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## Maternity Rights in Mexico: With References to the Spanish and American Codes

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## *International Perspective*

# Maternity Rights in Mexico: With References to the Spanish and American Codes

BY ROBERTO ROSAS\*

### **I. Introduction**

The integration of women in the workplace has triggered one of the greatest social and economic changes of recent times. More than half of American women are currently part of the country's working population. In 2001, approximately 20,499,170 women were employed in the United States' private sector alone.<sup>1</sup> Labor rights and benefits related to pregnancy and maternity are a growing concern for working women who decide to

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1. In the same year, 22,916,460 men were employed in the private sector. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OCCUPATIONAL EMPLOYMENT IN PRIVATE INDUSTRY BY RACE/ETHNIC GROUP/SEX, AND BY INDUSTRY, UNITED STATES, 2001, <http://www.eeoc.gov/stats/jobpat/2001/national.html> (last visited April 9, 2004).

have children.<sup>2</sup> These issues are not exclusive to women, however, because modern trends indicate that fathers are becoming more involved in raising and caring for, their children.<sup>3</sup> Maternity, defined as the state of being a mother, including pregnancy,<sup>4</sup> deserves legal protection in the workplace by virtue of its vital role to society. Women worldwide share a concern for maternity rights and benefits, but countries approach legal rights related to motherhood and pregnancy from differing perspectives.

The purpose of this article is to compare how two North American countries, Mexico and the United States, and a European country, Spain, have approached the issue of maternity rights and benefits from differing perspectives within diverse legal frameworks. Part II of this article presents a legal analysis of Mexican regulations, focusing on maternity and child care, two key issues for working mothers. Then, Part III of this article compares Mexico's regulations to the provisions of American and Spanish law that deal with maternity rights. In each Part, the article also notes the ways in which Mexico, the United States and Spain enforce their maternal regulations through legal action such as sanctions.

## II. Mexico's Legal Framework for the Protection of Maternity Rights

Mexico's regulations pertaining to maternity arose from the Mexican Constitution,<sup>5</sup> the Federal Labor Act ("LFT"),<sup>6</sup> the Social Security Act ("LSS"),<sup>7</sup> and from international conventions adopted by Mexico.<sup>8</sup> Mexico bases its legal approach to maternity rights on an acknowledgment of the differences between sexes as well as the special circumstances that surround maternity.<sup>9</sup> For example, women commonly require more resting

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2. See ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON WOMEN, INCORPORATION OF THE GENDER PERSPECTIVE IN REGIONAL LABOR POLICIES, PROGRESS AND PROPOSALS (2001), <http://www.oas.org/CIM/english/Gender%20Mains.SEPIA%20I.Doc.htm> (last visited April 9, 2004).

3. *Id.*

4. WEBSTER'S COLLEGIATE DICTIONARY, 887 (4th ed. 2000).

5. See MEX. CONST. art. 123.

6. Ley Federal del Trabajo, [L.F.T.] tit. V. (Mex.).

7. Ley del Seguro Social, [L.S.S.] art. 11 (Mex.).

8. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, arts. 5, 11(2), available at <http://www.un.org/womenwatch/daw/cedaw/econvention.htm> (last visited Apr. 10, 2004) (entered into force Sept. 3, 1981).

9. See Marina Ariza de Orlandina Olivera, Presentation at the Office of the Center the International Development Research Centre (CIID) of Canada in Montevideo-Uruguay, Taller "Género y Desarrollo" [Gender and Development Workshop] (Sept. 6-7, 1999), [http://web.idrc.ca/en/ev-23060-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-23060-201-1-DO_TOPIC.html) (last visited April 9, 2004).

periods during pregnancy as well as time to breastfeed after the baby is born.

The fundamental legal base for Mexico's Labor Rights, and consequently, rights protecting maternity, is found in Article 123 of the Constitution.<sup>10</sup> Section A of Article 123 regulates labor in the private sector, whereas Section B regulates labor in the public realm. This section outlines the general guidelines that protect maternity rights in Mexico as well as other aspects of labor and social welfare.<sup>11</sup>

The Federal Labor Act derives from Article 123 and is governed by it: "The totality of the Republic shall follow this law which governs labor relationships included in Article 123, section 'A' of the Constitution."<sup>12</sup> In addition, Article 123, § XXIX, provides for the legal existence of the Social Security Act:

The Social Security Act is a public utility law and it shall provide insurance for disability, the elderly, life, involuntary unemployment, sickness and accident, day care, and any other type of insurance destined to the protection and welfare of workers, non-wage earning farmers, and other social groups and their families.<sup>13</sup>

A key objective of the Mexican Social Security Act is to guarantee the right to healthcare, and the Act designates several state entities to oversee the execution of these rights. The Mexican Social Security Institute ("*Instituto Mexicano del Seguro Social*" hereinafter referred to as "IMSS") serves as the main entity in charge of social security.<sup>14</sup> However, other entities manage the application of social security for public workers.<sup>15</sup> Mexico recently ratified several international conventions, which reinforce and complement the labor rights that Mexico affords women.<sup>16</sup> Different

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10. See MEX. CONST. art. 123.

11. See *id.*

12. L.F.T. art. 1.

13. MEX. CONST. art. 123 § XXIX.

14. See Ley General de Salud [General Law of Health] (1984) (Mex.). See generally Instituto Mexicano del Seguro Social, at <http://www.imss.gob.mx/imss> (last visited April 9, 2004).

15. See, e.g., Ley del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado (State Workers Social Security Institute Act, ISSSTE), and the ISSSTE itself, respectively. See also Ley del Instituto de Seguridad Social de las Fuerzas Armadas (Social Security Institute Act for the Military) and its respective agency, the Instituto de Seguridad Social de las Fuerzas Armadas (Social Security Institute for the Military).

16. Three relevant international conventions of the ILO ratified by Mexico are: Convention (No. 45) Concerning the Employment of Women in Underground Work in Mines of All Kinds, June 21, 1935, at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C045> (last visited April 9, 2004) (entered into force May 30, 1937); Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, at [http://www.unhchr.ch/html/menu3/b/d\\_ilo100.htm](http://www.unhchr.ch/html/menu3/b/d_ilo100.htm) (last visited April 9, 2004) (entered into force

organizations have signed these conventions, such as: the International Labour Organization (“ILO”), Organization of American States (“OAS”), and the United Nations (“UN”). An example of one such international convention is the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>17</sup>

### A. Maternity

Taking into account the special and distinctive character of pregnancy, the Mexican legal provisions concerning maternity that affect working women are very specific. These legal provisions are contained in Article 123 of the Constitution and offer protection for the woman, the fetus, and the infant during pregnancy and the nursing period.<sup>18</sup> In addition, Article 123 refers to a section of the Federal Labor Law entitled “Working Women,” which contains regulations aimed at maternity protection.<sup>19</sup> The Federal Labor Law covers women, infants and the fetus, which are protected under Mexican law, and also addresses the specific rights pertaining to maternity as well as prohibited activities.<sup>20</sup> In Mexico, the law protects pregnant women, nursing women, the fetus, and the infant.<sup>21</sup> The law requires that employers accommodate pregnant and nursing women by providing sufficient chairs for them to sit in, as well as the option to transfer to a different position if necessary.<sup>22</sup>

The Federal Labor Law prohibits pregnant and nursing women from performing work deemed hazardous or unhealthy. The law defines hazardous or unhealthy work as activities with the potential to affect the

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May 23, 1953); and Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 15, 1958, at [http://www.unhcr.ch/html/menu3/b/d\\_ilo111.htm](http://www.unhcr.ch/html/menu3/b/d_ilo111.htm) (last visited April 9, 2004) (entered into force June 15, 1960).

17. Convention on the Elimination of All Forms of Discrimination Against Women, Dec.

18. 1979, 1249 U.N.T.S. 13, available at

<http://www.un.org/womenwatch/daw/cedaw/econvention.htm> (last visited April 9, 2004) (entered into force Sept. 3, 1981).

18. See MEX. CONST. art. 123 § A, pt. V. (“Pregnant women shall not perform work that requires a considerable effort and that is potentially harmful to her gestational health; they will enjoy a mandatory maternity leave consisting of six weeks before the expected due date and six weeks after childbirth, during which time they will receive full salary compensation and job security, as well as the rights they would have acquired by the employment relationship. During the nursing period they will have two daily resting periods consisting of thirty minutes each, to nurse their children.”) This subsection refers to women working in the private sector; subsection XI(c) of section B refers to public workers and is expressed in similar terms.

19. L.F.T. art. 165 (“The fundamental purpose of the modalities consigned in this chapter is the protection of maternity.”).

20. See *id.* arts. 166, 170.

21. *Id.* art. 167.

22. *Id.* arts. 166, 172.

life or the physical or mental health of the woman, fetus or infant. To determine whether the activity is prohibited, the laws in Mexico consider the nature of the work, the physical, chemical, or biological conditions of the environment in which it is performed, and the composition of the raw material that is used.<sup>23</sup> Mexican law also prohibits pregnant or nursing women from nighttime work (after 10 p.m.).<sup>24</sup>

Mexico also provides several specific rights for women protected under the Federal Labor Law. The law allows two six-week (42 days) maternity leave periods: one for prenatal care and one for postnatal care, with full salary compensation.<sup>25</sup> Working women may extend their prenatal and postnatal leave periods if their pregnancy or childbirth requires additional time (50% of the salary, not to exceed 60 days).<sup>26</sup> Mexican law also affords women two 30-minute resting periods per work day in order to nurse infants during the lactating period in a suitable and hygienic place as well as reinstatement (not to exceed one year after childbirth) and preservation of seniority rights during the prenatal and postnatal periods.<sup>27</sup>

According to the laws in Mexico, pregnant women are supposed to avoid activities deemed strenuous and hazardous during pregnancy, such as lifting, pulling, or pushing heavy objects, which may lead to trepidation or standing for long periods of time.<sup>28</sup> Likewise, Mexican law dictates that pregnant women must avoid activities that may affect their mental and physical state.<sup>29</sup>

The Mexican Constitution and the Federal Labor Law remit private workers to the applicable Social Security Law. The Social Security Law includes provisions dealing with maternity protection thereby expanding the benefits available to working women.<sup>30</sup> The IMSS, in charge of administering social security in Mexico, is a decentralized public entity under semi-private administration with its own personality and resources.<sup>31</sup>

Social Security in Mexico falls under two categories or regimes, one of which is voluntary and the other mandatory. The mandatory Social

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23. See *id.* art. 167. The second paragraph in Article 167 mentions the types of work considered dangerous or unhealthy. ("Issued regulations shall determine the types of work comprised in the above definition.")

24. *Id.* art. 166.

25. *Id.* art. 170 (II).

26. *Id.* art. 170 (V).

27. *Id.* art. 170 (VII).

28. *Id.* art. 170 (I).

29. *Id.*

30. See L.F.T. art. 170 (I).

31. See *Ley del Seguro Social*, [L.S.S.] art. 5 (Mex.).

Security regime includes a branch focused on labor risks. The labor risks branch consists of the following subsections: sickness and maternity; disability and life; retirement and dismissal at an elderly age; day care centers; and social provisions.<sup>32</sup> According to the maternity subsection of the labor risks branch, protected individuals in Mexico include: women with insurance, women with pensions, the wife or concubine of the insured, and the daughters of the insured until the daughter reaches either 16 years of age, or if the daughter is a student, until she reaches 25 years of age. Under Mexican law, disabled daughters who are unable to work are considered protected individuals for life.

In Mexico, maternity provisions become effective on the date that the IMSS certifies the pregnancy. The pregnancy certification designates an expected due date, which serves as the basis to calculate the 42-day prenatal period for purposes of salary payment, for the insured woman only.<sup>33</sup> IMSS provisions for the insured woman that are granted during pregnancy, birth, and the period of confinement following childbirth include: obstetric assistance; monetary assistance for lactation during six months; and a layette when the child is born.<sup>34</sup> The wife or concubine of the insured or the pensioned individual is entitled to all the abovementioned provisions except the layette.<sup>35</sup>

The law in Mexico accounts for special maternity cases or circumstances, such as high-risk pregnancy that requires complete bed rest before the prenatal period commences.<sup>36</sup> Moreover, the Social Security Law in Mexico establishes that for every insured, whether maternity-related or not, there is assistance to help with funeral costs in case the insured or pensioned woman dies.<sup>37</sup> There is also a one-time contribution to assist the insured with wedding costs.<sup>38</sup> Also, the financially dependent widow-husband or concubine-husband has the right to receive the deceased wife's insurance or the disabled wife's pension.<sup>39</sup> Further, each child of the insured or disabled, pensioned woman may rightfully obtain the pension to cover orphanage costs, but with certain age restrictions.<sup>40</sup>

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32. *Id.* arts. 6, 11.

33. *Id.* art. 85.

34. *See id.* art. 94.

35. *Id.* art. 95.

36. *See id.* art. 101.

37. *Id.* art. 104.

38. *Id.* art. 165.

39. *Id.* art. 130.

40. *Id.* art. 134.

## B. Day Care Centers

Mexican law also recognizes child care as an important issue related to maternity. The IMSS provides day care service in accordance with Article 123 of the Constitution and section 171 of the Federal Labor Law, which requires the IMSS to offer day care services as mandated by statute.<sup>41</sup>

In Mexico, the purpose of the day care centers is to provide a special service for insured women who work and therefore cannot care for their children during work hours. Mexican day care centers are not medical units for children. The service includes supervision, safekeeping, hygiene, feeding, healthcare, education, and recreation for the infant.<sup>42</sup> One of the objectives of the day care center is to foster family and social bonding. The centers take into account the social reality for women in the workplace. Thus, the day care service helps women carry out the duties of their jobs by caring for their children while they are at work.

The protected individuals under Mexico's day care center category, include: insured working women under the mandatory regime and insured working widows or divorced husbands that have legal custody of the children (as long as they do not marry or enter into a cohabitation relationship).<sup>43</sup> Day care services are provided to children at least 43-days old and continue up to four years of age.<sup>44</sup> Insured persons maintain their right to day care services for an extra four weeks once they no longer qualify for the mandatory regime.<sup>45</sup> The IMSS regulates this service under its Rules for the Provision of Day Care Services.<sup>46</sup>

## C. Liability and Sanctions

Mexico enforces its maternity regulations by imposing liability and sanctions on parties who do not comply with maternity-related regulations as established by Mexico's Federal Law.<sup>47</sup> The principles of liability and sanctions are represented in Article 992 of Mexico's Federal Labor Law, which states, "Labor rules violations by employers or workers will be sanctioned in accordance with the regulations set forth in this Title,

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41. See L.S.S. art. 201-207

42. Reglamento para la Prestación de los Servicios de Guardería [Regulation for the Provision of Day Care Services], cap. 2, art. 6, D.O., 30 de junio de 1997 (Mex.).

43. L.S.S. art. 205.

44. *Id.* art. 206.

45. *Id.* art. 207.

46. *See id.*

47. See Ley Federal del Trabajo, [L.F.T.] art. 992 (Mex.).



regardless of the applicable liability for failure to comply with their obligations.”<sup>48</sup> According to Article 992, employers or workers who violate the federal labor laws will be sanctioned.<sup>49</sup> The type of sanction imposed depends on whether the violation was civil, criminal, administrative, or other.<sup>50</sup> The law requires a case-by-case determination of liability.<sup>51</sup>

The second part of Article 992 addresses the amount of the sanction imposed on the violator: “The amount of the pecuniary sanctions established in this Title will be assessed by using the current per diem minimum wage for the location and time of the violation as a base calculation.”<sup>52</sup>

The Mexican Federal Labor Law also describes the formula used to calculate the amount of the sanction as, “A fine equal to 3 to 155 times the minimum wage, computed as set forth in Article 992, will be imposed on employers that violate the rules governing women and children’s labor.”<sup>53</sup>

### III. Comparison to Maternity Rights in Spain and the United States

The Mexican legal provisions for maternity rights constitute one approach to help employers and employees balance the demands of work and family. In contrast, the laws of Spain and the United States offer a different approach to maternity regulations. For example, while a great number of developed and underdeveloped countries have national policies in place for the protection of maternity rights, the United States does not have national provisions guaranteeing maternity and child care benefits for women in the workplace.<sup>54</sup> However, the laws in Mexico, Spain, and the United States share many common elements as each country developed laws in response to the large number of women entering the workforce.

#### A. Protected Individuals

In Mexico, the law protects pregnant women, nursing women, the fetus, and the infant.<sup>55</sup> In some instances, the protection extends to the father (widow or divorced with custody of the minors) by providing day

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* art. 995.

54. Caroline Little, *Mother Load or Overload: The Need for a National Maternity Policy*, 17 N.Y.U. J. INT’L L. & POL. 717 (1985).

55. See L.F.T. arts. 165, 201, 205.

care services for his children. From an objective standpoint, the protected individuals are the children and not the father. The law in Mexico acknowledges single fathers as individuals responsible for the care of their children and offers day care service as a result.<sup>56</sup>

In comparison, Spanish law protects the same individuals as Mexico, except for the father, whom the Mexican law considers only for day care purposes.<sup>57</sup> In Spain, the Labor Code also includes adopted or foster children younger than six years of age as protected individuals.<sup>58</sup> In contrast, the maternity-related laws in the United States solely protect the pregnant woman and the fetus. The U.S. laws do not consider children, except in special care situations, which include adopted children.<sup>59</sup>

## B. Measures

The maternity rights provisions of Mexico and Spain share many similarities. Both systems require employers to offer working women accommodations during pregnancy and the nursing period such as adjusting work conditions, changing jobs, and leaves of absence. Spanish law recognizes “pregnancy risks” as a cause for a leave of absence with reinstatement rights,<sup>60</sup> as well as temporary or permanent adoption and foster care for children six years of age or younger.<sup>61</sup>

In the United States, the concept of “discrimination” plays an

56. See *id.* art. 205.

57. See Estatuto de los Trabajadores [Worker’s Statute], art. 20 (B.O.E., 1995, 75) (Spain).

58. The Estatuto de los Trabajadores states, “Article 45: Contract suspension. Causes. . . d) Maternity, pregnancy risks for working women, and adoption, foster care, preadoptive or permanent of children younger than six.” *Id.* at 45.

59. See Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. §§ 2000(e)–(k) (1994)) (including discrimination arising from pregnancy, under the auspices of sex-based Title VII discrimination).

60. See FERNANDEZ MARCOS LEODEGARIO, PREVENCIÓN DE RIESGOS LABORALES, LEGISLACIÓN BÁSICA [PREVENTION OF LABOR RISKS, BASIC LEGISLATION] 627 (4th ed. 2002). The author indicates that Act 39/1999 of November 5th, to promote the conciliation between the family and working lives of workers, is very important because it modifies an ample list of formal articles and laws, such as articles 45(d) and 48.5 of the Estatuto de los Trabajadores. It adds: “These modifications constitute a fundamental consequence, although not exclusive, of the creation of a new contingency protected by Social Security, namely the risk during pregnancy that is directly related to ‘maternity protection’ in art. 26 of the Ley de Prevención de Riesgos Laborales (Labor Risks Prevention Act).” *Id.* This Act establishes that the suspension of the contract due to risks posed to pregnancy may be declared “. . . during a necessary period to protect their safety or health and while the impossibility remains for her to return to her previous position or to another position suitable for her condition.” *Id.*

61. See Estatuto de los Trabajadores [Worker’s Statute], art. 48 § 4 (B.O.E., 1995, 75) (Spain). “Suspension with reinstatement” of the Estatuto de los Trabajadores stipulates, “In the event of adoption and foster care, preadoptive and permanent, of minors six years of age or younger, the suspension will have a duration of sixteen uninterrupted weeks.” *Id.*

important role in its legal system. Under this system, it is unlawful for employers to discriminate on the basis of sex, which includes pregnancy. Thus, in the United States, employers cannot prevent or limit women, pregnant or not, from working in positions that require lifting heavy objects, working night shifts, or working overtime.<sup>62</sup>

### C. Prohibited Activities

The laws in Mexico and Spain prohibit work that is hazardous or unhealthy if it has the potential to adversely affect the physical or mental health of a protected individual. Mexico specifically enacted maternity-related regulations to determine the types of hazardous work that are prohibited due to their potential harm to protected individuals. In comparison, Spain developed Annex II of the 92/85/EEC Directive, which designates the prohibited activities.<sup>63</sup>

The statutory law of the United States, based on the principle of equal rights for women and men, protects working women through case law precedent and the provisions set forth by the Occupational Safety and Health Administration (“OSHA”).<sup>64</sup> The main objective of this agency is to create labor safety rules and enforce compliance to ensure that employers provide employees with a healthy workplace free of hazards. Even in those areas in which OSHA has not enacted specific safety rules, employers are still required to strictly comply with the fundamental provisions of the Act.<sup>65</sup> The main provision of OSHA establishes that every employer must offer a workplace that is free of any identified hazard that causes or could potentially cause death or serious injury to employees.<sup>66</sup>

Further, Title VII of the Civil Rights Act of 1964 specifically prohibits gender-based discrimination in employment.<sup>67</sup> However, there are two exceptions under Title VII that allow an employer to discriminate: the bona fide occupational qualification defense and the business necessity

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62. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(b)(1) (2002). See generally Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq. (2003).

63. See Council of the European Communities Directive 92/85/EEC, available at <http://www.dehp-facts.com/upload/documents/document39.pdf> (last visited April 9, 2004).

64. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1999).

65. See *id.* § 654.

66. See 29 U.S.C. § 654(a)(1) (1999).

67. See 42 U.S.C. § 2000e-2(a)(1) (2003) (setting forth elements required to prove gender-based discriminatory employment practice). Title VII provides, in pertinent part: “It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” *Id.*

defense.<sup>68</sup> The bona fide occupational qualification defense requires proof that the job requires a person of specific gender, religion, or ethnicity, and that such requirement is reasonably necessary to the regular business functions of the employer. The business necessity defense is a concept created by the courts that allows gender-based discrimination when it is necessary to protect the employer's commercial interests.<sup>69</sup> The difference between these two exceptions is that the business necessity defense looks at whether the activity at issue is absolutely necessary to the job.<sup>70</sup>

Nevertheless, courts in the United States focus primarily on equality among workers. Under this view, the health of the mother and the fetus may fall second to equal rights. For example, an Alabama federal district court held that it is illegal to dismiss a woman working as an X-ray technician on the grounds that she is pregnant, even though this type of work poses a considerable risk to the health of the fetus.<sup>71</sup> In reaching this conclusion, the court held that to justify the pregnant woman's dismissal, the employer would have to prove that the woman could not perform the duties of her job because of her pregnancy and therefore, the bona fide occupational qualification defense did not apply.<sup>72</sup> Although the court considered the employer's concern for the potential harm to the fetus, this was not a determining factor because safety measures were readily available to minimize the risk of harm.<sup>73</sup>

Similarly, the United States Supreme Court held that "fetal protection policies" created by some employers are discriminatory. For example, in a case involving a battery manufacturer that precluded fertile women from working under conditions that exposed them to high quantities of lead determined hazardous by OSHA, the Court found the policy facially discriminatory because the policy treated men and women differently.<sup>74</sup> In addition, the employer could not prove that gender was a bona fide qualification for the job.<sup>75</sup>

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68. See *International Union, United Automobile Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 194–195 (1991).

69. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971); *Gilbert v. General Electric Company*, 375 F. Supp. 367, 382 (E.D. Va. 1974).

70. James O. Pearson, Jr., "Business Necessity" *Justifying Prima Facie Discriminatory Employment Practice*, 12 Am. Jur. P.O.F. 2d. 49, 65 (2001).

71. *Hayes v. Shelby Mem'l Hosp.*, 546 F. Supp. 259, 263–264 (N.D. Ala. 1982).

72. See *id.* at 265.

73. See *id.*

74. See *UAW*, 499 U.S. at 206.

<sup>75</sup> *Id.*

## D. Specific Rights

Mexico's maternity laws are very generous and detailed, especially for women insured under social security institutions. Specifically, the IMSS grants women the right to obstetric assistance, including: office visits, exams, hospital care, pharmaceutical products, and in general, all the medical attention that the insured woman needs at the time of childbirth. In addition, the IMSS provides the necessary medical postpartum care for both the woman and her infant, including a layette when the child is born and monetary assistance for six months during the lactating period. In Mexico, the laws provide working women with the right to a six-week prenatal, and a six-week postnatal, maternity leave period with full salary compensation along with preservation of her seniority rights and position. During the nursing period, mothers have the right to take two 30-minute breaks each work day to nurse their infants.

In comparison, the Spanish law suspends the working contract during the maternity period and offers paid leave for prenatal exams as well as time to prepare for childbirth.<sup>76</sup> The suspension of the working contract in Spain during the maternity period is established by the *Estatuto de los Trabajadores* ("Workers Statute"), which states:

In the case of childbirth, the contract shall be suspended for an uninterrupted period of sixteen weeks, which may be extended where there are multiple births by two weeks per child, starting with the second child. The leave shall be allocated in accordance with the wishes of the woman concerned, provided that at least six weeks is taken immediately following the birth.<sup>77</sup>

Aside from offering paid leave for prenatal exams and preparation for childbirth, Spanish law allows working women to be absent from work for one hour per day in order to nurse an infant six-months or younger.<sup>78</sup> Spanish women may choose to divide the nursing hour into two 30-minute intervals during the day. According to Spanish law, women may also elect to end their work day 30 minutes early in order to nurse rather than spend the time to nurse at work. In Spain, the father or mother, in case both parents work outside the home, can enjoy this paid leave irrespectively.<sup>79</sup>

The United States implemented the Pregnancy Discrimination Act of 1964 to prevent employers from discriminating against pregnant women in the workplace. Under this law, pregnant women have the right to work in

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76. See *Estatuto de los Trabajadores* [Worker's Statute], art. 45 (B.O.E., 1995, 75) (Spain).

77. *Id.* art. 48(4).

78. *Ley de Prevención de Riesgos Laborales* [Law of Prevention of Labor Risks], art. 26.5 (B.O.E., 1995, 269) (Spain).

79. *Estatuto de los Trabajadores* [Worker's Statute], art. 37.4 (B.O.E., 1995, 75) (Spain).

any job, regardless of their pregnancy so long as they can perform the essential functions of the job. The Act prohibits employers from denying women the position on grounds of pregnancy.<sup>80</sup>

One of the greatest triumphs for working women in the United States was establishing the principle of equality between men and women in the workplace. However, fundamental to the principle of equality is the concept of “nondiscrimination based on gender,” which inherently conflicts with the special privileges maternity rights grant to pregnant women. For example, in *Newport News Shipbuilding v. Equal Employment Opportunity Commission*, the United States Supreme Court held that a company policy granting pregnancy benefits to women employees was in violation of the Pregnancy Discrimination Act to the extent that it did not grant the same benefits to the wives of male employees.<sup>81</sup> At present, the law in the United States classifies pregnancy under the same category as temporary illnesses or conditions.

In the United States, the working woman has the right to prohibit her employer from mentioning the condition of her pregnancy in regards to determining her work capacity.<sup>82</sup> If the working woman is temporarily disabled due to her pregnancy, she has the right to be treated like any other temporarily disabled worker. The pregnant working woman has the right to reinstatement in her job on the date she returns to work for the same amount of time and under the same conditions for any other disability.<sup>83</sup>

Under the Family and Medical Leave Act of 1993 (“FMLA”),<sup>84</sup> every eligible woman or man working for an employer with fifty or more employees within 75 miles of the worksite<sup>85</sup> has the right to a 12-week leave of absence without pay during any 12-month work period for childbirth, to care for a newborn child, and for adoption.<sup>86</sup> To be eligible, the individual must have worked for the employer for a one-year minimum and for at least 1,250 hours.<sup>87</sup> A leave of absence granted under the FMLA is without pay.<sup>88</sup>

According to the FMLA, the working woman has the right to maintain her health insurance coverage through her employer during her time off for

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80. See 29 C.F.R. § 1604.10 (2002).

81. 462 U.S. 669, 676 (1983).

82. See 29 C.F.R. § 1604, App., at question 6 (2002).

83. See *id.* at question 9 (2002).

84. See Family and Medical Leave Act, 29 U.S.C. §§ 2601–2619 (1999).

85. *Id.* § 2611(2)(B)(ii).

86. *Id.* § 2612(a)(1).

87. *Id.* § 2611(2)(A).

88. *Id.* § 2612(c).

pregnancy, childbirth, or adoption of a child. The FMLA ensures that the working woman's health benefits remain intact during her absence from work.<sup>89</sup> The United States Department of Labor investigates complaints from eligible workers regarding the FMLA. If the Department determines that the employer violated the employee's rights under the FMLA, the Secretary of Labor may bring legal administrative action against the employer to resolve the violation.<sup>90</sup> The employee suffering an FMLA violation can also bring an action for damages or equitable relief against her employer.<sup>91</sup>

#### IV. Conclusion

The laws in Mexico and Spain regarding maternity share many similarities, including protecting not only the mother and fetus, but also the infant and father. In contrast, the laws in the United States solely protect the mother and unborn fetus.

Mexican and Spanish regulations state precise measures that employers must take to adapt the working environment to accommodate the needs of pregnant mothers. By contrast, the laws in the United States focus on the equality of the sexes in the workplace and consequently do not provide specific accommodations for pregnant women. Whereas Mexican and Spanish legal provisions prohibit pregnant women from certain working conditions that have been deemed unsafe for their health, pregnant women in the United States working in hazardous conditions are protected by the same provisions that protect every worker, male or female, in the country.

Thus, this article reveals that the United States takes a distinctly different legal approach to maternity benefits as compared to Mexico and Spain. The laws in the United States dealing with maternity tend to be more general than their Mexican and Spanish counterparts.<sup>92</sup> As demonstrated by the analysis in this article, the key to this difference apparently lies in the foundation and rationale on which each entire legal regime is based. While Mexican and Spanish maternity rights are grounded in the unique circumstances of childbearing, the laws of the United States focus on establishing equality among workers.

Achieving equality in the workplace is a desirable goal attuned with American jurisprudence. However, while Mexican and Spanish laws

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89. *Id.* § 2614(c)(1).

90. *Id.* § 2617(b).

91. *Id.* § 2617(a).

92. *See Little, supra* note 54, at 748.

prohibiting only pregnant women from performing tasks considered hazardous may be overly intrusive and discriminatory, classifying pregnancy under a general disabilities category may disregard special inherent needs of these workers. These special needs, such as additional resting periods during the work day and child care, seem to be better met by regarding maternity as a distinct issue. Thus, in seeking to address the needs of American families, the United States can learn much from Mexico's approach to maternity rights.