code or was done in retaliation for having exercised or tried to exercise their labor and union rights.

- Article 48: Establishes four reasons for workers to be dismissed with just cause, without the employer being held responsible.
- Article 100: Establishes all employers' obligation to adopt necessary and adequate protective measures to effectively protect their workers' life and health.
- Article 141: Pregnant workers have the right to four weeks' rest before giving birth, and 8 weeks' rest afterwards, or to 10 weeks' rest in the case of multiple births. This rest time will be paid, and the workers will continue to enjoy the medical attention that the social institutions should provide.
- The Code also says that all work done outside of the normal workday will be considered overtime. The number of overtime hours cannot exceed three hours per day or nine hours per week. When workers work on Sundays or other rest days, they will be paid overtime. Vacations will be paid based on the workers' most recent normal salary. The normal salary includes the basic salary, incentives, and commissions.

International Labor Organization (ILO) Conventions:

- Convention 29, on forced labor, 1930.
  Ratified April 12, 1934.
- Convention 95, on the Protection of Wages, 1949.
  Ratified March 1, 1976.
- Convention 100, on Equal Pay, 1951.
  Ratified October 31, 1967.
- Convention 131, concerning Minimum Wage Fixing, with Special Reference to Developing Countries, 1970
  Ratified March 1, 1976.
- Convention 146, on annual paid vacations (seafarers), 1976.
  Ratified October 1, 1981.

What happens in practice with decent working conditions?

On the issue of decent working conditions, Nicaraguan law generally protects the interests of the working class. Nicaragua has adopted the most important international conventions regarding salary protection, vacations, occupational illnesses, and others.

The Nicaraguan Labor Code clearly defines rights such as job stability, salaries, incentives, commissions, vacations, unemployment compensation, maternity leave, health and safety conditions, and others. Furthermore, the State guarantees Nicaraguans the right to social security. However, as with other rights, in practice these are constantly violated, as we will explain below.

Legal and jurisprudential flexibility

Legal flexibility occurs when, for example, the law that regulates job stability in Nicaragua (the Labor Code) lacks an administrative process that allows labor inspectors

to hear and resolve employers' requests for just-cause dismissals. This situation makes it hard to guarantee due process for workers with regard to such dismissals.

Additionally, the business sectors uses legal loopholes like the following, to fail to provide job stability:

- **Contracts for "lending of services".** This type of contract was regulated by the Civil Code, which was revoked when the 1945 Labor Code went into effect. With the Code, only the "piecework contract" continued to be valid, which is the type of contract frequently used in the construction sector, and all of the legal frameworks related to workers became regulated by the Labor Code. However, many employers still use the "lending of services" contract (which legally no longer exists) in order to avoid paying benefits and social security contributions. This openly violates labor law and harms the rights of workers who accept this type of contract because of their desperation to find a job at a time when the unemployment rate is higher than 40% of the EAP.

- **Continuous contracting** is another way to avoid the responsibilities imposed by the Labor Code. It consists of hiring workers for short periods, no longer than 3 months. The contract is not extended beyond that time if the worker tries to defend their rights, join a union, sign a collective bargaining agreement, or support the declaration of a strike in a workers' assembly. For workers, this type of contracts represents nothing less than the loss of their labor rights, but they prefer to accept that rather than lose their jobs.

- **Salaries that include extra pay as compensation for not providing benefits.** This is another form of continuous contracting through which small amounts representing vacations and the end-of-the-year bonus are included in the salary. This divests vacations of their function of being a rest to allow workers to regain energy, and the 13th month bonus of its purpose as an extra income that allows workers to face end-of-the-year expenses. The Nicaraguan labor courts have said that this form of payment is legal.

Jurisprudential flexibility happens when the administrative and judicial authorites of Nicaragua use a restrictive interpretation of the labor laws on a daily basis. For example, despite the fact that the Labor Code's definition of "labor incentives" is general and does not distinguish between different types of incentives, the authorities interpret "incentives" to mean only those amounts linked to productivity. According to the general principle of law, "where the law does not distinguish, no one can legally make the distinction."

By reducing "incentives" to a restricted interpretation of the law, workers' pay, which is the basis for calculating all bonuses, is also restricted. This interpretation reduces the amounts given for vacations, end-of-the-year bonus, and overtime, because these amounts are calculated based on the normal salary received by workers. In all of these cases, the workers lose a percentage of what they should receive as benefits,

because both the Ministry of Labor and the labor judges say this method of payment is legal.

Flexibility in reality

Workers are often fired under the pretext of "just cause", and without asking for authorization from the Departmental Labor Inspectorate, so that employers can avoid paying compensation and benefits to these workers. At the same time, workers are unfamiliar with the law and do not use the legal mechanisms that would allow them to file a complaint with a judge demanding reinstatement in their jobs, since their employers did not comply with the requirements necessary to be able to fire them.

In practice, most companies do not comply with occupational health and safety laws, which systematically endangers the health of the workers, who have no protection. Meanwhile, the labor inspectors do not have the capacity or interest in controlling compliance with these regulations.

In order to attract foreign investment, the Nicaraguan government has signed conventions and passed decrees and laws to favor maquiladora companies in the export processing zones. These decrees clearly say that companies that benefit from such incentives should comply with the labor rights established by the Constitution, the Labor Code, ILO Conventions ratified by Nicaragua, and other Nicaraguan laws. However, companies in the export processing zones openly demand a kind of jurisdictional immunity in order to avoid complying with Nicaraguan labor laws. Every time they are warned to comply with the law, or the Ministry of Labor asks for authorization to inspect their factories, they threaten to pull out of the country.

The specific law created to benefit maquiladora companies that open factories in Nicaragua constitutes a real obstacle to the application of the labor law.

With respect to overtime pay, there are other kinds of problems, especially at Nicaraguan maquila companies:

- Employers demand that their workers work more overtime than the law allows for (3 hours per day and 9 hours per week). Workers cannot refuse to work these extra hours, because they will be fired.

- Once they have worked these extra hours, whether or not the law allows for them, they are not paid extra. In this case, while the worker is still employed, they do not request this pay, for fear of being fired. Generally they wait until they are fired to file the complaint. However, at that time the worker becomes aware of two situations: a) That the statute of limitations has passed, and they can no longer recover this unpaid overtime, and b) That they must detail exactly the dates and number of overtime hours worked, which is generally not possible given that most workers do not keep a file with this information.

Cases of noncompliance

1. Hansae Nicaragua and Metro Garments

At these companies, flexibility is clearly seen in terms of the payment of workers' salaries.

- The monthly salary in August 2002 was 875 córdobas (about US$64). That same year, a salary increase of 65 córdobas was decreed. However, these companies did not increase the salaries of their workers, who are paid based on the number of items that they produce.

- In 2002, the wage for one hours' work was 2.5 córdobas (17 cents). However, workers say that when they worked overtime hours, which should have been paid double, according to Article 62 of the Labor Code, *"this was not paid completely or reflected on all workers' pay stubs."*

- These companies offer a "production incentive" to those workers that fulfill a production goal. This incentive ranges from 30-50 córdobas (US$2 – $3.40) per week. The problem is that the production goal is unreasonably high in the opinion of the interviewed workers, because 80 operators work on each production line and together they must produce 6,000 items daily. Furthermore, in order to receive the incentive, they cannot have absences, late arrivals, or ask for time off. Therefore, workers generally arrive before 7 am, so as not to lose the punctuality incentive.

- In this way, the company gets each worker to work almost an hour for free, and excessively increase the physical and mental energy they put into their work, in order to not lose the incentive. If the workers do not reach the production goal that has been set, they will not receive the incentive, and the company has benefited from higher production without having to pay more.

2. Mil Colores

In 2002, this company paid a salary of 845 córdobas (US$61) per month. However, there are differences in the salary amounts, because each worker is paid based on what they produce. In that year, there were the following weekly wages:

205 córdobas (US$14.38)
300 córdobas (US$21.05)
480 córdobas (US$33.68)

- Overtime hours, which in principle should be paid double the amount paid for normal hours, are not paid completely. Workers must request the overtime pay, and even then it isn't always included on their pay stubs.

- An incentive or "production bonus" is given by the company with 1-4 months' delay. This bonus is not part of the salary, and is not taken into account when calculating vacations, unemployment compensation, or end-of-the-year bonuses.

- Workers are given a 15-minute rest in the morning and the afternoon, and a lunch break, but this time is deducted from their salaries. This violates Article 55 of the Labor Code, which establishes that workers at companies with continuous work shifts have the right to a half-hour of rest during the workday, which should be paid.

3. Textil Unlimited SA (TXU)

There is no minimum wage in this company, *"because if the worker produces they earn a salary, and if they don't they are not paid."* The salary that they earn is 600 córdobas per month (US$42.10) and they do not receive any other type of compensation.

Obstacles to compliance

Political and practical obstacles:

- Nicaraguan business owners have a perception of productivity that is based on paying less and less for labor. This leads to flexibility, because in the effort to reduce costs, companies use legal and illegal mechanisms to avoid their responsibilities as employers.
- Companies use legal ruses like the "lending of services" (with this type of contract they do not pay labor benefits or make social security contributions) and "continuous contracting" (hiring workers for three months or less). These practices are ways to make the labor relationship more flexible.
- Authorities have a restrictive interpretation of the labor norms, which hurts the workers.
- Employers make workers work more overtime than Article 58 of the Labor Code allows for. Once the workers have worked the overtime hours, whether they are legal or excessive, they are not paid.
- Social security services worsened drastically with the privatization of medical services. It has become a meaningless right, because workers' health problems are not resolved.
- Labor inspectors do not effectively ensure that companies comply with labor laws.
- Lack of inspection policies and dissuasive and corrective sanctions. The only existing sanction is a fine, which is limited to 10,000 córdobas (US$666), an amount so small that it does not effectively prevent employers from violating the law.

- The labor courts' jurisprudence seeks to favor productivity in companies and therefore they frequently disrespect workers' rights.
- The minimum wage is set well below the cost of living, as a result of agreements between governmental sectors and employers.
- With regard to women, business sectors pay attention to "negative" factors such as the chance that a woman will become pregnant, the nursing period, and women's inability to work overtime as a result of having work to do at home.
- Employers discriminate against women, considering them a disadvantage because they cost the company additional money.

Freedom of Association

Legal Recognition of this Right

Constitution:

- Article 87: In Nicaragua there is full freedom of association. Workers voluntarily organize unions and these unions can be constituted according to the law. No worker is obligated to belong to a certain union, or to renounce the union he or she belongs to. Union autonomy is fully recognized and union leaders are protected from being unjustly fired.

Labor Code:

- Article 204: Establishes that unions have the right to: freely create their statutes and regulations; freely elect their representatives; choose their structure, administration, and activities; formulate an action plan.
- Article 231: *Fuero sindical* is the union leaders' right to not be punished without just cause or be fired without prior authorization from the Ministry of Labor, based on a just cause established in the law.
- Article 219: Says that the labor judges are the ones able to recognize the dissolution of a union. That is to say, there is no way to legally dissolve a union through an administrative route.
- Article 213: Establishes that the administrative process for registering a union can take a maximum of ten days, and also establishes disciplinary sanctions for delaying this process.

Legislative decrees:

- Decree-Law number 46-91: This law was published in National Registry No. 221 on November 22, 1991. It regulates the export processing zones, establishing exceptions for the tax on rent, and determining that companies operating in these zones are subject to the rights laid out in the Constitution, Labor Code, ministerial resolutions, the ILO Conventions ratified by Nicaragua, and other national laws.

ILO Conventions:

Ratified:

- Convention 87, on freedom of association and protection of the right to unionize, 1948.
- Convention 98, on the right to organize and bargain collectively, 1949.

What happens in practice with freedom of association?

Nicaragua's Constitution guarantees union autonomy and provides heightened protection for union leaders (*fuero sindical)*. The Nicaraguan government has ratified ILO Convention 87, which guarantees workers the right to organize unions without prior authorization. Furthermore, the Labor Code also includes these guarantees, establishing time limits for the registration of new unions, and guaranteeing *fuero sindical*. In 1996, a reform to the Labor Code reduced requirements and paperwork to facilitate union activity.

The new Labor Code, which went into effect on December 30, 1996, improved some provisions related to freedom of association, including:

- It reduced the number of workers necessary to create a union from 25 to 20.
- It reduced the requirement for creating unions in a company from half plus one of the total number of workers to only 20 workers, so that several unions can exist in a single company.
- It established the reasons allowed for refusing to register a union, which the previous Labor Code did not.
- It also increased *fuero sindical* from 5 union leaders to all members of the leadership, and from three organizers to all of the affiliates of a new union, starting with the notification date until the end of the period that the law allows for registration of the union.

However, this protective legislation appears to be unrelated to what happens in reality. Since the creation of the ILO Committee on Freedom of Association, in November 1951, 37 cases have been presented against the Nicaraguan government for violations of union rights. Between May 1966, when the first case was presented before the Committee (case number 479), and July 1979, 14 cases were filed. Between November 1980 and 2001, 21 cases were presented.

The issues raised by these cases include the arbitrary detention of unionists; physical aggression, threats, and torture; raids and assaults on union offices and leaders' homes; limitations on freedom of expression; prohibitions on travel to participate in ILO activities; and the suppression of the right to strike.

According to statistical data from the Union Association division of the Ministry of Labor, between 1990 and June 2001, 2,023 unions were registered, of which 1,560 were active and 463 were inactive.

The number of union members rose to a high of 104,993. The aforementioned division of the Ministry of Labor does not keep track of the number of members that leave the unions, so the actual figure today must be less than this.

Table: Unions registered and number of affiliate members, from 1990 to June 2001

YEARS	Number of unions registered	Number of members
1990	591	41,012
1991	151	7,543
1992	168	11,586
1993	63	3,478
1994	64	3,149
1995	85	4,235
1996	151	6,447
1997	145	5,651
1998	129	5,516
1999	210	6,608
2000	172	6,226
2001	142	5,133
TOTAL	**2,071**	**106,584**

Source: Statistics from the Dirección de Asociaciones Sindicales, Ministry of Labor

The year 1990 saw the greatest growth in terms of union registration and new union members. Since 1991, this has decreased, particularly in 1993 and 1995. The percentage of workers affiliated to union is between 5.6% and 13% of the EAP, and it is decreasing.

Legal flexibility

Nicaraguan law establishes heightened protection (*fuero sindical)* for union leaders, meaning that they can only be fired if they do something that the Labor Code considers just cause. However, there is no clear administrative process to follow in these cases, so the protection guarantee is weak.

With the current law, there is no administrative procedure to guarantee due process, so tat the authorities in the Ministry of Labor can determine whether or not the employer is concealing the dismissal, if the true cause of the dismissal is retaliation because the worker tried to defend his or her rights, participate in union activities, bargain collectively or go on strike, which are legal rights of the workers. This omission becomes converted in legal flexibility of the right to *fuero sindical*, and a reform is necessary.

Flexibility in reality

Despite the fact that laws in terms of freedom of association are broad and protective in Nicaragua, in practice these laws are meaningless, because there is a systematic anti-union campaign by the business sector with the complicity of governmental authorities. One fact that helps one to understand this reality is that the current president of Nicaragua was the president of the Superior Council of private companies for many years, which is indicative of where his interests lie.

In Nicaragua, flexibility in terms of freedom of association is manifested in the following ways:

- Lack of union activity in maquilas (export processing zones), some public offices and private companies.
- Without being authorized to do so, the Ministry of Labor denies union registrations, suspends them, and gives extensions to unions' directors without the authorization of these unions' general assemblies.
- Employers request the removal of union leaders' *fuero sindical* in order to be able to fire them. They do this with the approval of the labor inspectors.
- When a union's leaders present the founding documents and statutes to the Ministry of Labor to be registered, the Ministry officials delay the process and notify the employer, who forces the workers who signed the union documents to erase their names. Thus the union is prevented from reaching the minimum number of affiliates (20) that it must have to be legally recognized.

Cases of noncompliance

1. Union of workers at the Universidad Nacional de Ingeniería (STUNI)

In 2001, the Union Association division of the Ministry of Labor had refused to register the new leadership board of the union at the Universidad Nacional de Ingeniería (STUNI), with arguments that violated the principle of freedom of association as it is established by the Constitution and ILO Convention 87. The union leaders had to appeal this resolution before the General Labor Inspectorate, which finally recognized that there had been a violation of freedom of association, and in 2002 it ordered the Union Association division of the Ministry of Labor to register the new leaders of STUNI (Resolution No 43-02 Violation of Freedom of Association).

2. Laboratorios Solka S.A. versus the Secretary General of the "Basilio Cáliz Quiñonez" union

In 2003, the Union Association division of the Ministry of Labor refused to register the newly elected leaders of the "Basilio Cáliz Quiñonez" union, accepting the complaint presented by the representative of Laboratorios Solka SA. In this complaint, he asked that the Extraordinary Assembly of the union be invalidated, arguing that the

assembly, where they elected the new union leaders, had happened outside of working hours and outside of the company. The union appealed this before the General Labor Inspectorate, which finally resolved that the company's complaint was not proper.

The union's appeal was based on the principle of autonomy and freedom of association, under which they should be able to hold assemblies either inside the company with the employer's permission, or outside of the company. If they hold the assembly off company property, the employer has no reason to interfere with the union's business, because doing so would violate the collective rights and the principles of autonomy and freedom of association, which are guaranteed by the Constitution. Because of this, the Union division of the Ministry of Labor was ultimately ordered to register the union's newly elected leaders.

3. The Corporación Municipal de Mercados de Managua and the Board of Directors of the Sindicato de Trabajadores de Mercados de Managua (SINTRAMEMA)

In this case, the authorities at the Ministry of Labor declared that the Corporación Municipal's firing of Miguel Hernandez Gutierrez, a SINTRAMEMA leader, was illegal. He had not been fired in accordance with the law, which requires that there be just cause and prior authorization. The union leaders had to complain before two different levels in the Ministry before the worker was finally ordered reinstated.

4. The Administration of the Instituto Nacional Autonomo Presbitero Arias H. Pallais versus union leader Feliciano del Carmen Mayorga

In 2002, union leader Felicano Mayorga Guzmán was transferred without his consent, by order of the director of the Institute. This transfer was revoked by the General Labor Inspectorate, which determined that it violated *fuero sindical*, because such transfers are only possible if there is mutual consent.

The General Labor Inspectorate ordered the Institute to maintain him in his original position, with the same salary he had previously. Mr. Mayorga Guzmán had to file complaints at two different levels of the Ministry of Labor before he received a decision that reaffirmed his right to *fuero sindical*.

5. The Consorcio Naviero Nicaraguense SA Company versus union leaders from the Montelimar sugar mill

In 2001, the Human Resources chief of the Consortium fired two leaders of the union at the Montelimar sugar mill, without complying with the law, which requires that there be just cause and prior authorization. Given this serious violation of *fuero sindical*, the General Labor Inspectorate declared the dismissals illegal, and ordered the Consortium to reinstate these workers in their positions, with the same salaries they had received before (Resolution No. 12.03).

Unfair practices by employers

- They transfer union organizers to areas where they are isolated from other workers.
- They fire union organizers.
- They create parallel (yellow) unions.
- They limit the union's ability to bargain collectively, in complicity with the parallel union.
- They refuse to give permission to hold union assemblies during working hours.
- They suspend production in areas where particularly vocal union leaders are working.

Obstacles to compliance

Political and practical obstacles:

- The authorities have indirectly limited freedom of association by not accepting requests to register unions, or by delaying this process.
- There is no political will in the government to enforce the laws. The government sides with the companies.

- The government treats the export processing zones benevolently, looking the other way when violations of labor rights occur.

- The administrative authorities selectively repress those unions that do not have the same politics as the government. The following practices occur:

    - When a union requests legal status, officials delay the paperwork and notify the employer so that he or she can pressure the workers who signed the union papers to renounce the new union.
    - In unions that have already been created, and that are trying to start a bargaining process, or are engaged in a socio-economic collective conflict, employers provoke the union leaders, hoping that they will react in a way that gives the employer just cause to request revocation of their *fuero sindical* and then fire them.
    - When several leaders of one union have been fired, the Ministry of Labor announces that the Board of Directors of the union is incomplete or nonexistent and that therefore the union is illegal and cannot negotiate a collective bargaining agreement or go on strike.
    - There is no special procedure to address the firing of a worker protected by *fuero sindical*, as there is in other countries.

- Another important obstacle is lack of job stability in Nicaragua today. This situation prevents workers from organizing, because they are afraid that they will

be fired for joining a union. This weakens the union and makes it harder for it to have the strength to negotiate a favorable bargaining agreement.

- Fear of dismissal has been a powerful weapon for employers to make workers submit to poor conditions. Although firing workers for their union activities is illegal, it is a common practice.

Collective Bargaining

Legal Recognition of this Right

Constitution:

- Article 88: Guarantees workers' inalienable right to defend their particular or collective interests and sign individual and collective agreements with their employers. Both must be done in accordance with the law.

Labor Code:

- Article 235: Establishes that the collective bargaining agreement is the agreement signed between an employer or group of employers and one or several legally established workers' organizations.

Legislative decrees:

- Law promoting foreign investment (Law No. 344, published in Public Registry No. 93 on May 24, 2000). Although this law establishes the rights of investors, it also conditions these rights on respect for the Constitution and national laws. However, there is one clause that allows the resolution of differences, controversies or complaints in a court of arbitration without the possibility of turning to another jurisdiction. Furthermore, some companies that have signed investment contracts with the government establish that they will have no additional obligations besides those specifically mentioned in the contract.

ILO Conventions:

Ratified:

- Convention 98, on the right to unionize and bargain collectively, 1949.

What happens in practice with collective bargaining?

Nicaraguan law provides special protection for workers' right to collectively bargain their working conditions. Nicaragua has ratified ILO Convention 98 which establishes that workers should enjoy adequate protection against any act of

discrimination that could undermine freedom of association, and that therefore national governments should encourage the free development of collective bargaining between employers and workers' organizations in order to regulate working conditions. This principle is also established by Article 88 of the Constitution, and regulated through a protective norm in the Labor Code (Articles 235-242), where, among other things, it is established that it is the union is the organization qualified to carry out the collective bargaining.

The Labor Code of 1996 introduced the following changes in terms of collective bargaining:

- The content of Article 238, which obligates all employers to negotiate a collective bargaining agreement with their unionized workers.
- The content of Article 240, which allows modifications in the collective bargaining agreement before it fully enters into effect, if there are substantial changes in conditions in the company or country that make such modifications advisable.
- The content of Article 241, which extends the time for which the collective bargaining agreement is in effect, if neither party requests a revision.
- Article 236, which establishes that "*no administrative or judicial authority can encourage, under any procedure, workers' or union leaders' relinquishment of claims, acquired rights, or benefits obtained through collective bargaining agreements and incorporated by these agreements into their individual work contracts.*"

Flexibility in practice

ILO Convention 98 clearly establishes the principle of assuring better working conditions through collective bargaining agreements. National laws also guarantee the right to collective bargaining.

But despite these legal norms, there is no freedom of association in Nicaragua. This hinders the right to collective bargaining, because this right is tightly linked to freedom of association. In practice, voluntary individual negotiation is more commonly used, against the interests of collective bargaining.

Selectively repressing freedom of association undermines the right to collective bargaining because without a set of workers' demands cannot be negotiated without unions and union leaders.

Governmental authorities, particularly those in the Ministry of Labor, do not provide true protection for this right. On the contrary, they carry out administrative actions that hinder the exercise of this right, thus failing to fulfill their legal obligation to guarantee union freedom and autonomy.

This is due to the fact that the Nicaraguan government has exchanged the principle of worker protection, guaranteed in its own laws, for the principle of protection of the employer, resulting in the incorrect application of labor law. This is a clear form of "flexibility" of the collective bargaining, prioritizing instead the right to work. That is to say, it encourages workers to protect their jobs, instead of fighting to improve the quality of these jobs. It encourages workers to individually rather than collectively negotiate their working conditions with their employers.

The protection of precarious work is explainable by the high unemployment rate and the difficult economic situation, which makes workers give up their rights instead of losing their jobs. Business owners fight against the formation of unions in order to avoid collective bargaining processes.

Cases of noncompliance

1. Nicaraguan Telecommunications Company (ENITEL)

In 1998, ENITEL asked the Ministry of Labor's Division of Collective Bargaining and Conciliation for authorization to cancel the contracts of 146 workers. These workers had participated in a strike because of ENITEL's failure to comply with several clauses of the collective bargaining agreement that it signed with the union. Despite the fact that the Attorney General pointed out violations that occurred during this process, finally the Ministry of Labor gave ENITEL authorization to fire the 146 workers' contracts. By doing this, the Ministry failed to correctly apply the labor law, basing its decision on norms related to civil processes that are not applicable in this type of case, with harmful results for the workers. (Resolution No 14-98)

2. Grasas y Aceitas S.A. Company

In January 2000, the Grasas y Aceites Company filed a complaint with the Ministry of Labor's Division of Collective Bargaining and Conciliation regarding the collective bargaining agreement at that company. The intention was to modify clauses and determine which clauses could continue to apply given the economic costs. The Division of Collective Bargaining heard the company's arguments and decided to eliminate a series of clauses in the agreement, violating the principle that the collective bargaining agreement has the power of law between the parties, and that only an agreement between the parties can lead to the elimination of some of its provisions. It is important to note as well that this resolution was made through the administrative channel, not the judicial channel.

3. The Nicaraguan Telecommunications Company and the workers of the Construction, Transportation, and Telecommunications Sector of Managua

In January 2003, the Secretary General of the Communications Union of Managua filed a complaint before the Departmental Labor Inspectorate regarding

noncompliance with several of the clauses of the collective bargaining agreement signed between the Nicaraguan Telecommunications Company and the workers at that company. However, the Departmental Inspectorate refused to inspect the workplace in order to determine whether or not the company was violating these clauses. As a result, the union appealed this decision before the General Labor Inspectorate, who heard the appeal and finally decided to order the Departmental Inspectorate to conduct the inspection.

Obstacles to compliance

Political and practical obstacles:

- The legal status of Leadership Boards of unions is frequently suspended through administrative processes in order to eliminate the protection of *fuero sindical* and allow employers to fire union leaders.
- When it benefits the employer, the labor authorities permit the extension of the terms of the pro-employer union's leaders, without authorization from the union's General Assembly, violating union autonomy.
- In the private sector, employers resist negotiating collectively with their workers.
- Conciliation lawyers at the Ministry of labor impose their decisions in terms of the content, limits, and scope of collective bargaining agreements.
- The government considers that unions and strikes scare away foreign investment, and that their collective bargaining agreements increase costs of production for business owners. This is their justification for not fulfilling their role of protecting the right established by law.
- In order to avoid their responsibilities, some companies declare themselves bankrupt, close, and fire their personnel, without paying all of their legally due benefits. Later, these companies reopen under a new legal identity, under which the union and collective bargaining agreement are no longer valid.

Elimination of forced labor and obligatory overtime

Legal Recognition of this Right

Constitution:

- Article 40: Establishes that no one will be enslaved. All forms of slavery and similar treatment are prohibited.

Labor Code:

- Article 58: Establishes a legal limit of 3 hours of overtime work per day, and 9 hours per week.

International ILO Conventions:
Ratified:

- Convention 29: Details the definitions of forced or obligatory labor, and the exceptions that could exist, 1930.
- Convention 105: Establishes that no one can be forced to do work or provide personal services without fair compensation and without their full consent, except in cases of public disaster and other situations described by the law, 1957.

What happens in practice with forced labor and overtime?

Nicaragua has ratified ILO Conventions 29 and 105 regarding the abolition of forced labor. The Constitution states that ono one will be enslaved and prohibits all forms of slavery. The 1996 Labor Code limits overtime hours to 3 hours per day and 9 hours per week. Articles 195-197 of the Labor Code regulate work in prisons, with the following restrictions:

- Prisoners may choose whether or not to accept work.
- Prisoners will earn a salary that is no less than the legal minimum wage for the work performed.
- Working hours in prison will always be at least ¼ shorter than the shifts allowed by the Labor Code.

The previous Labor Code said that in special cases, working hours could increase, and this work was considered extraordinary. There was no limit to obligatory overtime, but this situation was improved by the passing of the 1996 Code.

Flexibility in practice

It is a common practice in many companies to demand that the workers work overtime, in exchange for "free time" instead of additional pay.

Due to the low salaries in Nicaragua, workers offer to work overtime hours that exceed the limit established by labor law. When workers are forced to work excessive amounts of overtime, they generally do not denounce these violations. If they do file complaints, the labor inspectors do not consider these to be the fault of the employers.

Cases of noncompliance

WORKING HOURS AT MAQUILA FACTORIES

1. Mil Colores S.A.

In this company, workers work from 7 am to 5 pm from Monday to Friday. During each shift, they have two 15-minute breaks, one at 9 am and one at 3 pm. They also have 30 minutes for lunch, from 12 to 12:30 pm.

If there is a lot of work to do, workers may work from 5 pm to 5 am, returning to work again at 1 pm. In these cases, they may also work on Sundays. Workers who refuse to work overtime are fired.

There is a night shift from 7 pm to 5 am in the laundry and ironing sections. This shift rotates, both for men and women. With this schedule, workers pass most of their time working for the company, negatively affecting their family and social relations. For women workers, extending the workday greatly increases their workload, since they also have domestic work at home. This hurts their health and emotional well-being.

2. Hansae Nicaragua S.A. and Metro Garments S.A.

In both of these companies, the working hours are from 7 am to 5 pm, Monday to Friday. This means that workers normally work 10 hours per day, without being paid for overtime. They work 50 hours per week, which exceeds the limit established by law. If they work after 5 pm they are paid extra.

In high production times, particularly during October and November, the number of extra hours worked may be four, seven, or even 14. Two of these hours are not paid, because the "normal" workday at this company is 10 hours long, instead of the eight hours stipulated in the Labor Code.

These situations violate the labor law and are so notorious that the person in charge of labor issues at the National Export Processing Zone Corporation recognized in our interview that some companies violate overtime regulations. He said that he has heard "*complaints from certain employees… who have worked extra hours, and we have contacted the companies and even the Ministry of Labor has been present, so yes, there are people who have worked more hours. Last year there was a an attempt to strike for a few hours in one company, only because the workers there did not want to continue working so many overtime hours.*"

There are also other practices, such as the following:

- Article 52 of the Labor Code prohibits women more than 6 months pregnant from being forced to work night shifts, but neither company complies with this regulation.
- In times of high production, workers must work on rest days. Meanwhile, during times of lower production, working hours are decreased, and workers earn less.
- If there is a lot to produce, workers are not given the right to the 15 days' vacation that the law guarantees every 6 months. They must wait until production decreases, and thus the salary they receive while on vacation decreases.

3. Jhon Garments

Workers at this company work a "concentrated shift" which means that they work for 12 hours per day (7 am to 7 pm) four days straight, and then do not work the next four

days. These are called 4x4 shifts. The interviewed workers said that this kind of concentrated shift has led to family and health problems, and has prevented them from being able to study.

With this type of work schedule, the employer saves on salaries, especially on overtime pay, because workers receive the same pay for every hour worked, whether it be at night or during the day.

Since they work the 48 hours per week allowed by the Labor Code for day shifts, it appears that they are not exceeding the legal limit. The trick is that this shift does not pay extra for night work, weekends, and holidays.

In other words, this type of shift violates the maximum number of working hours and ignores the studies that show the serious repercussions that long shifts have on workers' physical and mental health.

4. Textil Unlimited S.A.

This company has an irregular work shift:

- On Mondays and Fridays, they work from 7 am to 3:45 pm. On both days, the work shift is 8 hours and 45 minutes long.
- On Tuesdays and Thursdays, they work from 7 am to 5 pm. On these days, the work shift is 10 hours long.
- On Saturdays, they work from 7 am to 4 pm, for a total of 9 hours.
- There are two 15-minute breaks, at 9:45 am and 2:45 pm. Lunch is from 12-1 pm.

If we add up the total number of hours, workers at this company are working 45.9 hours per week, which does not violate the labor Code. However, interviewed workers indicated that they also have to work Sundays sometimes. There is also a night shift from 5 pm to 11 pm (6 hours), both for men and for women, which violates the maximum number of overtime hours allowed by Article 63 of the Labor Code.

Obstacles to compliance

- National law stipulates the abolishment of forced labor, but judges have continued to allow forced overtime, leading to an extension of the workday.
- There are legal loopholes in terms of the management of the workday, which favor the employer and force workers to accept shifts that are 10, 12, 16, and even 24 hours long in extreme cases.
- In practice, there are high levels of legal insecurity for workers, due to the great discretion that employers have in the export processing zones. This creates conditions under which workers must be available according to production needs. Similarly, if international market fluctuations affect export volumes, the employer can, in practice, reduce the number of employees, or reduce the number of working hours (and therefore salaries).

- Bonuses and overtime pay are not factored in to salary calculations, which has a negative effect on settlement pay, vacations, and year-end bonuses.
- As a result of the low salaries, workers try to work extra hours in excess of the legally allowed overtime hours. This violation is therefore not denounced before the labor inspectors, and if it is, the inspectors do not fault the employer.

Elimination of Discrimination

Legal Recognition of this Right

Constitution:

- Article 82, part 1: Establishes that workers have the right to working conditions that assure them equal pay for equal work, without discrimination based on politics, religion, race, sex, or anything else, guaranteeing them conditions compatible with human dignity.
- Article 27: Establishes that all persons are equal before the law and have an equal right to protection. There will be no discrimination based on birthplace, nationality, political creed, race, sex, etc.
- Article 48: Establishes absolute equality between men and women.
- Article 47: "*No one can refuse to give employment to a woman due to pregnancy, or fire a woman while or after she is pregnant, in conformity with the law.*"

ILO Conventions:

Ratified:

- Convention 100, on equal pay, 1951.
- Convention 111, related to discrimination in employment, 1958.

What happens in practice with discrimination?

"The term discrimination includes any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; as well as any other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."
ILO Convention 111 Concerning Discrimination (Employment and Occupation), 1958.

According to the International Labor Organization, discrimination can be either direct or indirect. With regard to discrimination against women, the ILO says: "*Direct discrimination occurs when laws or practices treat men differently than women. For example, a law that does not allow women to sign contracts is directly discriminatory; indirect discrimination involves laws and practices that appear neutral, but establish a*

form of discrimination against women, or are unfavorable for them. This occurs, for example, when height and weight requirements are set that only men can fulfill." (ILO 1994).

Nicaragua has ratified ILO Conventions 100 and 111 related to equal pay and discrimination in employment based on race, color, sex, religion, political opinion, nationality, or social origin that has the effect of annulling or altering equal opportunities or equal treatment at work. The Constitution prohibits discrimination based on birthplace, nationality, political beliefs, race, or sex, and establishes absolute equality between men and women. The Constitution also prohibits employers from refusing to hire women because of pregnancy, and from firing them when they are pregnant or nursing.

The Labor Code introduced two other clauses related to discrimination:

1. In section XI, it established that men and women have equal job access, and enjoy equal treatment, according to the principles laid out in the Constitution.
2. Article 138 establishes that women workers will enjoy all of the rights guaranteed by law, under equal conditions and with equal opportunities, and that they can not be discriminated against based on gender. Their salaries will reflect their capacity and the jobs they hold.

Although gender-based discrimination is illegal in Nicaragua, in practice, women, indigenous communities, and other sectors of the population are the victims of various kinds of discrimination in the workplace.

Flexibility in practice

Despite the existence of laws that guarantee equality between the sexes and prohibit gender-based discrimination, these laws are frequently violated, particularly in the Nicaraguan maquila companies.

Discrimination is particularly common against pregnant women, because employers do not respect the legal protection from dismissal that these women should enjoy, and instead fire them without complying with the legal requirements.

There is also age-based discrimination against women. Maquila companies often refuse to hire women over age 25.

The high unemployment rate in Nicaragua allows the State and companies to set very low salaries. While men may choose to refuse these poorly paid jobs, women often accept them. Thus we see that the sectors with the most workers and the lowest salaries, such as the education and health sectors and the export processing zones, are where there are the most women working. Single mothers have to accept any job that they are offered, even if the wage is low, to be able to support their children.

Public and private sector employers use this form of discrimination, marginalizing women and ignoring their right to a job that pays them more than a subsistence wage.

Another form of discrimination occurs when an employer refuses to hire a pregnant woman in order to avoid paying for the pre and post-birth rest periods. Additionally, women over age 25 have trouble finding jobs, because thousands of women between the ages of 14 and 24 are also seeking jobs, and employers value their youth, energy, lack of union experience, and lack of knowledge about their rights.

Cases of noncompliance

1. Corporación Municipal de Mercados de Managua and the worker Heidelberg del Rosario Velasquez Herrera

In January 2002, the Corporación Municipal de Mercados de Managua fired pregnant worker Rosario Velasquez without showing just cause or following the authorization process required to fire her.

The General Labor Inspectorate determined that this dismissal was arbitrary and illegal, and ordered the company to keep her in her job, with the same salary. Despite this resolution, it is almost hopeless that she will be reinstated, because the judges, and not the administrative authorities (like the Inspectorate) are responsible for ensuring that the reinstatement happens.

Obstacles to compliance

- The existing laws regarding discrimination in employment are insufficient. Discrimination, particularly against women, is a real obstacle to women's development and advancement, because their access to jobs is limited because of their sex or age. This is a serious violation of their rights.
- Lack of a vision against discrimination: The Ministry of Labor has not done any campaigns against discrimination in the workplace, nor done anything to address the problem.
- For many companies, "freedom in hiring" is the highest principle, even though it implies adopting measures of discrimination.
- The Nicaraguan government has not adopted the principle of "equal pay for work of equal value".
- A *machista* and exclusion-based culture: Certain jobs are thought of as belonging to workers of a certain age or sex. Experience, capacity, and suitability are not considered.

Elimination of Child Labor

Legal Recognition of this Right

Constitution:

- Article 71, second paragraph: Establishes that children enjoy special protection and all of the rights that their condition requires.
- Article 84: Prohibits children from being employed in jobs that can affect their normal development or obligatory schooling. It protects children and adolescents against any kind of economic or social exploitation.

Labor Code:

- Article 131: Establishes that the minimum working age is 14. The General Labor Inspectorate will regulate exceptions.
- Article 132: Establishes that it is the obligation of the government, employers, and families to protect boys, girls, and adolescents, preventing them from carrying out any activity or job that will harm their education, health, or their physical, mental, intellectual, social, or spiritual development.
- Article 133: Prohibits adolescents, boys and girls from performing unhealthy or morally dangerous jobs, including work in mines, trash dumps, or nighttime entertainment centers.

Legislative decrees:

- Law 22-97: Published in Official Registry No. 66 from April 10, 1977. Creates the National Commission for the Progressive Eradication of Child Labor and the Protection of Child Workers, which includes governmental institutions, worker and employer representatives, NGOs that address issues related to children, and that has the permanent support of the ILO and UNICEF.
- Law No. 71-98: The Child Labor Inspectorate will have the responsibility to: supervise, monitor, and control compliance with labor law related to child labor; follow up on complaints filed by child workers; train labor inspectors on the issue of child labor; guarantee compliance with labor rights through inspections; educate workers and employers about children's labor rights; etcetera.
- Law No. 474: Published in Official Registry No. 199 from October 21, 2003. Reaffirmed that the minimum working age is 14, and abolished labor inspectors' ability to establish exceptions. Also recognized that 16 year olds can legally have labor contracts. It also broadened the prohibition on adolescents' work in certain places where they are exposed to moral and physical danger.
- An agreement with the owners of nighttime entertainment centers in Managua, León, Matagalpa and Jinotega to not hire children younger than 14. Afterwards,

there was another agreement with the export processing zone companies and the owners of employment agencies in Managua.

ILO Conventions:

Ratified:

- Convention 138, on the minimum working age, 1973
- Convention 182, prohibiting the worst forms of child labor, and discussing immediate action to eliminate it, 1999.

What happens in practice with child labor?

Nicaragua has ratified ILO Conventions 138 and 182 stating that the minimum age for employment is 18 and that children younger than 16 can be authorized to work if the working conditions guarantee their health, safety, and morality. Convention 182 discusses the elimination of the worse forms of child labor. The Constitution prohibits minors from working in jobs that could affect their education or normal development.

Despite this protective legislation, children suffer all kinds of violations of their rights in the workplace. Children are paid less than minimum wage. The work is not done in a healthy environment, but rather in the open air without access to potable water or bathrooms. The food they are given does not fulfill the requirements of a balanced diet or allow them to recuperate the energy spent working. Continuous work does not allow them to go to school. Along with the mistreatment they are subjected to, this does not help them develop healthy personalities. They learn to resolve their problems with violence.

Furthermore, child workers do not enjoy any social security or other benefits, because they cannot appear on the registries as formally hired workers.

In general, the conditions of child labor are precarious.

Legal flexibility

Article 131 of the Labor Code establishes 14 as the minimum working age, but it also allows the General Labor Inspectorate to determine exceptions. This opens a loophole allowing the widespread use of children under age 14, given Nicaragua's economic conditions and the Ministry of Labor's inability to monitor to ensure compliance with the law. This Article was reformed through Law 474 in October 2003, eliminating the Labor Inspectorate's ability to establish exceptions and allow children under age 14 to work.

Flexibility in practice

It is well known that laws restricting child labor are not applied in the agricultural sector. This situation worsens during the harvest times for coffee, cotton, or bananas;

during these seasons, many children help their parents in the fields to increase the family's income. In urban areas, many children work informally in the streets, exposed to bad weather and without access to potable water or bathrooms.

Cases of noncompliance

1. Children working during the harvest season on coffee, cotton, or banana plantations.

Children help their families during the harvest time, cutting or carrying the products, or handing out water and food among the workers, without receiving any pay. In some cases they receive small sums of money, as "recognition" of their efforts. These children work between about 7 am and 4 pm. They work without protection or security.

2. Children working in the streets

Many children work in the streets selling ice water, juices, gum, and candy at bus stops. Others work cleaning car windshields at the stoplights, washing cars in parking lots, or weeding gardens at private homes.

3. In supermarkets

In addition to agricultural work, child labor is also evident in large supermarket chains, where children under age 14 are work as grocery beggars, without fixed salaries or any other benefits. They are paid only with tips from shoppers.

4. Domestic servants

Many girls work as domestic servants in the houses of rich families. They have very long working hours and their responsibilities exceed the abilities of a young girl. There is practically no control over working conditions for domestic workers.

In Nicaraguan homes, particularly in rural areas, girls are prevented from working under equal conditions with boys, because they are forced to drop out of school and help in the home and take care of their younger siblings. This is a form of double discrimination: first because they are placed in the traditional female "domestic" role, and second because their human rights, as children, are violated.

Obstacles to compliance

- Poverty is a primary cause of noncompliance with child labor laws in Nicaragua.
- The authorities carry out few inspections with regard to child labor, particularly domestic work.
- When a labor inspector visits a plantation or hacienda, he may witness hundreds of children working, but not include this information in his report.

- In some sectors, child labor is seen in a positive light, as something necessary to teach children responsibility. From this perspective, children should start working at an early age, because it will teach them skills and earn them money. This perspective does not consider access to schools, continuing the cycle of poverty.

Final Reflections

In Nicaragua, there is a tendency to weaken collective labor rights and prioritize individual rights. This process contradicts the legal criteria that favor collective negotiation of working conditions. But in the context of poverty and unemployment, workers do not have another option. They must defend their jobs, and remain in an individual working relationship with their boss.

The processes of globalization and "free trade" require a labor market without much governmental control or intervention, where private agents (capital and labor, or employer and worker) establish their own work arrangement. This reality, known as labor flexibility, puts workers in a vulnerable situation before the power of the employer, and limits their ability to organize or bargain collectively.

Workers are not motivated to organize into unions because they fear that they will be fired as a result. This makes it difficult for workers to gather the strength to be able to collectively bargain and achieve better conditions. The low union presence in different companies reflects the precarious working conditions, job instability, legal loopholes that facilitate dismissals, and the minimal governmental control over company activities.

However, there is still legal protection for collective bargaining processes. This situation should allow a search for new alternatives, new clauses and social pacts, that ensure the growth of unions and the possibility of making a difference on a national level. For now, unions are the only organizations that are legally allowed to negotiate working conditions on behalf of workers.

Unions should not limit themselves to the small space of their relationship with a particular company. They should expand their scope, proposing new labor policies, denouncing violations and protecting labor rights. Women's participation in unions should be promoted and facilitated.

Decrees, laws, and conventions have been signed in Nicaragua with the objective of encouraging investment in the export processing zones, highways, and tourist sector. There have also been contracts providing concessions of the public services or natural resources, and these documents do not include clauses that guarantee compliance with labor law.

All of the problems that we have mentioned in this document are part of a general tendency in Central America and the world, to increase flexibility of labor rights. This clearly is a response to the new economic model. We speak of a neoliberal model, a "free

trade" system, which promotes freedom for the business sector as a priority over workers' rights.

In this way, labor rights are simply a nuisance for companies that want to generate higher profits at the lowest possible cost. Pressure from international organizations like the International Monetary Fund and the World Bank has promoted changes in the labor field and in state services. The visible consequence of these policies has been the proliferation of precarious and unstable work, the expansion of social inequality, and increased poverty. It is foreseeable that labor rights will continue to be deregulated, because of the idea that labor and social rights are "barriers" or obstacles for business. This perspective is being integrated into the work of public institutions, which traditionally were responsible for ensuring compliance with these regulations.

In cases where the law provides protection for certain rights, these laws are not applied in practice, because the public institutions are inefficient and do not fulfill their monitoring role, and companies are thus free to violate these regulations.

The systematic violations of different rights, which we have investigated here, reduce the income that workers are due. These violations make the workers work more than the legally allowed overtime hours, and prevent workers from enjoying a healthy workplace environment and medical services to cure work-related illnesses. They must sign contracts that create illegal hiring mechanisms, such as the lending of services or continuous contracting. They are required to work long shifts without receiving additional pay for the extra hours.

The panorama we are presented with is thus that of "labor flexibility", which on the surface sounds like a positive term but in reality causes the loss of workers' rights. Flexibility in all of its manifestations (legal, jurisprudential, and in practice) is the labor strategy used by the proponents of "free trade", in other words, by multinational companies and groups of international power.

Its strategy is aimed towards a final objective: eliminating all of the laws, norms, and protections that impede "free trade between the parties". This is because it is considered that in the "free market" labor relations should be regulated by the market, not by Labor Codes or the government. This perspective is then integrated not only into the reality of the workplace, but also into the labor, commercial, and environmental laws, and into all aspects of social life.

Let us look at the example of occupational health. We can say that in terms of health, many rights are guaranteed by law, but in practice, the workers encounter serious problems. When medical services were privatized, these services worsened substantially, and became a privilege for those who have the economic means to pay for them. Furthermore, companies commonly fail to give their workers this insurance, or give them permission to go to medical appointments.

The medical attention given to the insured population is given by the so-called provisional medicine companies, which are subcontracted by the Nicaraguan Social Security Institute as a way to privatize the medical services that this Institute is responsible for providing. Before 1990, the Nicaraguan Social Security Institute attended to all of the workers' illnesses; today, the provisional medicine companies do not cover chronic, degenerative, or high-cost illnesses, with resulting harm to the working population.

In terms of protections and working conditions, we found that the Ministry of Labor's labor inspectors acted more often in benefit of the companies, which does not allow for the adequate enforcement of labor rights.

Another clear example of labor flexibility is found in employers' use and abuse of overtime hours. These abuses are possible because in practice, judicial and administrative authorities use a restricted interpretation of the terms "incentive" and "salary", which creates jurisprudential flexibility.

Article 84 says: "*The normal salary is that earned during the ordinary workday, which includes the basic salary, incentives, and commissions.*"

The authorities interpret "incentives" to mean only those sums of money paid for high productivity, and not amounts paid for working overtime or for other reasons. No law or regulation makes this distinction, so the judicial and administrative authorities' interpretation openly violates the fundamental principle No. VIII *In dubio pro operario* which establishes that in the case of a conflict or doubt regarding the application or interpretation of legal norms, the most favorable interpretation for the workers will prevail.

Through this restricted and illegal interpretation, the narrow scope of "incentives" is restricting the ordinary salary received by workers, which is the basis for calculating vacations, year-end bonuses, overtime hours, and work on holidays or weekends. In all cases, the worker loses a percentage of the pay they are due, and they do not have anywhere to go to complain, because both the administrative authorities and the labor judges have adopted the same interpretation of labor rights.

This restricted interpretation also allows employers to contribute less to the social security system, because when workers earn less pay, the employer's contribution is less. Also, when the salary is reduced, the employer can pay less to the INATEC for workers' technical training.

There are also other problems, including:

1. Employers force employees to work more overtime hours than Article 58 of the Labor Code allows.
2. Once the workers have worked the extra hours, whether or not they are legal, they are not paid extra.

The worker cannot refuse to work the extra hours, even if they go beyond the legal limit, because they may be fired. If they are then not paid extra for this overtime work, they will not file a complaint while they sill have their job, because this could also lead to their dismissal.

When a worker decides to file a complaint to demand their pay for working overtime, Sundays, or holidays, they become aware of two limitations:

1. Statute of limitations: Article 257 of the Labor Code establishes that actions derived from the collective bargaining agreement and individual work contracts expire after one year. Although this article does not specify when this year begins, the judicial and administrative authorities have interpreted it to mean that the year starts from the moment when the workers should be paid for the hours they have worked. Again, the authorities use a restrictive interpretation which hurts the workers and openly violates the principle *In dubio pro operario.* An interpretation faithfully based on this principle would determine that the year starts from the time when the work contract ends.
2. Requirements of the complaint: Article 207 of the Labor Code establishes the requirement that the objective of the complaint be determined with as much precision as possible. This does not mean that if the worker forgets to mention some days when he or she worked extra hours that they will not be paid, because the labor processes allow a judge to recognize and concede benefits not requested. However, the courts have gone beyond the law, demanding that workers indicate every single extra hour that they have worked, in the filing of their lawsuits.

The courts allege that if the worker does not detail all of the hours worked, they could cause damages for the employer, which is not true, because the employer has at his disposition all of the pay stubs and time cards, which they could use to contradict the worker.

Workers, on the other hand, generally do not maintain exhaustive and detailed registries of all of the extra hours worked, and in most cases they cannot calculate exactly how much they are owed. Generally, if the worker cannot detail hours and days worked, the case will not be heard.

We have seen how flexibility is imposed on the workers. In the face of this, we should decide to defend the rights contemplated in our law, before it is too late to recover them. It is crucial to begin the struggle for change, and take firm positions against the institutionalization of the injustices that we observe.

Bibliography

This document is an adaptation of:

- Alemán Mena, Donald (2003). “Labor laws in Nicaragua: Legal, political, and practical obstacles to compliance.” Final report. ASEPROLA.
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These documents and other related documents can be found on our website, **www.aseprola.org**

Information was also taken from the following report published by ASEPROLA

- Cruz Castillo, Scarleth, and Leda Abdallah (2003). “Case study: Labor flexibility in maquila companies in Nicaragua. Salaries, working hours, union autonomy, and collective bargaining.” ASEPROLA.