



SUMMARY

JUNE 2017

Legal Analysis of the Right to Childcare for Workers in Honduras

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Introduction

This legal analysis of the right to childcare for workers in Honduras is presented at a moment when the Honduran Maquila Union Network (RSM-H) and the Honduran Maquila Association (AHM) are collaborating on a pilot project, which was negotiated as part of the 2014 Tripartite Agreement between the RSM-H, the AHM and the Secretariat of Labour and Social Security. The focus of that project is improving home-based childcare facilities for the children of maquila workers, principally those in the garment export sector. In this context, when childcare options for workers have become a subject of public discussion and debate, it is important to assess the legal obligations of both employers and the state concerning the provision of childcare for working parents and their children.

National legal obligations and relevant legislative norms

Honduras has the most extensive legal framework for childcare in Central America setting out the responsibilities of both employers and the state regarding the provision of childcare for working parents.

- **Honduran Labour Code, Article 142 (1959):**

Any employer with more than 20 women workers must provide a space for working mothers to safely feed their children under three years of age and where they can leave their children during working hours under the care of a suitable person who is designated and paid to carry out that task.

English summary of *Análisis Legal Vigencia: Centros de cuidado de niñas y niños en Honduras*, junio 2017. The full Spanish document is available [here](#). This work is part of the regional initiative *Promoting Sustainable Childcare Solutions in Central America's Garment Industry*.

- **Childhood and Adolescence Code, Article 138**

(1996): Various government departments will jointly adopt necessary measures to ensure that children under the care of working parents and legal guardians will be taken care of in childcare centres during working hours. They will also ensure that these centres have the necessary facilities to provide quality care, taking into consideration the age, physical and mental state of the child, in order to adequately meet the child's basic health and nutritional needs, and contribute to their sustained psychosocial development. Childcare workers must receive special training in order to be able to provide this service.

- **Equal Opportunities for Women Act,**

Article 59 (2000): Employers employing more than 30 women workers must establish a childcare centre with

proportional support from the parents based on their economic ability in order to provide care for female and male workers' children under the age of seven.

- **Regulations to the Equal Opportunities for Women Act, Article 23 (2008):**

All employers who employ more than 30 female and male workers are required, in each of their establishments that meet this condition, to maintain and pay for a childcare centre and nursery approved by the General Labour Inspectorate in order to care for the children of their workers who are under the age of seven. Qualified staff will care for children during working hours. The National Institute for Women may, at any time during the workday, inspect these centres without prior notice and verify the quality of service that is being offered.

The Debate on Legal Obligations Regarding the Provision of Childcare

The existence of various legal norms that promote the creation of childcare centres for working parents has generated considerable debate regarding which laws apply. There are differences in those laws and regulations concerning the responsibilities of the various parties involved, including who must assume the costs of childcare.

One source of confusion is an October 15, 2004 letter from the Honduran Secretariat of Labour to the Maquila Association (Official Document Number 394-STSS-04), in response to a written request for clarification from the Association, which argues that Article 138 of the 1996 Childhood and Adolescence Code cancels out (tacitly repeals) Article 142 of the Labour Code of 1959 and prevails over Article 59 of the Equal Opportunities for Women Act (2000) and Regulations (2008), despite the fact that the latter is the most recent piece of legislation on childcare. While the letter represents a legal opinion of the Secretariat of Labour, it is important to note that according to the Constitution, only the National Congress has the authority to create, make a ruling on, interpret, reform and repeal laws (Article 205 of the Constitution of the Republic). As such, the statement from the Secretariat is subsequently non-binding.

Legal Interpretation

According to Article 18 of the current Labour Code, when confronted with contradictions in labour laws, recognized labour rights principles must be applied to resolve them, in particular, the *principio protector*, which refers to the application of the rights most favourable to workers, and the *principio de razonabilidad*, which recognizes the relative imbalance of power and resources between the employer and the worker.¹

Based on the *principio protector*, the Equal Opportunities for Women Act and Regulations prevail because, of the three pieces of legislation, it is the most favourable and beneficial to workers. However, while the Equal Opportunities for Women Act states that working parents may provide a financial contribution for the childcare service, based on their ability to contribute, Article 23 of the 2008 Regulations for the Act goes further, stating that the employer must bear full responsibility for the cost of the childcare facility. This argument is reinforced by the *principio de razonabilidad*, which establishes that because workers have few financial resources to contribute to covering childcare costs, the employer must bear the main proportion of, if not all, the costs.

The Equal Opportunities for Women Act also establishes the role of the state to promote and provide oversight on legal compliance, and to authorize, regulate and supervise childcare centres.

¹ Other important labour rights principles that may be employed to resolve conflicts among laws include *El Principio de irrenunciabilidad* (once rights have been established, these rights cannot be renounced); *El Principio de continuidad* (once established, rights continue to apply); *El Principio de primacia de la realidad* (when existing conditions are more beneficial to workers, they continue to apply); and *El Principio de equidad de genero* (right of workers to gender equality). For a slide show review (in Spanish) of these principles, visit: <https://www.slideshare.net/luciaagonzalez1989/principios-del-derecho-laboral>.

Recognizing the Equal Opportunities for Women Act and Regulations as the prevailing legal norms regarding provision of childcare, in 2015, the AFL-CIO Solidarity Center recommended that the government of Honduras through the Secretariat of Labor and in collaboration with the National Women's Institute (INAM) set dates to visit all establishments to determine if they have more than 30 workers and, if so, to make employers aware of their obligations to establish a child care centre and nursery for all workers' children under seven years of age. The recommendation specified that the centres should be approved by the Inspector General of Labour and staffed by qualified personnel throughout the work day. The INAM should also verify the quality of the childcare provided and perform unannounced inspections.

The Worker Rights Consortium (WRC) and Fair Labor Association (FLA) have recognized employers' legal responsibility for provision of childcare, citing both the Honduran Labour Code and the Equal Opportunities for Women Act as the applicable standards. In two 2015



reports, the WRC acknowledged the tripartite agreement on childcare, however it stated that the agreement neither negates the employer's obligation under the law nor provides a clear path for any given factory to come into legal compliance.²

In 2016, Honduran women's, human rights and other civil society organizations made submissions to both the UN Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Committee on Economic, Social and Cultural Rights (DESC), calling for the harmonization of legislation and policies related to the right of working parents to childcare in Honduras.³ (For a summary of International Standards and Statements on the Right to Childcare, see page 4.)

Conclusions

The *principio protector* states that in cases of conflict between two or more laws, the norm most favourable to workers applies. The Equal Opportunities for Women Act and Regulations are the legal norm most favourable to workers. The Regulations to the Act require the establishment of workplace childcare centres for children under seven in each workplace that employs more than 30 male and female workers. According to Article 23 of the Regulations, the cost of childcare centres must be assumed by the employer.

If there is agreement among unions and employers in the sector to explore other childcare options for workers outside the workplace, the responsibilities of employers, including their responsibility to cover the cost of childcare, would need to be determined through negotiation between the two parties. The creation of childcare options for working parents outside the workplace does not negate the legal obligation for the employer to provide a facility for nursing and childcare at the workplace.

The Equal Opportunities for Women Act and Regulations also reinforce the obligations of the state, established in Article 138 of the Childhood and Adolescence Code, to promote and oversee compliance with the legislation and regulations, and to authorize, regulate and supervise childcare centres.

² See WRC reports of Genesis Apparel, March 2016 and Gildan Villanueva, December 2015. Those reports are available at: <http://www.fairlabor.org/transparency/workplace-monitoring-reports>. FLA workplace monitoring reports are accessible at <http://www.fairlabor.org/transparency/workplace-monitoring-reports>.

³ Informe Alternativo al Segundo Informe del Estado de Honduras ante el Comité de Derechos Económicos, Sociales y Culturales Presentado ante del Comité de Derechos Económicos, Sociales y Culturales de Naciones Unidas en 58o período de sesiones, Mayo 2016. Situación de mujeres trabajadoras, p.59. Informe Alternativo ante el Comité para la Eliminación de Discriminación contra la Mujer CEDAW, Plataforma CEDAW Honduras, Sept 2016. Recomendaciones. Situación económica y laboral, #8, p. 33.



International Standards and Statements on the Right to Childcare

Access to childcare for working parents and their children is internationally recognized as a human and labour right, and as an important factor in helping to achieve equality for women.

Article 11 of the **UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** calls on State Parties to “prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work... through the promotion and development of a network of childcare facilities.”

In 2016, the **CEDAW Committee** expressed concern to the Honduran government about the lack of gender equity in the workplace, including the disproportionate unemployment among women, the high concentration of women in low paying jobs and in the informal sector, and the problem of gender-based segregation in employment. As a result, the Committee recommended that the government guarantee equal opportunity in the labour market for men and women, including the creation of adequate measures to promote access and transition for women to the formal sector.

In 2016, the **UN Committee on Economic, Social and Cultural Rights** recommended to the Government of Honduras that it “adopt the necessary measures to improve the working conditions for women, in particular in the maquila and domestic labour sectors in order to achieve the same labour conditions as those of other workers.”

ILO Convention 156 and Recommendation 165 refer to the rights of male and female workers with family responsibilities such as children in their care. Article 9 of Recommendation 165 specifically calls for equal opportunity of men and women workers and calls on State Parties to “develop or promote childcare and other community services, public or private, responding to their needs.”

One of the **ILO’s Fundamental Principles and Rights at Work** is non-discrimination in employment, including on the basis of gender. The need for compliance with these principles is also established in the DR-CAFTA free trade agreement.

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977/2017) calls on multinational enterprises to contribute to the elimination of discrimination in employment and occupation.

For a comparison of Central American childcare legislation and regulation see:
http://www.maquilasolidarity.org/sites/maquilasolidarity.org/files/attachment/Childcare_Legal_Central_America_Feb_2016.pdf