

# EL SALVADOR

## Legal Analysis: New law on work place childcare



This document analyses each article of the 2018 Special law for the *Regulation and Installation of Nurseries for Workers' Children* ratified by the Salvadoran Legislative Assembly on May 31, 2018. The purpose of this document is to clarify the intent of the regulations in terms of their present application and to guide employers who are committed to complying with this constitutional mandate and taking steps towards its implementation. The document ends with conclusions and recommendations.

Organizations such as Coalition for Decent Work for Women (CEDM) and various trade union organizations have expressed the importance of drawing attention to the particular situation of women who, in large part, take responsibility for childcare. However, both fathers and mothers must have access to social support services that enable them to combine family obligations with work responsibilities and participation in public life.

Achieving a balance between work and family life in companies contributes to improved job satisfaction, improved worker attitudes, and increased motivation to make additional efforts to fulfill work obligations and maintain employment. All of these factors have a positive impact on productivity. The existence of childcare centres ensures that workers of both sexes - and particularly women, who have historically been assigned the role of childcare provider - can reconcile their work and family responsibilities.

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Coalition for Decent Work for Women and the Americas Group have been collaborating on an initiative to promote sustainable and quality childcare solutions for working parents in El Salvador's garment maquila industry. On August 28, CEDM and the Americas Group co-hosted a roundtable for international brands and manufacturers and suppliers on the implications of El Salvador's new childcare legislation for employers and workers in the sector. At that meeting, Ena Lilian Núñez Mancía, an independent legal consultant and expert on labour issues, presented her analysis of the obligations of employers under the new legislation. Meeting participants were unanimous in requesting additional information on the content of the law. This document is the result of that work. We hope it is of use to factory management, civil society and public officials as they prepare for the implementation of the legislation over the next year and a half.

Americas Group / CEDM

### Additional Resources:

- [Summary Report Forum on Childcare: Options for Workers and the Business Case for Employers](#)
- [Seeking solutions to childcare needs of maquila workers in El Salvador](#)
- [Legal Analysis of the Right to Childcare for Workers in Honduras](#)
- [Tackling Childcare: The Business Case for Employer-Supported Childcare](#)

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**CEDM** is a coalition of women's and trade union organizations, including Mérida Anaya Montes – Las Méridas; Organización de Mujeres Salvadoreñas por la Paz – ORMUSA; Federación de Asociaciones y Sindicatos Independientes de El Salvador – FEASIES; Mujeres Transformando; Coordinación de Mujeres Sindicalistas de El Salvador – CMSES.



**The Americas Group (AG)** is a multi-stakeholder forum that includes international brands and manufacturers, the Fair Labor Association (FLA) and the Maquila Solidarity Network (MSN) working collaboratively to promote sustainable practices in the apparel and footwear sector in the region. Companies participating in the childcare initiative include: adidas, Dallas Cowboys Merchandising, Gildan Activewear, Hanesbrands, Mountain Equipment Co-op, Fanatics, Fruit of the Loom, New Balance, Nike, Puma, Under Armour, and VF Corporation.

## THE AMERICAS GROUP

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# EMPLOYER OBLIGATIONS TO ESTABLISH AND MAINTAIN NURSERIES

In El Salvador, employer obligations to establish and maintain nurseries and childcare centres for workers' children was first established in the 1950 Constitution and later in the 1983 Constitution, currently in force, under Article 42(2).

Nevertheless, this stipulation went unnoticed until May 31, 2018, when the Legislative Assembly issued the *Special Law for the Regulation and Installation of Nurseries and Childcare Facilities for Workers' Children*. This law is the subject of this document.

It is important to understand the reach of this new law and identify whether it will require the adoption of additional normative or institutional guarantees that ensure that its regulations are implemented effectively.

The law establishes general rules pertaining to the conditions required to comply with the obligations to provide this service and refers to future regulations, which must be enacted 120 working days after the law comes into effect. The details of these conditions and procedures that regulate childcare centres are currently in operation even before the application of this law. It is the norm that companies should follow even before the special law comes into effect – not because of the obligation required under the law, but because of the obligations emanating from the actual Constitution.

## International laws ratified by El Salvador related to childcare

- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), ratified by El Salvador in 1981. Art. 11 establishes specific steps related to the right to equal conditions of employment between men and women, protections for maternity, and the provision of social services to balance work and family responsibilities.
- The Salvadoran state has also ratified three of the most important ILO Conventions related to equality between men and women in the area of remunerated work: Convention 100, the Equal Remuneration Convention for work of equal value (ratified in 2000); Convention 111 Discrimination in Employment and Occupation (ratified in 1995); and Convention 156 regarding Workers with Family Responsibilities (ratified in 2000).
- Art. 3.3 of the International Convention on the Rights of the Child, ratified by El Salvador, establishes the legal foundation for nurseries and childcare centres, and Article 18(3) establishes the obligation of State parties to adopt appropriate measures to ensure that “children of working parents have the right to benefit from child-care services and facilities for which they are eligible.”

## General content of the law<sup>1</sup>

- CHAPTER I: **Object of the law, area of application and concept** (Articles 1-3)
- CHAPTER II: **Rights and obligations** (Articles 4-6)
- CHAPTER III: **Conditions, requirements and responsibilities** (Articles 7-9)
- CHAPTER IV: **Final provisions** (Articles 10-15)

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<b>Art. 1.</b> Object of the law	To regulate the conditions under which employer will put in place nurseries or childcare centres for workers' children.	The law uses the terms "Nurseries" and "Childcare Facilities" (in Spanish, the term used is " <i>área de custodia</i> ") which are no longer in common use. It should be understood that these terms refer to childcare centres or child development centres.
<b>Art. 2.</b> Scope of application	Applies to the public sector, independent public institutions ( <i>instituciones oficiales autónomas</i> ), municipalities and private companies.	This means that all employers, of any sector, are obligated to comply with the law.
<b>Art. 3.</b> Concept of nurseries and child care facilities	What is a Nursery or Childcare Facility for? <ul style="list-style-type: none"><li>• For women workers to be able to breastfeed their children.</li><li>• For workers to be able to leave their children under the supervision and care of trained individuals while they work.</li></ul>	<p>This article articulates the Constitutional Court's central mandate, which orders that children's comprehensive development be ensured.</p> <p>The concept of comprehensive development considers children to be entitled to human rights. It includes nutrition, health, stimulation, education, protection and recreation, ensuring development and achievement of skills for life.</p> <p>Given that the law establishes that the nursery be a place where children can be breastfed by their mothers, an appropriate space (private and hygienic) should be established.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
Schedule for services provided	As in Art. 3, the services of care and supervision should be available during the times that the father or mother is at work.	<p>It should be understood that whichever type of service is offered, whether it be the employer who provides it directly, or through a third party, the intention is that workers' children are taken care of and supervised while they are at work. For the law to be fulfilled, the following must be guaranteed:</p> <ol style="list-style-type: none"> <li>(1) That the service is available before the beginning of the work day;</li> <li>(2) That the service remains available until the end of the work day; and</li> <li>(3) That ways of extending the service are taken into consideration when workers work overtime or night shifts. The law does not indicate that this service is only required during day shifts.</li> </ol>
Age of the children covered by the law	When the post-natal period has ended until three years of age.	<p>Whenever children's rights are concerned, as in this case, a broad interpretation of the law should be applied in the interest of the child. This means that in this case a child will be considered to be three years old until the day before she/he turns four. It should not be interpreted that the child no longer has the right to this benefit when she/he turns three.</p> <p>Given that early childhood is considered to end at 6 years and 11 months, it appears that the law's coverage is excessively limited and insufficient, considering that (access to childcare) is a constitutional right. It could be concluded that the law's scope is extremely restricted and that it does not fulfill the Constitutional Court's decision.<sup>2</sup> Since constitutional rights are not absolute, their regulation should not prevent the exercise of those rights or disproportionately limit their scope. The law's scope should be reasonable, given that an analysis could be done to determine whether the ruling is being properly fulfilled and this article could be deemed to unjustifiably limit the right established in the Constitution.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<p><b>Who should take care of children and what requirements should there be?</b></p>	<p>Art. 3 indicates that those in charge of supervising children should be professionals in early childhood education, or pre-school education.</p>	<p>The requirements and specific job description will presumably be contained in the law's regulations once they are established.</p> <p>For an idea of what could be included in the regulations, one could refer to the current <i>Reglamento de Programas de Atención de la Niñez y la Adolescencia</i>, established by CONNA<sup>3</sup> (Art. 10) and the steps that childcare centres are currently required to take to accredit their programs. It also outlines what qualifications and aptitude childcare personnel or those who come into direct contact with children and adolescents should have.</p> <p>They should be educated in a relevant field and have passed medical, psychological and aptitude tests. Their previous experience should be verified. For example, they should not have a criminal record related to the violation of children's or adolescents' rights.</p> <p>A priority established by the stipulation referred to in Art. 36, letter I, is the obligation to provide ongoing training to personnel to develop different kinds of skills required for working with children, including in the areas of:</p> <ul style="list-style-type: none"> <li>• daily care,</li> <li>• models of child development,</li> <li>• good treatment,</li> <li>• positive discipline,</li> <li>• children's rights, and</li> <li>• early development and stimulation, among others.</li> </ul>
<p><b>What role do these individuals carry out?</b></p>	<p>In addition to the work of caregiving, their work will involve carrying out activities aimed at the development of children's cognitive, social, emotional and psychomotor skills.</p>	<ul style="list-style-type: none"> <li>• Plan and develop education, recreational, social and cultural activities with the children</li> <li>• Promote the putting into practice of civic and moral values</li> <li>• Perform stimulating activities relevant to different developmental stages and ages</li> <li>• In general, activities should be carried out with a focus on creativity, be game-based and use expressive language as fundamental components of children's learning.</li> </ul>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<p><b>Art. 4.</b> Who has the right to Nurseries and Childcare Facility?</p>	<p>Workers in the public sector, private sector, independent public institutions and municipalities have the right to enjoy access to nurseries and childcare facilities. Workers who have children whose age falls within the stipulations of the law.</p>	<p>The explicit recognition of access to nurseries and childcare facilities as a worker's right is one the most valuable aspects of this law, given that it constitutes the State's commitment to positively impact the quality of life.</p> <p>This means that access to this right should be guaranteed, equally (for both men and women), and without discrimination, although always within the stipulations of the law. In other words, children must be within the age range established by the law. No conditions should be placed on the provision of services other than those that are presumed to be necessary to fulfill the law's application. Access cannot be linked to how a worker carries out her work or the type of contract she holds. It should be understood that if the law does not make any distinctions, the person implementing the law must not either – in this case, the employer.</p>
<p><b>Art. 5.</b> Who is obligated to guarantee the establishment of Nurseries or Childcare Facilities?</p>	<p>Employers with more than 100 workers.</p>	<p>The central issue here is the number of workers who work for the same employer regardless of whether they are all located in the same work area. This should be considered when one is deciding on which childcare option to implement in order for it to be adapted to the way the company is organized.</p> <p>Official statistics<sup>4</sup> state that only 0.31% of all companies have more than 100 workers; of a total of 161,934, only 494 belong in the category of being a large company. That means that in terms of the workers that are covered by the law, of a total of 634,454 workers according to the report,<sup>5</sup> 26% (164,514) of all workers are employed by large companies, 6% (40,551) by medium-sized companies, and 68% (429,113) by micro and small companies. In other words, the majority of workers work for companies categorized as being smaller sized. If there is follow up to determine whether the Constitutional Court's ruling is being carried out properly, this limitation may be examined to determine whether or not the coverage of this benefit is reasonable, given the situation of small, medium and micro companies.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<p><b>Art. 6.</b> Options to fulfill the right to Nurseries.</p>	<p>There are 3 options for fulfilling this right:</p> <ol style="list-style-type: none"> <li>1. Establish and maintain an on-site nursery in an annex of, or area independent of the workplace, but still within the same geographic location.</li> <li>2. Establish and maintain a shared centre with other companies.</li> <li>3. Pay for services to be provided by professional nurseries.</li> </ol>	<ol style="list-style-type: none"> <li> <p><b>1. On-site nursery and childcare facility</b></p> <p>The first option refers to the employer establishing or setting up an appropriate space for a nursery or a childcare facility as defined by the law. The idea is that the area is close to the workplace – the law calls it an annex or a space that is independent from the work area, because it should be a place that is appropriate for children.</p> <p>The idea is to have a space close to work to enable parents to leave their children there without incurring transport expenses or investing additional time. The space should also be nearby to enable breastfeeding mothers to feed their children during the time periods that the employer is obligated to establish for that purpose. Without there being a childcare space near the workplace, the employer would have to provide the worker with additional time to travel to the place where the nursery or childcare facility is located.</p> </li> <li> <p><b>2. Shared Nursery and childcare facility</b></p> <p>The second option makes sense if the companies are in close proximity, or in the same commercial or industrial park (free trade zone), or in the same geographic area where workers from different companies could bring their children and where breastfeeding mothers could feed their children during the work day in designated time periods.</p> <p>The intention of the lawmakers here is to enable various employers to contribute to the cost and administration of a nursery that is in close physical proximity to their workplaces. A weakness of the law is that it does not provide details regarding that option, which could cause future problems related to interpretation. However, the basic idea is that the companies that are located in the same area or near one another could share a childcare space.</p> </li> </ol>



## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
		<p><b>3. Nursery and childcare facility through a third party</b></p> <p>The third option stipulates that the employer can provide the service through a third party contracted by the company. In other words, the cost of the service will be the employer's full responsibility. This should be a professional and accredited entity that normally provides this kind of service.</p> <p>Importantly, this should not be understood to mean that the employer could contract only one childcare centre or nursery – there can be various service providers. The idea is that the childcare services be easily accessible to workers. If the employer chooses a place that is located in an area that is difficult to access, this has implications in terms of cost and workers' time - this option would not be viable and the employer's compliance with the law could be called into question. In other words, it could be argued that the employer is not fulfilling their obligation under the law by choosing a place that is far from the work place.</p>
<p><b>Who determines which option to implement?</b></p>	<p>The law establishes that it is the exclusive responsibility of the employer to choose which option or options to use to comply with the law.</p>	<p>What the lawmakers intend here is to give the employer the flexibility to choose without obligating him to choose a specific option, given the various circumstances of different companies or institutions, and the fact that the option chosen should be the most suitable to the company and to the needs of the workers who will access this service. Labour relations should be based on the principle of good faith and here the lawmaker assumes that the person obligated to comply with the law will do all that is necessary to achieve compliance.</p>
<p><b>What happens if employers cannot implement either of the options, for reasons that are not their fault?</b></p>	<p>If employers have done all that they possibly can to comply with the law but there are extenuating circumstances for which they cannot be held responsible and are unable to implement the options established by the law, they can set up another option, with the worker's agreement.</p>	<p>In this case, it is up to the employers to establish a common agreement with workers to determine how to comply with the law. This is based on the fact that the reasons for which employers have not complied with the law are not their fault. It is therefore left to the employer's discretion, agreement with the worker, to determine how to be in compliance. The law leaves it to the discretion of the employers to seek agreement with the workers; they are not obliged to do so.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<p>Art. 7. What should childcare areas consist of?</p>	<p>Special protection measures should be adopted to guarantee that care is optimal.</p> <p>The law specifies that the infrastructure should include basic conditions according to children's height and the number of children housed there, in terms of:</p> <ul style="list-style-type: none"> <li>• Space</li> <li>• Health standards</li> <li>• Security</li> <li>• Equipment</li> </ul>	<p>The physical childcare area, structure, inside space – for example, diaper change room, furniture, play area -- and the outdoor area contributes to all aspects of children's development.</p> <p>Even though the Regulations that will be established should clearly stipulate this, there are regulations already in existence that can be referred to:</p> <p><b>1. Acuerdo ejecutivo N° 15-788 del Ministerio de Educación,</b><sup>6</sup> this agreement sets out the specific conditions that childcare centres must meet:</p> <p><b>Infrastructure:</b> First floor: adequate ventilation and natural or artificial light, with ramps and railings according to technical requirements and accessibility.</p> <p><b>Basic services:</b> Electricity and potable water.</p> <p>Water for children to drink and, if possible, to have a shower.</p> <p><b>Bathroom facilities:</b> Private, adequate and appropriate for children's age (pediatric bathroom), and accessible.</p> <p>As a minimum, the bathroom facilities should be set up for the use of 20 girls and boys and when possible, include a shower.</p> <p><b>Spaces for child development:</b> Places to crawl, engage in stimulating activities, rest and play.</p> <p>Work areas will be based on the ages of the children registered in the nursery.</p> <p><b>Requirements for classrooms:</b> According to age; located on the first floor with proper ventilation and natural or artificial light; 1.75 square metres per child and in special cases could be integrated classrooms (more than two age groups). Breastfeeding rooms: 4 months to a year. Rooms for ages 1 to 2 years and 2 years to 3 years.</p> <p>Multiple-use for activities (in case space is limited). For example: for eating, resting, and other activities.</p> <p>Furniture according to the age of the children. Guarantee hygienic and safe areas, protected and sanitized for crawling and activities.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
		<p><b>Requirements for Outdoor Green Space:</b> Large area with a swing set for recreation and play activities. In the absence of outdoor green space, a space for free play could be set up.</p> <p><b>2. Reglamento de Programas de Atención de las Niñez y la Adolescencia, en el Art. 36 letra e)</b> stipulates that facilities should have materials, furniture, games, and spaces that are safe and age appropriate for children's development.</p>
<p><b>Art. 8. Benefit of access to Nursery and Childcare Facility services (requirements that workers must fulfill)</b></p>	<p>In addition to the requirement of having children between the ages stipulated in the law, workers must fulfill requirements established by the administration of each Nursery or Childcare Facility.</p>	<p>This article should be read in relation to article 3, which indicates that all workers who have children between the ages set out in the law have the right to enjoy this benefit regardless of the type of employment contract they have (permanent, part time or casual).</p> <p>As such, <b>equal treatment, without discrimination</b> must be guaranteed,<sup>8</sup> which means that the enjoyment of this right cannot be linked with any aspect of how a worker carries out their work, the way they act, or other criteria. The only necessary and reasonable requirements are those that relate to the actual operations of the nursery or the childcare facility. Special attention should be paid to ensure that access to this benefit is not limited or that exclusions to the benefit are not implemented in an unjustified manner.</p> <p>Employers cannot establish criteria that limits access to childcare, given that it is a right. It is not up to their discretion. It is an obligation and therefore admission criteria must only relate to a facility's capacity to operate properly.</p> <p>Children within the age range established by the law whose parents work for companies obligated to follow the law, have the right to access the services of the nursery or childcare facility and are guaranteed equal, quality, and safe treatment with respect to the exercise of their rights.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<p><b>Art. 9.</b> Institutions in charge of ensuring the proper operation of the nurseries and childcare facility.</p>	<p>The institutions in charge of ensuring the proper operation of nurseries and childcare facilities are el Consejo Nacional de la Niñez y de la Adolescencia (CONNA), and the <i>Instituto Salvadoreño para el Desarrollo Integral de la Niñez y Adolescencia (ISNA)</i>.</p>	<p>While the law lacks clarity in relation to which institution will accredit the operation of nurseries and which institution will carry out supervision, it should be recognized that CONNA, as mandated by law as the institution responsible for accrediting and registering facilities that provide services to children. It is therefore the responsibility of CONNA to authorize these facilities. ISNA is the institution that currently conducts the supervision of those centres.</p> <p>Similarly, MINED<sup>8</sup> also has a role given that it is the institution that accredits formal education programs and, in accordance with <i>Acuerdo Ejecutivo No 15-1788</i>, regulates the requirements that all centres that carry out early education should meet.</p>
<p><b>Art. 10.</b> Prohibitions</p>	<p>No type of discount, compensation or reimbursement shall be given to workers if they bring their children to a facility that is not authorized by the company where they work, when that company already has a contract with an existing facility.</p>	<p>This article is confusing and could be considered to put extra limitations on employers prohibiting them from recognizing the childcare costs that workers incur when they do not bring their children to a facility that has been contracted by the company for childcare. The reasons for which a worker or various workers do not use the services of the facility designated by the employer can be justified given the distance, a special services required by the child, difficulty with transportation etc. The employer would therefore have the right to compensate the worker(s) economically if they consider it to be reasonable and appropriate. Furthermore, it may also be considered the employer's obligation to fulfill this right in favor of the workers, given Article 42 of the Constitution. This article could be examined by the Constitutional court to determine compliance with the ruling and it could be determined that the lawmakers were overstepping their mandate.</p> <p>Similarly, this does not take into account that an agreement may exist with the workers through a collective bargaining agreement (CBA). If a collective agreement does exist, a provision regarding childcare would be valid, given that the CBA prevails over the law.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<p><b>Art. 11.</b>  <b>Fines to the employer for failure to comply (for reasons that are attributable to the employer).</b></p>	<p>Failure of an employer to comply with the law will result in a fine of 5 to 8 current minimum wages in the commercial and service sector by the Ministry of Employment and Social Provision.</p>	<p>This means that if employers do not take the necessary steps, in a diligent and opportune way, to comply with the law, they will be fined according to a sanctioned procedure and following an inspection, this may result in a complaint or legal proceeding being filed.</p> <p>Nonetheless, if employers diligently make an effort to comply with the law to ensure workers can exercise this right, but for reasons that are not their fault, it is not possible to do so, and this leads to delays in receiving authorization for a nursery or a childcare facility, they will not be subject to fines, if they can demonstrate that the delays were not their fault.</p>
<p><b>Who pays for the full cost of children's care and supervision?</b></p>	<p>The employer(s) will pay for the total cost of any of the different childcare options.</p>	<p>Despite which type of childcare is chosen, the worker does not have to contribute to the cost.</p>
<p><b>Art. 12.</b>  <b>Fiscal incentives</b></p>	<p>Costs incurred by the employer related to the options established in article 6 (a) and (b) of the law shall be deductible from the <i>Impuesto sobre la Renta</i>, only when those costs are generated as a result of construction and equipment purchases for the nursery and childcare facility.</p>	<p>The incentive is limited to the facility's construction and equipment costs when the employer establishes the facility, and will be applied individually or with the other employers. It does not include expenses incurred when the service is contracted out to a third party and it does not include operational costs.</p> <p>Nonetheless, Art. 32 of the <i>Impuesto sobre la Renta</i> law includes deductions related to similar maintenance and operational expenditures stemming from any service that is provided to workers free of cost.</p> <p>In practice, this could create a problem between the application of both laws and given the special nature of this 2018 childcare law and the prevalence it is given over other laws, as established in Article 13, the incentive may only be regulated according to this law and not according to provisions of the <i>Impuesto sobre la Renta</i> law. A possible conflict is predicted here.</p>

## PRINCIPLE ELEMENTS REGULATED BY THE LAW

TITLE	DESCRIPTION	COMMENTARIES
<b>Art. 13.</b> <b>Specialty of law</b>	The provisions of this law have special legal character and prevail over any other law that contradicts them.	In general, the rights and obligations derived from the employment relationship are found in sector-specific laws (public or private). This law has special legal character and therefore prevails over any other existing law that stipulates something different, except in the case of a collective agreement that has improved benefits for workers. In that situation, the collective agreement is applicable.
<b>Art. 14.</b> <b>Regulations</b>	The President of the Republic will announce regulations for the law 120 days after the law comes into effect, to facilitate and ensure its correct and effective application.	<p>The law allows for a period of 120 working days for the corresponding regulations to be announced. This implies a bit more than five months. This period will delay the application of the law given that it will not be required to take effect until the respective regulations establish procedures for the accreditation and operation of the nurseries and childcare facility.</p> <p>The regulations will establish the content of the law and facilitate its implementation. The assumption is that they will be in harmony with existent regulations and that the institutions responsible will be CONNA, ISNA and the Ministry of Education and their established regulations.</p>
<b>Art. 15.</b> <b>Law will enter into force</b>	The present law will enter into force twenty-four months after being published in the Official Gazette.	The period for the law to enter into force is excessive and could compromise the ruling put forward by the Constitutional Court, which had ordered that the law be put into effect promptly, given that it has been 35 years since the constitutional requirement has existed and yet it has not been put into effect.

## CONCLUSIONS

- I. The law has gaps and imprecisions that should be resolved prior to its entrance into force in order to, unequivocally define its scope. It will be important for the Legislative Assembly to:
  - a. Clarify the role of the institutions that will be involved in the accreditation and supervision of Childcare Centres, outline their responsibilities, and indicate how they will interact with the Ministry of Education. The Ministry of Education currently has an executive order that regulates services related to early childhood.
  - b. Eliminate the prohibition in Art. 10 that refers to the freedom of employers to support or compensate the worker – if they choose to – when the worker for some reason does not use the childcare service chosen by the employer.
  - c. Clarify the fiscal incentive regulated in Art. 12, in order to avoid a conflict in the application and interpretation of the laws, given that the *Impuesto sobre la Renta* law – specifically its Art 32<sup>9</sup> - can be understood to include deductions based on operation costs or those that are incurred when the service is provided in a different manner, as would be the case if services were provided by a third party.
  - d. Establish a condition on all the childcare options so that they are in neighbouring areas or close to the workplace or workers' residences. Or, establish a maximum distance for easy access, and so that the location of the facility is not a barrier to the use of the service.
- II. Nonetheless, while it is important to carry out the indicated modifications, their absence cannot be considered an unavoidable obstacle. The obligations derived from the law are unquestionable.
- III. The Constitutional Court of the Supreme Court of Justice has the capacity to determine if its decisions have been complied with or not (in this case, by the Legislative Assembly). As a result of a petition filed by a party,<sup>10</sup> the court could review the ruling which set in motion the law in question, evaluating if the law fulfills the parameters established by the ruling in relation to the following points:
  - a. Limited coverage in relation to the age of the children that can receive the service (up to 3 years of age) regulated in Art. 3, and in respect to the number of workers (at least 100 workers), as required in Art. 5, to obligate the employer (to establish childcare services). Given that these are constitutional rights, the limitations or exclusions are only acceptable to the extent that they are the most minimal possible and are duly justified.
  - b. Time periods. There has been a 35-year delay in enacting the law (since the Constitutional came into force in 1983). Furthermore, the Constitutional Court provided a relatively short time-frame to the Legislative Assembly to issue the law (6 months). As a result, the court could determine that the 24-month period for the law to come into effect and to enact the regulations -- 120 working days after the law enters into force -- nullifies or evades the Court's order. As such, the Court could order an amendment to the law.
  - c. Prohibition of compensation, under Art. 10. The Court could consider that the lawmakers overstepped their authority in the creation of this article, which goes against the freedom of the employer to offer a worker compensation or another form of support for the costs that she incurs when she cannot make use of the facility or service designated by the employer.
  - d. Fines for failure to comply. Art. 11 regulates a fine of five to eight minimum wages. The Court could determine that the fine is insufficient to encourage compliance with the constitutional right and therefore does not have a dissuasive effect.

## RECOMMENDATIONS

- I. In order for all citizens to comply in good faith with a legal obligation, those required to comply with a law should make a concerted effort to do so and guarantee that it is a true benefit to workers. As such, and considering the protective nature of the principles informed by labour rights and the rights of the child, the law should be interpreted in the most favorable way for the interests of workers and children. In those situations where there is not enough clarity with respect to the scope of the law, it should not be interpreted in a restrictive way, but instead in an expansive way; in a way that the scope of the law, with respect to its benefits, are the broadest possible.
- II. Considering that the time period for the law to come into force has begun and that regulations for childcare centres already exist and can be used as a reference, companies could prepare themselves for the law coming into effect and take steps to create the conditions to facilitate their implementation. As a result, it will be important to carry out surveys and studies, through accessible consultation mechanisms with workers so that companies can move forward in identifying children's ages, the geographic location where they live, transport options, childcare needs or interest in using childcare services, among others. The previous information will be useful in identifying possible costs, external childcare services, etc.
- III. Similarly, considering that the issue of childcare is based on cultural and educational components, among others, workers' organizations – when they exist – and the company should coordinate actions and promote the distribution of information and awareness on the importance of childcare and the benefits that it can bring for children's development.
- IV. In general, even though the law stipulates that the type of childcare facility implemented depends on the employer, dialogue with workers should be prioritized and the employer should identify – in consultation with workers or the worker organizations, if they exist, the option or options that best suit the circumstances. This should be done in an effective way that helps workers to balance their work life with their family life and to give their children the possibility of holistic development, which will result in a benefit to companies in terms of decreased absenteeism and increased worker satisfaction.



## END NOTES

- <sup>1</sup> Ley especial para la regulación e instalación de salas cunas para los hijos de los trabajadores (Decreto Legislativo Número 20. 19 of June 2018, published in the Official Gazette No 112, on June 19, 2018, Volume No 419, pages 3-6 ) <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/B5F66818-6C3A-4F74-9CC5-57ADE2745E7E.pdf>.
- <sup>2</sup> See statistic about childcare needs by age in Seeking Solutions to Childcare Needs of Maquila Workers in El Salvador. (May 2018) by the Coalition for Decent Work for Women (CEDM) and the Maquila Solidarity Network (MSN) <http://www.maquilasolidarity.org/en/seeking-solutions-childcare-el-salvador>.
- <sup>3</sup> Reglamento de Programas de Atención de la Niñez y la Adolescencia, issued by the Consejo Nacional de la Niñez y de la Adolescencia (CONNA), under Agreement No 1, published in the Official Gazette No 78, Volume 415, April 28, 2017 (Pages 115–173) (<https://www.diariooficial.gob.sv/diarios/do-2017/04-abril/28-04-2017.pdf>).
- <sup>4</sup> Dirección General de Estadísticas y Censos del Ministerio de Economía. DIGESTYC. Directorio de Unidades Económicas 2011-2012, resumen. P 6. <http://www.digestyc.gob.sv/index.php/temas/ee/directorio-de-unidades-economicas.html>.
- <sup>5</sup> Statistic corresponds to 2011.
- <sup>6</sup> Acuerdo Ejecutivo No 15-1788 of the Ministry of Education, Instructivo para la autorización y funcionamiento del Nivel de Educación Inicial en Instituciones Educativas Oficiales y Privadas, published in the Official Gazette, January 13, 2017, Volume No 414, pp: 39-46.
- <sup>7</sup> Art. 30(12) prohibits employers from making any distinction, exclusion or preference based on race, color, sex, religion, political opinion, nationality, origin, except for the exceptions provided in the law to protect the worker.
- <sup>8</sup> Ministry of Education.
- <sup>9</sup> Art. 32(1) of the Ley del Impuesto sobre la Renta states: “Expenses carried out by the taxpayer for the following reasons, are deductible from the obtained income: 1) Expenses for construction, maintenance and operation of housing, schools, hospitals and medical services, and cultural promotion, retirement plans, health and life insurance and similar benefits that are provided for free to all workers for their cultural improvement and well being and that of their children when those benefits are carried out in national territory; (...)”.
- <sup>10</sup> Constitutional Court of the Supreme Court of Justice. Unconstitutionality sentence Ref. 94-2014, of the twenty-fourth of April of two thousand and fifteen.

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