



THE AMERICAS GROUP

October 2023

EMPLOYER GUIDANCE: Ensuring Respect for Freedom of Association (FOA) in El Salvador

Introduction

Employer Guidance: Ensuring Respect for Freedom of Association (FOA) in El Salvador was developed by the Central America Committee of the Americas Group (AG) to provide employers in the garment and textile industry in El Salvador with greater clarity on the Committee's expectations regarding policies that should be adopted, and actions that should be taken and prohibited, to ensure respect for workers' right to freedom of association and collective bargaining in the workplace.

The FOA *Employer Guidance* takes into consideration the country-specific characteristics of industrial relations in the garment and textile sector in El Salvador, as well as the legal framework and common FOA violations. It also draws upon the experiences of the AG Central America Committee member companies during their engagement with their suppliers and senior management in wholly-owned facilities on FOA issues and related corrective action plans and their implementation. It provides a list of relevant Salvadoran labour laws and ILO Conventions regarding freedom of association, collective bargaining and the right to strike, as well as a Glossary of key terms used in the document with brief explanations of how they are defined in El Salvador.

While focusing on the policies employers should adopt and positive actions they should take to ensure respect for freedom of association in the workplace, the *Guidance* also includes an Annex listing negative actions that undermine freedom of association that employers should abstain from taking.

We hope the *Guidance* will assist employers in El Salvador's garment and textile sector to take steps to prevent violations of freedom of association and to promote constructive and healthy industrial relations in the workplace.

**EMPLOYER GUIDANCE:
Ensuring Respect for Freedom of Association (FOA)
in El Salvador**

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THE AMERICAS GROUP (AG) is a multi-stakeholder forum composed of international brands and manufacturers, and labour rights organizations working together to promote and support socially responsible apparel and footwear industries and decent work in the Americas.

The AG Central America Committee includes adidas, Bella + Canvas, Carhartt, Dick’s Sporting Goods, Fanatics, Fruit of the Loom, Gap, Gildan Activewear, Levi Strauss & Company, New Balance, Nike, Patagonia, PUMA, PVH Corporation, Under Armour, VF Corporation, the Fair Labor Association (FLA), and the Maquila Solidarity Network (MSN).

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El Salvador: Challenges to Ensuring Respect for FOA

Annual country reports from the International Labour Organization (ILO), International Trade Union Confederation (ITUC), and the US State Department highlight a number of weaknesses in Salvadoran labour law and its enforcement, and the need to strengthen laws and judicial and administrative institutions to ensure respect for freedom of association and collective bargaining.

Weaknesses in the law and its enforcement include the legal requirement that a union must prove it represents 51% of the workforce, which is a high bar compared to many other jurisdictions, to compel the employer to negotiate a first collective bargaining agreement. Another weakness is the lack of explicit provisions in the Labour Code for the reinstatement of workers fired for union membership or for participating in union activities. Reports also point to lengthy delays and appeals in legal procedures when workers file legal complaints alleging freedom of association violations.

Although workers and their unions continue to file complaints with the Ministry of Labour and Social Welfare (MTPS in Spanish) and the labour courts when their associational rights are violated, due to weaknesses in the law and its enforcement, they increasingly turn to brand buyers and US-based independent labour rights monitoring initiatives to achieve timely interventions and corrective action when national complaint processes prove ineffective.

Significantly, the majority of complaints filed with the Fair Labor Association (FLA) and the Worker Rights Consortium (WRC) by Salvador labour and other civil society organizations include allegations of freedom of association violations. Although union founders and executive board members in El Salvador have legal protection (*fuero sindical*) against dismissal without just cause, FLA and/or WRC investigations have verified a number of cases in which one or more union executive board members have been dismissed for their union activities. While corrective action, including reinstatement of workers and executive board members fired for union activity, has often been achieved in these cases, respecting the exercise of FOA continues to be a challenge in El Salvador.

There is a lack of awareness among workers and employers of the fact that freedom of association is a fundamental internationally recognized human right, as well as an important principle, in code of conduct provisions and benchmarks of many companies and multi-stakeholder initiatives. Employer noncompliance with these code provisions and benchmarks result in violations of workers' associational rights. There is also a lack of understanding among employers of the role of unions in society, the benefits of healthy industrial relations, and the rights and duties of workers' representatives, as defined by the International Labour Organization (ILO) Convention 135.

El Salvador is the only country in Central America where no employer in the garment and textile sector has a signed Collective Bargaining Agreement (CBA). One reason for this is that the legal threshold in El Salvador for requiring employers to bargain collectively is high – set at 51% of eligible workers. (El Salvador Labour Code, Art. 271). By contrast, in Honduras the Labour Code (Art. 54) requires that once a union is formed, with a minimum of 30 members, the employer must negotiate a collective bargaining agreement.

In factories where unions do exist, the vast majority are branch unions (*seccionales*) of industry unions (*sindicatos de industria*) with a presence in various workplaces. In many workplaces there are multiple *seccionales* affiliated to the same or different union federations.

In workplaces with unions, there are very few examples of open and effective communication channels and problem-solving mechanisms between management and worker representatives, such as through regular dialogue tables. In many cases, factory management relies on internal or outside lawyers to communicate with elected union executive board members, while excluding representatives of the union federation from the discussion, which results in one-way communication of a legal interpretation, rather than a good-faith effort to find a mutually acceptable solution to a problem.

In addition, when unions attempt to organize the broader workforce in order to win the legal right to negotiate a collective bargaining agreement, their efforts are often limited by management restrictions on their ability to disseminate information to workers on the union's proposals or agreements reached with management. In some cases, workers attempting to increase union membership are dismissed or pressured to sign "voluntary" resignation letters. Even when brand buyers verify these unjust and often unlawful dismissals and demand reinstatement of the dismissed workers, unions are unable to expand their membership significantly, due a lack of worker awareness of their associational rights and the role of unions, as well as their fear of further dismissals and blacklisting blocking future employment opportunities at other factories in the sector.

Overcoming these challenges will require a fundamental change in the attitudes and approaches of employers in the sector regarding workers' right to freedom of association and collective bargaining, increased awareness of workers of their associational rights and the role of unions, improved management systems to take workers' associational rights into account, and a culture of constructive dialogue between employers and unions.

II

Freedom of Association: A Fundamental Human Right

Freedom of association is the right of workers to form or join a union of their free choice, or to not join a union, without employer authorization or interference. It includes the right of workers to participate in legitimate trade union activities, the right to bargain collectively with their employer on their wages, benefits and other terms and conditions of their employment, and the right to participate in a lawful strike.

Freedom of association and collective bargaining are fundamental human rights under the International Labour Organization's Fundamental Principles and Rights at Work, ILO Convention 87 and Convention 98 and the United Nations' Universal Declaration of Human Rights. In El Salvador, it is also recognized and protected in the Constitution of the Republic and the Labour Code. In the apparel and textile sector, FOA is an important principle and requirement for suppliers in codes of conduct and benchmarks of international brands, retailers, manufacturers and the Fair Labor Association (FLA) and Worker Rights Consortium (WRC).

Summary of Rights, Regulations and Applicable ILO Conventions

RECOGNIZED RIGHTS	LAWS AND CONVENTIONS	REFERENCES
To form trade unions, federations and confederations	El Salvador Constitution: Art. 47 ILO C087: Arts. 2 & 5 ILO C098: Art. 1 El Salvador Labour Code: Arts. 204, 210, 211, 228, 229 & 257	
To exercise right to freedom of association	Constitution: Art. 47 ILO C087: Arts. 2 & 3, ILO C098: Art. 2, ILO C 135: Arts. 1 & 2 and its Recommendation 143 Labour Code: Arts. 204, 217, 221, 226.	El Salvador Constitution
Protection of the right to Freedom of Association (discrimination and interference)	Constitution: Art. 47 ILO C087: Art. 11 ILO C098: Art. 2 ILO C135: Arts. 5,6,7 and 8 Labour Code: Art. 30 Num 5, 205, 214 incl. 2, 248, 250, 251	El Salvador Labour Code C087 - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), ILO
Permissions and facilities afforded to workers' representatives to carry out their work	ILO C135: Art. 2 ILO Recommendation 143: Arts. 9-17 Labour Code: Art. 29, Num 6(c), 252	C098 - Right to Organize and Collective Bargaining Convention, 1949 (No.98), ILO C135 - Workers' Representatives Convention, 1971 (No. 135), ILO R143 - Workers' Representatives Recommendation, 1971 (No. 143), ILO
Recognition of "seccionales" (branch unions)	Labour Code: Art. 221	
Communication and legal recognition of the union	Constitution: Art. 47 ILO C087: Art. 7 ILO C135 ILO Recommendation 143 Labour Code: Arts. 214, 219, 606.	
Collective bargaining	Constitution: Art. 47 Labour Code: Arts. 268 & subsequent. ILO C098: Art. 4 ILO C154	C154 - Collective Bargaining Convention, 1981 (No. 154), ILO
Right to Strike	Constitution: Art. 48 ILO C087 San Salvador Protocol 8.1(b) Labour Code: Arts. 527 & subsequent.	

III

Benefits for Employers of Effective Industrial Relations Between Management and Workers

Freedom of association is an internationally recognized human right that business enterprises must respect under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

There is also a business case for respecting workers' right to freedom of association and collective bargaining, which can create healthy management-worker relations in the workplace:

- Establishing formal mechanisms for dialogue between employers and unions makes it possible for grievances to be discussed and resolved before they become intractable problems. This can minimize disruptions to business and reduce costs.
- By reducing the risk of management-worker disputes, dialogue between employers and unions can create the stability needed to ensure continued production and investment.
- Good cooperation at the workplace is critical to achieving high levels of productivity.
- Dialogue can contribute to a sense of shared responsibility for business success between workers, unions and management.
- Collective bargaining can support predictability, stability and industrial peace. Collective agreements can reduce turnover. Negotiated, effective mechanisms for remedy can help avoid costly labour disputes.

IV

Employer Actions to Ensure Respect for Freedom of Association

1. Adoption of a freedom of association policy

Adopt and commit to a clear policy and procedure on freedom of association (FOA). (See model FOA Policy on p. 14.)

2. Communication of the FOA Policy

Effectively communicate the FOA policy to workers and management personnel. Provide a printed copy of the FOA policy to all workers and management personnel, including new employees. The policy should be posted on the company announcement board and/or in other prominent, well-trafficked areas in the work place. The FOA Policy should be an important reference in annual and refresher trainings on FOA.

3. Revision of internal workplace rules

Revise and update internal workplace rules (bylaws) and disciplinary and employment termination procedures, including for worker retrenchment, to ensure respect for freedom of association for all workers. These should include prohibitions and sanctions, up to and including dismissal, for hindering and interfering with workers' efforts to form or join a union, bargain collectively or exercise their legal right to strike, and guarantees of legal protections for union founders and executive board members (*fuero sindical*).

4. Implementation of discrimination-free recruitment and hiring processes

Ensure that the criteria and process for recruitment and hiring of new employees is free of discrimination based on past union membership, activities or sympathies, and that selection of new employees is based solely on skills, qualifications and experience, as well as employment equity policies. Refrain from the use of blacklists or participation in blacklisting or otherwise reviewing workers' past union activities when recruiting and hiring new employees, such as the use of polygraph tests to question workers' political and union affiliations and other personal information. Ensure that company personnel or any third party involved in recruitment and hiring processes are made fully aware of the company's policy on this matter.

5. An induction process free of anti-union discrimination or intimidation

During orientation and training of new employees, communicate the company's FOA policy and ensure that the employer and management personnel will respect the right of workers to join or form a union of their free choice and to participate in the activities of that organization.

Communicate to management personnel, including supervisory staff, involved in the induction or orientation process that they must not express anti-union sentiments to workers or imply that participation in unions or a particular union will negatively affect workers' employment status or opportunities for promotion. Where there is a union or unions present in the workplace management should provide the union(s) an opportunity to introduce their union to new employees.

6. Strengthening the company's performance evaluation system and disciplinary process

Adopt or strengthen the company's current performance evaluation system to ensure that decisions regarding promotions, demotions,¹ job reassignment and dismissals are based on clear, legal and objective criteria and do not discriminate based on an employee's past or current union membership, sympathies or activities.

Adopt a progressive disciplinary process to help ensure that no employee is negatively impacted based on their past or current union membership, sympathies or activities. A worker's current or past union membership, sympathies or activities should never be the basis of disciplinary action.

7. Annual FOA training for workers and management personnel

To maintain and improve the workforce's knowledge and understanding of the company's FOA policy, and support its effective implementation, it is recommended that trainings on freedom of association be provided at least once annually for all workers and management personnel. In addition to effectively communicating the FOA policy to all employees and new inductees, holding annual FOA trainings indicates to the workforce that the company is committed to its FOA Policy, and renews and deepens the workforce's understanding of freedom of association over time. If workers in the factory choose to form a union, FOA training can help foster a productive and harmonious relationship between management and the union. At a minimum, training should ensure the workforce receives a clear and accurate understanding of their rights and obligations regarding freedom of association.

¹ According to the El Salvador Labour Code, reductions in the terms and conditions of employment (without just cause) could be equivalent to an indirect dismissal (Art. 53, 1) and therefore any form of demotion could be a step toward the termination of an employment contract, for which the employer is responsible.

8. Grievance mechanisms

To ensure that workers can report possible labour rights violations, employers should:

- Provide a confidential mechanism for workers to file anonymous complaints in writing with the Human Resources Department or senior management staff.
- Communicate to all workers and management personnel verbally and in writing how workers can file complaints and the company's policy that there will be no discrimination or retaliation against any worker for filing a complaint.
- Take appropriate and timely steps to address complaints, and communicate the actions taken to resolve them to all workers and management personnel.
- Respect the right of workers to be accompanied, at their request, by a union-selected representative in discussing grievances and disciplinary actions with management.

9. How a company should respond when a union is being formed at the workplace

If the company learns that workers are in the process of forming a union, senior management should immediately communicate to all management personnel, including supervisors, that the company respects freedom of association and will not tolerate attempts to discourage workers from forming or joining the union through threats, inducements not to join, or acts of discrimination against union supporters. The company should refrain from any attempt to interfere with or influence the labour authorities to impede the registration or legal recognition of the union.

10. How a company should respond when it receives formal notification that a union has been formed at the workplace

- Accept and sign the written notification of the registration of a union with the Ministry of Labour and Social Welfare (MTPS), whether that written notification is delivered by the Ministry or the union.
- Propose a dialogue table or respond positively to a request from the union to set up a dialogue table [*mesa de diálogo*] and establish a meeting schedule. (See Guidelines on p. 9.)
- Communicate in writing to all employees, including workers, supervisors and management personnel, that a union has formed, indicating the names of the union executive board members, and the company's commitment to respect the right of all workers to join or not join the union. The employer should also give executive board members the opportunity to make an announcement of the union's formation to the workers.
- Do not make financial payments or provide other incentives to founders and/or executive board members to avoid the formation of a union or attempt to control the union or influence its policies or practices.
- Respect the autonomy of the union and do not interfere in its internal affairs or in its selection of executive board members.
- If management becomes aware that a union has been formed at the workplace before management has received official notification from the Ministry of Labour, management should treat the new union as a legitimate workers' organization and must not take any retaliatory action against the union founders or executive board members related to the formation of the union. Management always has the right to request documented proof of the union's registration from either the union or the Ministry of Labour.
- If a recently formed union has not requested to meet with management to establish initial contact, management may wish to express their willingness to initiate dialogue with the union executive board members.

GUIDELINES FOR A DIALOGUE TABLE (*MESA DE DIÁLOGO*)

A union/management dialogue table is a forum to discuss workplace issues in good faith as they arise and attempt to find mutually acceptable solutions to those issues. However, a dialogue table should not be seen as a substitute for collective bargaining.

Dialogue tables are forums to discuss all relevant issues between the union and company, for example, conditions required by unions to carry out their work and options for granting those conditions. Agreements reached in dialogue table meetings should be documented in writing, shared with affected workers and management personnel, and respected from the time of signing. Senior management or designees with decision-making authority should participate in dialogue table meetings.

If there is more than one union in the workplace, human resources staff or senior management should consult with those unions as to whether they would prefer to participate in one joint dialogue table or in a separate dialogue table for their organization. If a union decides not to participate in a dialogue table, the employer should respect their decision.

Employer representatives and the participating union(s) should agree upon a regular schedule for dialogue table meetings, which should take place in the workplace during regular working hours and, preferably, at least once a month. Such meetings should involve designated human resources staff or senior management and workers' representatives selected by their members. Involvement of lawyers in such meetings is not recommended, unless there is a specific legal issue that requires their interpretation.

Unions should have the option to include a representative of their federation or any other designated advisor to participate in dialogue table meetings when their expertise is required. When the two parties are not able to resolve an important issue, a mediator, acceptable to both, should be sought.

Management representatives to the dialogue table should keep a record of the minutes from each meeting, and any agreements reached should be signed off on by both parties and such signed agreements should be posted in a visible place in the workplace.

11. Notification of an additional union in the workplace

- Communicate to all workers and management personnel that an additional union has been established in the workplace.
- Reiterate to all personnel, including any other union in the workplace, the company's policy of respecting the right of workers to decide to affiliate or not to affiliate to a union, its commitment to remain neutral and not favour one union over another and zero tolerance for any form of discrimination against workers for their union affiliation or activities.

- Respect the right of the unions to operate and represent their members in the workplace, including the presentation of grievances and the creation of dialogue tables for collective problems.

If the newly or recently formed union has not requested to meet with management, management – as a way of establishing initial contact – could express their willingness to initiate dialogue with the union executive board members, if the union wishes to engage in dialogue.

12. Facilitating the necessary conditions for unions to conduct their activities²

In order for freedom of association to be respected in practice, other fundamental rights such as freedom of opinion and expression, and freedom of assembly must also be recognized and respected.

In the absence of a CBA defining the rights and procedures outlined below, the company should be willing to receive requests regarding union activities or access to facilities in the workplace and determine, together with the union, how and to what extent those activities can be carried out or facilities made available. Such requests may only be granted when the activities do not negatively impact the efficiency of business operations. An unjustified negative response to such requests can constitute an obstacle to freedom of association.

Types of facilities and permissions that should be granted by the employer to union representatives include:³

- The employer should promptly schedule meetings requested by the union with senior management and company representatives with decision-making power.
- The employer should ensure that union executive members can communicate with union members and other workers during break periods through different modes of communication, including bulletins, fliers, pamphlets, mailboxes for the union's exclusive use.
- The employer should provide free access to a bulletin board or wall space to post information about union activities or other information of interest to workers. Management should not require prior review of content in union publications; the information posted may only be subject to the limits established by law regarding respect for the dignity and rights of all people.
- The employer should ensure that union representatives can conduct their legitimate union activities inside and outside the workplace during working hours, when necessary, related to representing, advising and/or assisting union members, or other workers who request assistance. Union representatives should have access to any areas of the workplace necessary to carry out those activities.
- The employer should provide an office or other meeting space for union meetings or other union activities outside of working hours or, with the employer's authorization, within working hours. If the employer is unable to provide existing offices or rooms on a full-time basis, such offices or rooms could be granted for certain periods of time, as determined through negotiations with executive board members of the union(s).
- The employer should make payroll deductions for union dues from affiliates and transfer them to the union, according to the law.

² ILO Convention 135 on workers' representatives and its Recommendation 143 establish the types of facilities that should be provided to workers' representatives. ILO Convention 135 was ratified by El Salvador in September 2006.

³ These facilities and permissions are emblematic examples; others can be granted depending on the union's needs and with the agreement of the employer.

Ensuring unions can conduct union-related activities

- **Union executive board members:** Union executive board members may request authorization from the employer to take time off during work hours to carry out their union-related functions inside the workplace or to participate in legitimate union activities outside the workplace.
- **Union affiliates:** When prior agreement has been reached between the employer and the union, union affiliates who are not union executive board members may be granted authorization to participate in legitimate union-related activities inside or outside the workplace during working hours.
- **Union representatives who do not work in the factory:** Union representatives not employed at the factory, but who have affiliates employed there, should be authorized to enter the facilities. The type of entry granted is subject to negotiation between the parties.

Paid leave to conduct legitimate union activities outside of the workplace

The employer should grant union executive board members paid leaves at their base rate or minimum wage – whichever is higher, so that they can participate in union activities outside the workplace during normal working hours, such as union training, conferences, workshops, congresses, union meetings, or other related activities.⁴ When there is a prior agreement between the union and employer, union members may also have access to paid leave to participate in legitimate union activities outside the workplace.

Union representatives must make a prior request, with sufficient notice, to management and the leave should be for a reasonable period of time and solely for union activities. Management and union representatives may come to mutual agreement on a set timeframe and put limits on the number of union executive board members and/or affiliates participating in the activity, according to the union's needs and the company's need to maintain the efficient operation of the workplace.

The purpose and duration of such leaves should always be determined through mutual agreement between the parties. They could also reach agreement on a weekly or monthly number of hours or days that the union can use for a predetermined number of members.

13. Respecting union protection (*fuero sindical*)

The employer should fully comply with the legal obligation to respect the rights of union founders and union executive board members to not be dismissed, suspended through disciplinary action, transferred or have their terms and conditions of employment downgraded for exercising the legitimate right to freedom of association. Such actions can only be taken in circumstances where there is just cause as previously determined by the appropriate authority.⁵

⁴ See ILO Recommendation 143, Article 11.

⁵ Articles 248 and 249 of the El Salvador Labour Code provide that founders of any type of union have 60 days of protection (*fuero*) from the time they apply to the Ministry of Labour and Social Welfare (MTPS) for registration of their union. Union executive board members have *fuero* protection from the period of their election through the life of their time in office, plus one year after they complete their mandate.

14. Respecting collective bargaining rights

In El Salvador, collective bargaining is compulsory when a union or coalition of unions represents 51% or more of eligible workers (Art. 271 of the Labour Code) and voluntary if the union, or coalition of unions represents less than 51% of eligible workers. To promote respect for workers' right to bargain collectively, employers should:

- Comply with their legal obligation to enter into collective bargaining with the union, or coalition of unions that have affiliated 51% or more of all eligible workers and schedule a process for negotiations, when the negotiation has been requested.
- Consider a request from a union, or coalition of unions to voluntarily enter into collective bargaining, even when the minimum percentage of workers to require collective bargaining has not been met. This option is provided for in Art. 272 of the Labour Code.

Once it has been agreed to initiate collective bargaining, the company should:

- Inform the entire work force about the bargaining process.
- Designate representatives with decision-making power to be at the bargaining table. The unions that participate in the bargaining process should be able to freely choose their representatives – without any restriction, as well as those who will provide them with assistance during the bargaining process.
- Commit to bargaining in good faith, including: making every possible effort to reach agreement; avoiding unjustified delays during the bargaining process; sharing necessary information with workers' representatives to carry out constructive negotiations, and respecting the compromises reached, among others.
- Provide the necessary conditions for bargaining to be carried out in an effective and efficient manner. For example, providing the necessary space where the negotiations will take place, and providing workers' representatives with the necessary time off work without loss of salary and benefits, so that they can participate in the process.
- Once a CBA is negotiated and signed, all workers should receive a copy of the agreement from either management or the union.

15. Respecting workers' right to strike

If workers participate in a lawful strike, the employer should refrain from and not tolerate any acts of discrimination, threats, harassment, violence, or intimidation against workers for their participation in the strike. Nor should the employer request or cooperate with any acts of violence or repression by state authorities or private security firms.

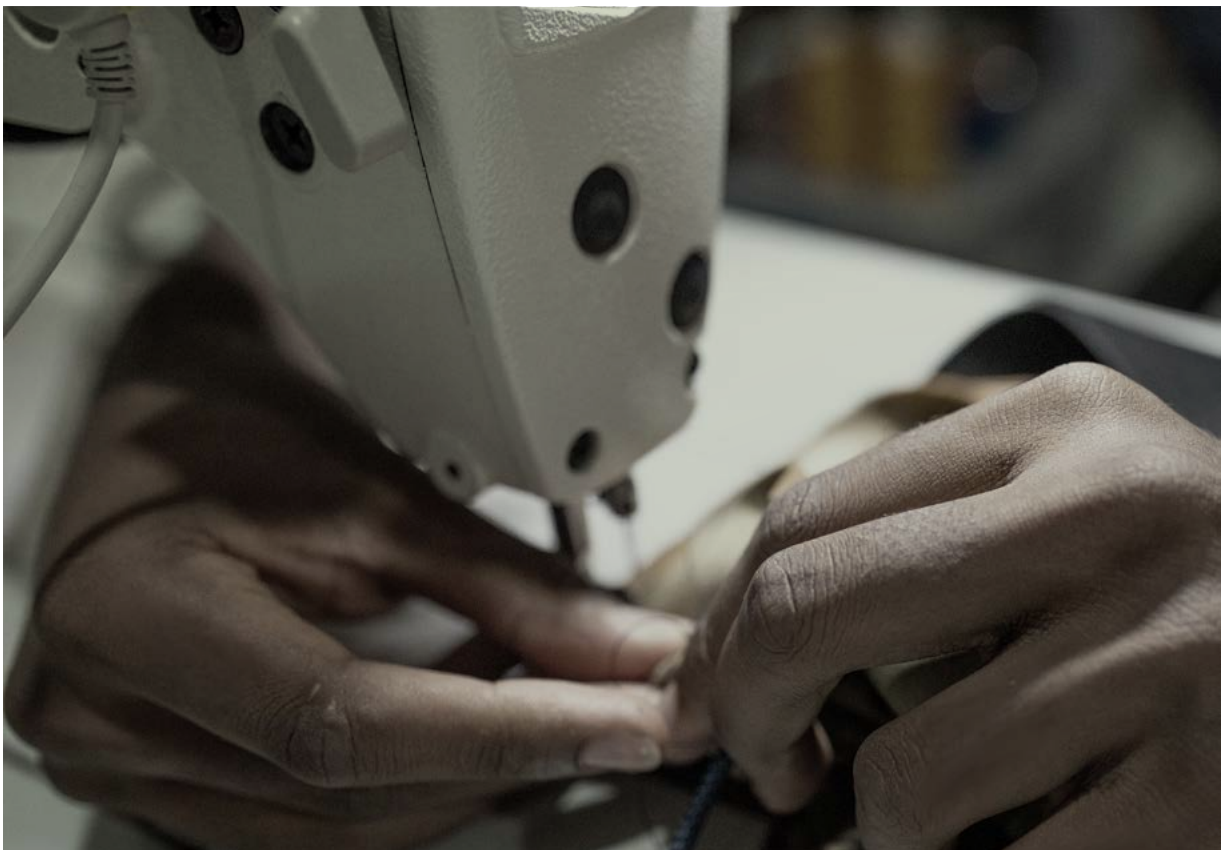
It is also important for employers to establish appropriate guidelines on how to address cases in which unions and/or union affiliates engage in other industrial actions that alter the normal operation of the workplace, including activities carried out outside of the workplace. In such cases, the employer should:

- Acknowledge that the right to engage in peaceful protest is an important element of the constitutionally recognized rights to freedom of assembly, association and expression. The employer should also consider that workers' collective actions could be the result of a lack of access to forums for workers' representatives to engage in dialogue with employer representatives, or that those forums are ineffective.
- Respond in a timely manner to a conflict or collective demand, since doing so is key to preventing an escalation of a conflict.

- Invite the worker representatives to a dialogue table, without delay, in order to listen to their grievances and demands and seek a rapid and effective resolution to the conflict. The employer should avoid resorting to disciplinary actions as an immediate response to an industrial action, and/or the use of police, armed forces or private security to limit workers' right to freedom of assembly or to strike.

16. Prior notice and consultation on suspension of employment contracts, dismissals and workplace closures

In cases of temporary suspensions, permanent layoffs or factory closures, employers should communicate their plans to the union(s) in the workplace as soon as possible. In cases of suspension for economic reasons, the employer should ensure that workers receive the advanced judicial notice required by law.⁶ The employer should engage in dialogue with the union(s) on possible alternatives to retrenchment or closure and how to mitigate the negative impacts on the workers who will be affected.



⁶ Article 42 of the Labour Code establishes that in cases when contracts are suspended for economic reasons, to which the numbers 2, 3, and 4 of Article 37 refer, the employer is obligated to provide 30 days prior notice to workers, through the appropriate judge.

In the event that a worker retrenchment is planned, the employer should consult with the union(s) to define objective criteria to determine which personnel will be laid off and in what order. Such criteria could include length of service, work performance, and categories of workers with special protections, paying severance and benefits for the period of special protection in accordance with relevant articles of the Labour Code.⁷

The employer should provide the union(s) a list of workers proposed for temporary suspensions and/or permanent layoffs for their review, regardless of whether the suspensions or layoffs are ultimately implemented. This is to verify that the process and the selection criteria have been applied objectively according to the previously established procedures.

The employer must pay outstanding severance, proportional Christmas bonus (*aguinaldo*) and vacation pay in the amount established in the Labor Code, as well as all other monetary benefits owed to the affected workers.⁸

In cases where companies have previously made advance severance payments, the final settlement calculation should comply with the MTPS' December 2019 Legal Opinion and the May 2022 Fair Labor Association (FLA) Issue Brief recommendations.⁹

In the case of a closure, workers who enjoy special protection (*fuero*) according to the law must receive, in addition to their severance, the wages and benefits to which they have the right during the full period of protection.

Once the plan for retrenchment and/or closure has been determined, the employer should communicate the plan to all personnel, verbally and in writing, and establish a complaints process to address and seek solutions to all concerns of workers and their unions regarding layoffs and payments.

⁷ The following legal provisions of the Labor Code define the special protections afforded to executive board members, union members, pregnant workers, workers on leave, and workers with chronic illnesses: Arts. 113, 248, 251, 308-A.

⁸ Additional benefits owing are defined in Arts. 58, 59, 197 inc. 2° and 187 of the Labor Code.

⁹ El Salvador: Advance Severance Payments to Garment Workers, Fair Labor Association, May 18, 2022. Final liquidation calculation must take into account the last salary in effect for the total number of years the employee has worked at the company and subtracting from that total the liquidation payments that were paid in previous years. https://www.fairlabor.org/wp-content/uploads/2023/03/2022_El-Salvador-Issue-Brief-Advancing-employees-severance-FINAL-18May2022-format.docx.pdf.

V

Model FOA Policy

This Model Freedom of Association (FOA) Policy is based on ILO Conventions and El Salvador's Constitution and Labour Code. Employers are urged to either adopt and implement the Model Policy or develop, adopt and implement a policy that is consistent with these principles. In either case, the employer should effectively communicate the policy to all workers and management personnel, including newly hired employees, and use it as a resource in periodic FOA trainings with workers and management personnel.

[Name of Company] commits to respecting and ensuring full compliance with the following principles and legal obligations regarding freedom of association, the right to bargain collectively, and the right to strike. Based on this commitment, the company:

- will recognize and respect the right of all workers, without distinction, to form or join a union of their own choosing in order to defend their rights and interests, or to not join a union, without fear of retaliation.
- will afford workers' representatives the necessary conditions in which to carry out their responsibilities to represent workers effectively.
- will respect the rights of union executive board members and founders to *fuero sindical*.
- will respect the right of unions to autonomy and independence, and will not interfere or tolerate interference by management in the internal affairs of unions.
- will respect the right of workers to bargain collectively and to strike, in accordance with the law.
- will ensure that workers who exercise their associational and collective bargaining rights and/or their lawful right to strike do not suffer any physical or psychological violence, intimidation, harassment or abuse.
- will not carry out nor tolerate anti-union discrimination that would impact the terms and conditions of a worker's employment.
- will not convey or tolerate threatening messages or incentives to workers in an attempt to prevent or discourage the formation of a union or worker participation in legitimate union activities, including collective bargaining and a lawful strike.

Where there is more than one union in the workplace, the company will remain neutral and will not favour one union over another.

The company commits to investigate allegations of anti-union actions or threats by any employee, regardless of their position, and to impose appropriate sanctions, up to and including dismissal, if those allegations are verified.

If there are violations to this policy, workers have the right to use and escalate the company's grievance mechanisms without fear of retaliation.

VI

Glossary

Collective Bargaining: The right of workers, through their union, to negotiate with their employer on the terms and conditions of their employment. In El Salvador, a union, or coalition of unions, must represent at least 51% of the workers in a workplace in order to compel the employer to negotiate a collective bargaining agreement (CBA). However, the employer can voluntarily enter into negotiations with a union, or coalition of unions, that represents a smaller percentage of the workforce.

Right to Strike: The right of workers to collectively withdraw their labour in order to achieve a collective bargaining agreement (CBA) or revisions to an existing CBA, or to defend the rights and common interests of the workers. In order for a strike to be carried out in El Salvador, it must be peaceful and follow the procedures established by law. It is the sole responsibility of a judge with authority over these matters to determine if a strike is illegal, in cases where a ruling is requested by the employer. As long as there is no declaration of illegality, the strike shall be presumed legal.

Industry Union (*Sindicato de Industria*): A union formed by workers at factories dedicated to the same industrial, commercial, services, social and other comparable activities. A minimum of 35 members is required to constitute an industry union.

Branch Union (*Seccional por empresa*): The term branch union refers to each organization that is affiliated with an industrial union and that includes affiliated workers and union executive members who work in the same workplace.

Enterprise Union: An enterprise union is formed by workers who are employed in the same workplace. It requires at least 35 members to be formed.

Union Federation: A union federation is a union organization formed by at least 5 unions to defend their common interests. They enjoy the same rights and entitlements as unions.

Union Founders: Union founders are workers who organize to form a union organization of any kind and seek to obtain legal standing and registration from the Ministry of Labour and Social Welfare (MTPS). To do so, the law requires a minimum of 35 workers. The founders enjoy protection (*fuero sindical*) upon requesting union registration and for the 60 days after the Ministry of Labour notifies the employer of the union registration.



Union Executive Board (*Junta Directiva*): The union executive is the body that manages and administers a general union or a branch union. General unions oversee the management and administration of the union as a whole (of any type of union), and branch unions manage and administer the specific affairs of the branch union at the workplace level. There cannot be less than 3 or more than 11 members on the executive of a union and the executive committee of a branch union cannot have less than 3 or more than 7 members.

Union Protection (*Fuero Sindical*): Union protection is a special protection provided to union executive members with legal standing or in the process of obtaining it, guaranteeing that they cannot be dismissed, transferred,¹⁰ have their terms and conditions of employment downgraded, or be suspended due to disciplinary action, except for just cause as determined previously by the competent authority. The protection also applies to union founders and to candidates for union executive positions. This protection covers a maximum of 35 union founders.

Workers' Representatives: As per ILO Convention 135, workers' representatives are persons designated or elected by unions or members of such unions, as well as representatives freely elected by workers in a workplace.

Dialogue Tables: Dialogue tables are regular meetings of workers' representatives and Human Resources or other senior management personnel to discuss and seek solutions to workplace issues or worker grievances.

Black Lists (or Block Lists): Lists of workers and former workers formulated, maintained and shared by employers, who are, have been, or who are presumed to have been, union members or sympathizers and/or have engaged in union activities. The purpose of blacklists is to prevent the hiring of workers with union backgrounds or sympathies.



¹⁰ A transfer occurs when the employer sends workers to a different work station or area than the one where they currently work (Art. 248 of the Labour Code).

ANNEX

Practices that Violate or Restrict Freedom of Association

The following actions are based on workplace investigations and evaluations carried out in the Americas and on established international standards, mainly from the International Labour Organization (ILO). They are violations of the right to freedom of association, to bargain collectively and to strike. As such, employers should abstain from carrying out or tolerating these actions in the workplace.

Actions that seek to hinder or restrict the exercise of the right to freedom of association, to collective bargaining or to strike

1. Closing or threatening to close the company in response to a union being formed.
2. Dismissing, transferring, demoting or imposing unjustified disciplinary actions against workers who promote or support a union, including union members, union executive board members, or union sympathizers.
3. Taking actions that result in a reduction in union members' and/or sympathizers' wages and benefits or taking other actions that negatively impact workers' incomes, including reduction in, or reduction in access to, in-kind payments or additional benefits.
4. Taking actions that negatively impact union members' and/or sympathizers' working conditions or employment opportunities, such as denying opportunities for promotion, overtime work, days off for education/training, and making reductions in or reducing access to, production bonuses.
5. Offer or use of severance pay, or another form of payment to union founders, executive board members or sympathizers in an effort to prevent or hinder the formation or development of the union.
6. Giving preferential treatment to non-unionized workers regarding salary increases, promotions, and choice of preferred shifts.
7. Using, creating, distributing or consulting "black lists," which are a database of names of people who were previously (or who are presumed to have been) union members or who have participated in union activities.
8. Avoiding hiring workers who are known to have previously been union members or participated in union activities in the past or who are union sympathizers.
9. Asking a job applicant questions about their past participation in union activities and/or their views on unions, or if they have family members who are union members. This includes asking other factories for references about a worker's previous union affiliation or sympathies.
10. Requiring union members and/or sympathizers to work overtime or during days off, or denying workers the right to work overtime, as a form of retaliation for their affiliation with the union.
11. Failing to recognize the union(s) as legitimate worker organizations following notification of a union's legal status at a facility.
12. Refusing to establish an ongoing dialogue with trade union organizations, including the federations or confederations to which unions are affiliated.
13. Attempting to discourage workers from exercising their right to freedom of association, to bargain collectively or to strike. For example, bribing workers to resign from the union or from the company.
14. Failing to recognize and respect the right of founders and union executive board members to "*fuero sindical*."

15. Promoting or tolerating any kind of violence or intimidation against union supporters and/or organizers, including attacks, either physical or psychological, whether carried out by colleagues, supervisors, or management, against workers who belong to unions or who participate in union activities.
16. Failing to take positive actions to resolve complaints from workers regarding anti-union discrimination, harassment or abuse.
17. Failing to comply with findings, directives, and/or final rulings issued by the local labour authorities or courts with regard to violations of FOA. Appeals should not be used to delay remediation indefinitely.
18. Promoting the creation of pro-employer unions that represent the interests of the employer and not those of the workers.
19. Giving the impression that the company is downsizing due to economic or structural reasons in order to dismiss workers who are trying to form a union or who have joined one.
20. Resorting to the hiring of workers on temporary employment contracts, even when the work is of a permanent nature, as a way of discouraging or hindering union organization.
21. Initiating or threatening criminal proceedings against union executive board members in response to the formation of a union or for carrying out legitimate union activities.
22. Refusing to reinstate with back pay workers who were unjustly dismissed for union-related reasons.
23. Using committees where workers participate to counter the work of unions. For example: Communications Committee, Workers' Committee, etc.
24. Prohibiting workers from wearing t-shirts with union names and/or logos.

Interference in the exercise of union activities

25. Giving preferential treatment to, or favoring, one union over another in the same workplace.
26. Influencing the decisions of the relevant labour authorities to prevent the registration or legal recognition of unions, or to seek their dissolution or suspension.
27. Giving preferential treatment or privileges to union executive board members, in the form of monetary or material benefits, release from work obligations, gifts or other favorable treatment as a means to influence or coopt union executive board members.
28. Interfering in the drafting or the approval of union statutes and rules.
29. Interfering in the election processes of workers' representatives or executive board members.
30. Interfering in the organization, administration and execution of a union's action plan, and their activities in general.
31. Attempting to influence a union's agenda and proposals during a collective bargaining process.
32. Refusing, without justification, to grant accommodations requested by unions, such as providing paid time off so that executive board members can carry out their union work within the workplace, during or outside of work hours.
33. Refusing, without justification, to grant union requests, when requested and received with sufficient notice from unions, for executive board members or other union members – when there has been prior agreement between the employer and the unions - to take paid leave during work hours to participate in union activities outside the workplace, such as union trainings, meetings or conferences, etc.

34. Controlling or censoring information that union(s) disseminate on bulletin boards or by other means.
35. Granting financial support to trade union organizations, in order to control their operations, to strengthen one organization to the detriment of another, or to avoid labour disputes.
36. Imposing restrictions on freedom of movement on workers' representatives within certain work areas or on company premises, without proper justification.
37. Communicating negative messages to workers with the purpose of hampering the efforts of, or delegitimizing, those who participate in unions; for example, saying that these workers are "traitors", "ungrateful to the company" or that "they seek to harm the company."
38. Encouraging workers not to speak, or avoid contact, with union officials, union affiliates or union sympathizers.
39. Monitoring, through supervisors or the company's security cameras, workers who speak with union affiliates or union executive board members.

Actions that undermine collective bargaining, the right to strike and other legitimate industrial activities.

40. Failing to negotiate a collective bargaining agreement in good faith (i.e. refusing to initiate legally required negotiations, failing to make every effort to reach agreement in a timely manner).
41. Refusing to provide, or avoid providing, sufficient and pertinent information to workers' representatives related to the issues under negotiation, or to provide the necessary facilities for their participation in the process.
42. Failing to comply with the agreed upon provisions under a valid collective bargaining agreement.
43. Refusing to print and publish the text of the collective bargaining agreement in a visible and accessible place for workers, inside the workplace, or to refuse to distribute it to workers through various channels, such as printed pocket-sized versions.
44. Refusing to initiate, or delaying, the revision of a collective agreement when the period in which the previous agreement is in force is about to expire and the union has requested the review.
45. Minimizing, or ignoring, the proposals presented by the union during the negotiation process.
46. Proposing the negotiation of working conditions, salaries and benefits equal to or lower than those already provided for by local law.
47. Negotiating superior working conditions with unorganized workers when there is a union in the company.
48. Closing or threatening to close the company as a reaction to a request to bargain collectively or to review the collective bargaining agreement.
49. Fining or dismissing workers who organize or participate in a strike or other legitimate union activity such as protests, sit-ins, walk-outs, slowdowns, and/or hiring new workers to replace the striking workers.
50. Use of, or threatening to use, armed forces, police or private security to break up a legitimate strike or other legitimate union activity.