

GLOBALIZING U.S. EMPLOYMENT STATUTES THROUGH FOREIGN LAW INFLUENCE: MEXICO'S FOREIGN EMPLOYER PROVISION AND RECRUITED MEXICAN WORKERS

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I. INTRODUCTION

It is widely acknowledged that Mexican nationals comprise a growing portion of the U.S. workforce, both as authorized and unauthorized workers.¹ The focus on Mexican workers who are currently within the United States² overshadows the fact that U.S. employers—typically with the help of their Mexico-based agents—are regularly recruiting and hiring low-wage Mexican workers in Mexico to work in the United States (hereinafter referred to as “recruited Mexican workers”).³ For instance, it was reported in January 2008

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1. See, e.g., Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, (Nov. 2005), tbl. 1 (indicating that Mexico is country of origin of majority of foreign-born workers); *Illegal immigrants not acting alone*, DAYTON DAILY NEWS, Dec. 11, 2005, at B6 (“More than half of [the 6.3 million unauthorized] workers are from Mexico.”). See generally Brad Knickerbocker, *Illegal immigrants in the US: How many are there?*, CHRISTIAN SCI. MONITOR, May 16, 2006, at 1 (stating that estimates of unauthorized persons in the U.S. “range widely—from about 7 to 20 million”).

2. See, e.g., Lizette Alvarez & John M. Broder, *More and More, Women Risk All to Enter the U.S.*, N.Y. TIMES, Jan. 10, 2006, at A2.

3. Claire Osborn, *In search of able fingers, tailors turn south*, AUSTIN AMERICAN-STATESMAN (TEXAS), Nov. 27, 2007, at D1 (acknowledging that some U.S. employers and their recruiters seek out workers in Mexico); Natali T. Del Conti, *Disposable Workers*, HISPANIC TRENDS, Nov. 30, 2005, at 42 (same); Cindy Rodriguez, *For Labor Activists, Unlikely Alliance*, BOSTON GLOBE, May 2, 2001, at B1 (same); Andrea Batista Schlesinger, *Immigration raid an 'economic dead end,'* CHICAGO SUN TIMES, Nov. 23, 2006, Editorial at 33 (same); Kevin G. Hall,

that “Iowa meatpackers actively recruited workers in Mexico” to have enough workers so that they could ship pork “from Iowa slaughterhouses to the rest of America.”⁴ Moreover, in conjunction with U.S. work authorization visa programs for low-skilled workers, there are vast networks operating within Mexico to help U.S. employers find employees who will travel to the United States to work.⁵ This article considers whether a provision of Mexican labor law—which unconditionally forbids foreign employers from failing to pay recruited Mexican workers’ relocation costs to the United States up front—may influence two domestic U.S. employment statutes in cases involving recruited Mexican workers.

This examination of the potential for foreign law influence on two U.S. employment statutes brings an under-explored area of inquiry to the growing literature on the scope of rights of foreign workers in the United States. To date, the scholarship on the scope of foreign workers’ workplace rights in the United States has not concentrated on foreign law.⁶ Instead, there is increasing focus on the domestic labor and employment law implications of recent curtailments to unauthorized workers’ abilities to collect backpay remedies for wrongful discharge under the National Labor Relations Act (NLRA) in the wake of the U.S. Supreme Court’s *Hoffman Plastics v. NLRB* decision.⁷ Some scholarship on the scope of foreign

Illegal immigrants’ determination overcomes hurdles, CENTRE DAILY TIMES, June 6, 2006, at A1 (same); Lisa Duran & Estevan Flores, *Immigration raids shatter families and human rights*, DENVER POST, Nov. 29, 1998, at G-03 (same); Editorial Writers Desk, *An Immigration Policy Muddle; Green Card Controversy Exemplifies this Federal Problem*, L.A. TIMES, Oct. 2, 1997, at B8 (same); *Marijuana discovered on federal land; Growers hidden; laborers do work*, PRESS ENTERPRISE CO., July 25, 1994, at B01 (same).

4. Carlos Guerra, *Among the big losers in Iowa: Immigration as a wedge issue*, SAN ANTONIO EXPRESS-NEWS, Jan. 5, 2008, at 1B.

5. Kevin Diaz, *Advocates urge U.S. to expand guest-worker opportunities*, CHATTANOOGA TIMES FREE PRESS, Aug. 13, 2006, at A11 (acknowledging that U.S. employers and their recruiters try to find workers in Mexico for guest worker visa programs in the United States); Bob Scott, *Making the kids happy*, JOURNAL AND COURIER (LAFAYETTE, INDIANA), July 27, 2006, at 1C (same); Scott Jagow, *Texas man has great success with a guest worker program for Mexican workers*, MARKETPLACE MORNING REPORT: MINNESOTA PUBLIC RADIO, Dec. 15, 2005 (same); Kim Nilsen, *Quietly, law firm beefs up its personal injury practice*, TRIANGLE BUS. J., Sept. 3, 2004, at 9 (same).

6. For a rare and recent exception to this, see Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT’L L. 169, 172–73 (2007) (arguing that domestic courts in the United States “can and should consider international and foreign law when adjudicating the rights of unauthorized immigrant workers.”).

7. 535 U.S. 137 (2002). See, e.g., Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INT’L L.J. 115 (2008); Anne Marie O’Donovan, *Immigrant Workers and Workers’ Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299 (2006); Beth Lyon, *When More ‘Security’ Equals Less Workplace Safety: Reconsidering U.S. Laws that*

workers' rights is more international in its focus as it examines the role of international forums and international labor standards. For instance, there is an expanding literature on foreign workers' rights adjudication in international bodies such as the International Labor Organization,⁸ Inter-American Court of Human Rights,⁹ and the National Office of Administration of the North American Agreement on Free Trade.¹⁰ Some have assessed the prospects of enforcing international labor standards through domestic courts in the United States.¹¹ There has also been considerable attention paid to the applicability of U.S. employment statutes to workplaces and foreign workers abroad.¹² While these examples move beyond a purely domestic focus, however, they do not specifically address the influence of foreign labor laws on U.S. domestic causes of action on behalf of foreign workers in domestic courts.

Disadvantage Unauthorized Workers, 6 U. PA. J. LAB. & EMP. L. 571 (2004); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004).

8. See, e.g., *Developments in the Law: Jobs and Borders-Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV., 2202, 2204 (2005) (discussing efforts to increasingly link "trade and labor rights under the auspices of the International Labor Organization.").

9. See, e.g., Sarah H. Cleveland, *International Decisions: Legal Status and Rights of Undocumented Workers*, 99 AM. J. INT'L LAW 460 (2005); Sarah Cleveland, Beth Lyon, & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 812-22 (2003).

10. See generally Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 199, 212-21 (Lance A. Compa & Stephen F. Diamond eds., 1996); Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U.J. INT'L L. & POL'Y 117, 117-19 (1993) ("Advocates of international fair labor standards have challenged the traditional right of countries to address their labor laws and labor relations as solely internal matters . . . sovereignty is now being challenged by claims of international labor rights in the field of employment standards and industrial relations."). Some of these articles focus on the applicability of these avenues to both foreign and domestic workers in the United States.

11. See generally Sarah H. Cleveland, *The Alien Tort Statute: Civil Society and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 971 (2004) (discussing the circumstances where ATCA can be used "to enforce fundamental human rights norms against multinational corporations."); Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Standards*, 4 U. PA. J. LAB. & EMP. L. 529, 533-58 (2002) (arguing that ATCA creates a private right of action in some cases involving involuntary servitude, peonage, or forced labor).

12. See, e.g., Olivia P. Dirig & Mahra Sarosfky, Note, *The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 HOFSTRA LAB. & EMP. L.J. 709 (2005); Thomas Wang, *Mahoney v. RFE/RL: An Unexpected Direction for the Foreign Laws Defense*, 30 VAND. J. TRANSNAT'L L. 379, 383-84 (1997). The U.S. Congress clarified that U.S. employers operating abroad cannot escape Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., and Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., vis-à-vis their U.S. citizen employees by conducting business abroad. See, e.g., 42 U.S.C. § 2000e-1(c)(2) (Title VII); 42 U.S.C. § 12112(c)(2) (ADA); 29 U.S.C. § 623(h)(2) (ADEA).

Not only will this article speak to the scope of rights of foreign workers in the United States from a unique vantage point, but it may also inform an ongoing area of inquiry for labor and employment law scholars about the extent to which U.S. employment law is unresponsive to new challenges. Scholars have identified a myriad of new challenges to domestic labor and employment law regimes often linked to global economic integration.¹³ Moreover, some have illustrated how new types of employment relationships in the United States, often in workplaces with a significant number of foreign workers, raise new questions about the meaning of statutory terms embodied in U.S. employment law.¹⁴ Scholars continue to grapple with and debate to what extent traditional labor and employment law regimes are able to respond to these challenges.¹⁵ While this article is not a comprehensive assessment of the adaptability of the U.S. system, it contributes to this inquiry by assessing one aspect of the U.S. employment law regime's ability to respond to a new challenge.

After setting the framework for the travel costs of recruited Mexican workers and Mexico's foreign employer provision in Section II, Sections III and IV of this article examine two pathways for the potential influence of Mexico's foreign employer provision on the U.S. employment law regime; specifically, they explore the influence

13. See, e.g., Benjamin Aaron & Katherine V.W. Stone, *Bridging the Past and the Future: A Symposium on Comparative Labor Law*, 28 COMP. LAB. L. & POL'Y J. 377, 386 (2007) ("In the past decade, all of the labor law regimes in the Western world have had to contend with the reality of globalization. Everywhere, globalized production strategies and new international trading arrangements have had an impact on domestic labor law."); Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case for a Comparative Transnational Approach*, 28 COMP. LAB. L. & POL'Y J. 565, 567 (2007) ("Many countries in the developed world are facing major challenges to their labor law regimes, challenges that emanate from the separate but interrelated dynamics of flexibilization, globalization, and privatization."); Andrew P. Morriss & Samuel Estreicher, *Introduction*, in CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES, PROCEEDINGS OF THE 54TH ANNUAL CONFERENCE ON LABOR 1, 1 (2005).

14. See, e.g., Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988 (1999) (stating that the "proliferation of multitiered employment relationships . . . by means of which one or more layers of employing intermediaries shield real employers from their workers" has sparked new questions about the scope of the definition of "employer" under the Migrant and Seasonal Agricultural Worker Protection Act and the Fair Labor Standards Act.).

15. See, e.g., Aaron & Stone, *supra* note 13, at 386 (summarizing Caruso's identification of three perspectives about how well traditional labor and employment law regimes can cope as (1) optimistic about their abilities to innovatively adapt; (2) more pessimistic about the prospects and (3) a realist view which combines the two previous perspectives); see Bruno Caruso, *Changes in the Workplace and the Dialogue of Global Law in the "Global Village"*, 28 COMP. LAB. L. & POL'Y J. 501 (2007). For a discussion of the outdated nature and "morbidity" of collective bargaining under the National Labor Relations Act see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527-30 (2002). See generally, Cynthia Estlund, *Something Old, Something New: Governing the Workplace By Contract Again*, 28 COMP. LAB. L. & POL'Y J. 351 (2007).

of Mexico's foreign employer provision on domestic employment claims based on (1) the Migrant and Seasonal Agricultural Worker Protection Act¹⁶ and (2) the Fair Labor Standards Act.¹⁷ As will be discussed below, the former explores the potential for the "incorporation of" foreign law requirements into a U.S. employment statute and the latter explores the potential for the "use of" foreign law to aid the interpretation of a U.S. employment statute. Both are explorations of foreign law influence on domestic causes of action in U.S. courts and neither are explorations of foreign law causes of action in the U.S. courts or abroad. By limiting the inquiry to a context where the employment relationship involves foreign workers and originates in a foreign country but overwhelmingly takes place within the United States, I examine a unique situation where foreign labor law is more likely to be related to the particular facts before a U.S. court. Section V addresses potential resistance to the consideration of foreign law in the context of these domestic employment claims. Section VI concludes with a brief summary and discussion of the implications of the theories presented in the article.

II. THE TRAVEL COSTS OF RECRUITED MEXICAN WORKERS AND MEXICO'S FOREIGN EMPLOYER PROVISION

It is not uncommon for a low-wage recruited Mexican worker to incur significant costs by paying recruitment, visa, and transportation costs to travel great distances from the interior of Mexico to his or her final place of employment in the United States.¹⁸ A number of

16. 29 U.S.C. §§ 1801 et seq.

17. 29 U.S.C. §§ 201 et seq.

18. The travel costs range from approximately \$300 to more than \$1250 per person. *See Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 U.S. Dist. LEXIS 51950, at *9 (D. Ga. 2007) ("In total, the Laborers each claim between \$ 500 and \$ 600 dollars in pre-employment fees"); Diaz, *supra* note 6 (stating that the U.S. employer's recruiters "can charge prospective workers upward of \$1,250"); Avila-Gonzalez v. Barajas, 2006 U.S. Dist. LEXIS 9727, at *13 (D. Fla. 2006) (indicating that employer was responsible for named Plaintiff's visa, recruitment, transportation, and subsistence fees, which totaled approximately \$650); Martinez-Bautista v. D&S Produce, 447 F. Supp. 2d 954, 964 (D. Ark. 2006) (stating that named plaintiff's bus transportation and visa fees totaled \$311); Morante-Navarro v. T & Y Pine Straw, Inc., 350 F.3d 1163, 1166 (11th Cir. 2003) (stating that the "deducted expenses included a \$400 processing fee T&Y was required to pay to its agent for filing H-2B applications, \$ 153 for visa-related expenses, and \$ 197 for bus fare between Monterrey, Mexico, and the work site."); Perez-Perez v. Progressive Forestry Servs., 2000 U.S. Dist. LEXIS 414, at *8 (D. Or. 2000) (stating that Plaintiffs claimed reimbursement for approximately \$1000 in recruitment fees as well as additional amounts for other travel expenses); Arriaga v. Florida Pacific Farms, L.L.C., 305 F. 3d 1228, 1234 (11th Cir. 2002) (representing that plaintiffs' claims for travel costs were for approximately \$400 not counting recruitment fees); De Jesus De Luna-Guerrero v. North Carolina Grower's Ass'n, 338 F. Supp. 2d 649, 652 (E.D.N.C. 2004) (same).

lawsuits involving H2-B visa guest workers in the United States,¹⁹ for instance, have alleged that employer representatives demanded that workers pay grossly inflated “recruitment fees” before leaving Mexico.²⁰ Some foreign workers have complained that U.S. employers convince them with false promises before they leave Mexico.²¹ Moreover, in a recent federal class action suit involving H2-B workers in Oregon, the lead plaintiff alleged that the employer’s deduction for relocation transportation and recruitment fees brought his take-home wage down to thirteen cents per hour during the first few weeks of employment.²²

It is unclear whether U.S. law requires U.S. employers to pay, up front, for the relocation travel costs associated with bringing recruited Mexican workers to the U.S. site of employment. The U.S. H2-B visa program regulations for foreign guest workers do not require U.S. employers to pay for recruited Mexican workers transportation, visa, recruitment, and subsistence costs related to the move to the United States (hereinafter collectively referred to as “relocation travel costs”). The H2-A agricultural guest worker program regulations require U.S. employers to pay a portion of the relocation travel costs but not until 50% of the period of employment, as specified in the contract, is completed.²³ The federal and state courts of the United

19. The names “H2-A” and “H2-B” refer to the sections of the Immigration and Nationality Act that authorize temporary unskilled workers to be admitted to the United States, 8 U.S.C. § 1101(a)(15)(H)(ii) (a)–(b). The H2-B program allows approximately 66,000 visas each year. U.S. DEPARTMENT OF LABOR, *Employment & Training Administration, H-2B Certification for Temporary Nonagricultural Work*, available at <http://www.foreignlaborcert.doleta.gov/h-2b.cfm> (last accessed Feb. 9, 2008). This article does not address other work authorization programs that largely target higher income workers, such as the H1B program, which authorizes visas for certain skilled foreign workers.

20. See, e.g., *Recinos-Recinos, et al. v. Express Forestry*, 2006 U.S. Dist. LEXIS 2510 (D. La. 2006). For discussion of additional cases, see Mary Bauer et al., *Worker Concerns About the McCain-Kennedy Immigration Reform Bill, S. 1033*, n.1, available at http://friendsfw.org/Advocates/Immig/Worker_Concerns_McCain-Kennedy.pdf.

21. See, e.g., *Barajas v. Bermudez*, 43 F.3d 1251, 1254 (9th Cir. 1994) (recounting that Plaintiffs claimed that Defendants provided them “false and misleading information concerning wage rates and other terms of employment”); *Villalobos v. Vasquez-Campbell*, 1991 U.S. Dist. LEXIS 18841, at *2 (D. Tex. 1991) (finding that “Defendants knowingly provided false or misleading information to Plaintiffs and class members concerning the terms, conditions, or existence of agricultural employment” in Mexico).

22. Tom Knudson & Hector Amezcua, *Forest workers caught in web of exploitation*, SACRAMENTO BEE, Nov. 13, 2005, at A1.

23. See 20 C.F.R. § 655.102(b)(5)(1). Agricultural employers can hire workers through the H2-A program if the U.S.D.O.L. certifies that there are not enough domestic workers willing and able to do the work and that the H2-A workers will not adversely affect the working conditions and wages of domestic workers. 8 U.S.C. §§ 1184(c)(1), 1188(a)(1). Beth Lyon, *Farm Workers in Illinois: Law Reforms and Opportunities for the Legal Academy to Assist Some of the State’s Most Disadvantaged Workers*, 29 S. ILL. U. L.J. 263, 273 (2005) (“For example, under the ‘H2-A’ visa program, agricultural employers request roughly 45,000 temporary visas . . . on an annual basis.”).

States have not comprehensively addressed whether, and under what circumstances, these up-front relocation travel costs are required by relevant U.S. employment law—such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).²⁴ While this is an unsettled area of U.S. employment law, Mexican law unambiguously requires its domestic employers²⁵ and foreign employers who come to Mexico to pay all of the relocation travel costs of their relocated employees. Article 28 of Mexican Federal Labor Law specifically requires a foreign employer to pay for the relocation travel costs of recruited Mexican workers.²⁶ Mexican Federal Labor Law, Title II, Chapter I, Article 28, states, among other things,²⁷ that for Mexican workers who will work outside of Mexico:

The cost of transportation, repatriation, transport to the place of origin and nourishment of the worker and his family, as applicable, and all costs which arise from crossing the border and fulfillment of

24. As the article discusses below, there is one U.S. Circuit Court of Appeals that has addressed this issue to a limited extent. In *Arriaga v. Florida Pacific Farms*, a case arising under the Fair Labor Standards Act (FLSA), the Eleventh Circuit held that employers are required to reimburse their recruited workers for transportation and visa costs when the employee's payment of these costs brings his or her wage below federal minimum wage standards during the first week of employment. 305 F. 3d 1228, 1243, 1248 (11th Cir. 2002). While the *Arriaga* court's reasoning arguably applies equally to all recruited Mexican workers, it does not address whether the workers' recruitment or subsistence costs can also be recouped under FLSA when they bring wages below minimum standards. The *Arriaga* court was not confronted with an argument relating to subsistence costs and did not reach the issue of recruitment costs because it found that the recruiter at issue in the case was not acting as an "agent" of the employer. *Arriaga*, 305 F. 3d at 1244–45.

25. See Ley Federal de Trabajo: Mexico, Article 30, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

26. As a matter of Mexican law, Mexican labor law does not become enforceable until the employment relationship is formed. It is not entirely clear when the relationship is formed. Some Mexican legal experts contend, however, that Mexico's foreign employer provision becomes legally cognizable on the day of departure from Mexico because the worker is, at that point, acting primarily for the benefit of the employer. E-mail communication from Mexican Labor Lawyer and Professor at the Universidad Autónoma Metropolitana, Jorge Fernandez Souza (Oct. 21, 2007) (on file with author). See Ley Federal de Trabajo: Mexico, Article 20 and 58, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI. Because this article focuses on domestic causes of action once the worker is in the United States, this distinction is not relevant.

27. This article only addresses the relocation travel costs portion of Mexico's foreign employer provision as it is the most relevant and straightforward aspect for AWPA and FLSA purposes. Mexico's foreign employer provision also requires the payment of social security benefits similar to those provided in Mexico and for foreign employers to register with, and submit a written contract to, Mexican Conciliation and Arbitration Boards (CABs). Mexican labor law is federal and local and federal CABs have jurisdiction to enforce it, depending on the industry of the employee. It is widely acknowledged that foreign employers rarely submit contracts to CABs. An employer's obligation to pay relocation travel costs, however, does not depend on the submission of a contract. E-mail communication from Mexican Labor Lawyers, Patricia Juan Pineda, (Jan. 24, 2006) and Jorge Fernandez Souza (Oct. 21, 2007) (on file with author). See Ley Federal de Trabajo: Mexico, Article 26, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

the arrangements of migration, or for any other similar concept, will be the exclusive responsibility of the employer. The laborer will receive the whole salary that belongs to him/her, [without] any deductions for those concepts.²⁸

Legal advocates for low-wage foreign workers in the United States have increasingly shown interest in the potential application of the relocation travel costs portion of Article 28 of Mexican Federal Labor Law (hereinafter referred to as "Mexico's foreign employer provision") in U.S. domestic courts.²⁹ As a result, Mexico's foreign employer provision has been raised in conjunction with AWPAs and FLSA claims on a few occasions but, as of the writing of this article, there are no judicial opinions addressing Mexico's foreign employer provision.³⁰

This article examines various legal theories for the influence of Mexico's foreign employer provision in U.S. employment law cases through two domestic legal claims: the AWPAs and the FLSA. As I will elaborate below, a U.S. court may acknowledge that Mexico's foreign employer provision (1) can be incorporated into AWPAs claims of recruited Mexican workers through AWPAs' "Working Arrangement" provision in limited circumstances and (2) may provide guidance as to whether a U.S. employer's failure to pay a recruited worker's relocation travel costs constitutes an improper deduction from minimum wages under the FLSA in circumstances when the employer's failure to pay those costs brings a recruited Mexican worker's wages below minimum standards. Rather than exploring whether Mexico's foreign employer can be brought in U.S. courts as

28. See *Ley Federal de Trabajo: Mexico*, Article 28, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI (Translation from Affidavit of Alma P. Soria Ayuso, Consul General for the Consulate of the United Mexican States located in Portland, Oregon, submitted in *Perez-Perez v. Progressive Forestry Servs.*, 2000 U.S. Dist. LEXIS 414 (D. Or. 2000) (Civ. No. 98-1474)).

29. See, e.g., *Binational Labor Convening Minutes*, Mexico City, Mexico (Oct. 4-8, 2007).

30. For a case citing Mexico's foreign employer provision as part of an AWPAs "working arrangement" see *Plaintiffs' Complaint, Salmeron-De Jesus v. Northern Dutchess Landscaping Inc.*, (S.D.N.Y. filed Mar. 4, 2008) (No. 08-cv-2168). See also *Plaintiffs' Amended Complaint, Aguilar et al. v. Imperial Nurseries et al.*, ¶ 363 (D. Conn. filed Mar. 14, 2007) (No. 07-cv-0193) (based on a similar provision of Guatemalan labor law). For a case raising Mexico's foreign employer provision in conjunction with a FLSA claim, see *Arriaga Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment (99-Civ-1726)*, at 15, and *Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment*, at 13 (arguing that "Article 28 of the Mexican Federal Labor Law explicitly requires that employers seeking to hire Mexican nationals abroad must pay for all costs related to the worker's travel outside the country."). Mexico's foreign employer law has also been raised as an independent foreign law claim. See, e.g., *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 366 (S.D.N.Y. 2007) (stating that plaintiffs claimed that defendants violated, among other things, "Mexican Law."); *Plaintiffs' Second Amended Complaint, Iglesias-Mendoza v. La Belle Farm Complaint*, (S.D.N.Y. filed Nov. 15, 2006) (No. 06-cv1756).

an independent legal claim, this article focuses on the ways Mexican labor law may be incorporated into and may inform the proper interpretation of domestic legal claims based on two U.S. employment law statutes. While there may be a case to be made for bringing Mexican foreign employer claims as independent foreign law causes of action in U.S. domestic courts, this article maintains a domestic law focal point and explores domestic pathways for the influence of Mexico's foreign employer provision.³¹

III. FOREIGN LAW INFLUENCE ON AWWA

Mexico's foreign employer provision may influence a U.S. employment statute—the Migrant and Seasonal Agricultural Worker Protection Act (AWWA)—in some circumstances. While no domestic court has considered the role of foreign laws in the AWWA context, a group of domestic cases provide the basis for several theories that Mexico's foreign employer provision may be incorporated as a term of an AWWA "working arrangement." While at first blush it may seem entirely novel to incorporate one aspect of a foreign law into an otherwise domestic cause of action, courts have done something similar in the contract law context. For instance, *McGhee v. Arabian American Oil Co.*, a U.S. Court of Appeals for the Ninth Circuit decision, indicated that the federal court interpreted Saudi Arabian labor law within the context of a contract dispute otherwise governed by Texas law.³² The employment contract, formed in Texas, was for work to be performed in Saudi Arabia. The otherwise domestic contract explicitly incorporated required provisions of Saudi Arabian Labor Law. The court's role in *McGhee* was to "apply Texas law to a contract incorporating protections against discharge except for [a]

31. By wedding Mexico's foreign employer provision to existing U.S. domestic laws, rather than bringing it as an independent foreign law cause of action, jurisdictional and choice of law issues are not implicated. If recruited Mexican workers brought Mexico's foreign employer provision claim as a foreign law cause of action, a court would perform a choice of law analysis under the forum state's choice of law rules. Ultimately the determination would rest on whether Mexico's interest in the application of its foreign employer provision is strong enough to overcome the widely acknowledged practice of applying the "local law of the state where the contract requires that the services . . . be rendered." Restatement (Second) of Conflict of Laws § 196 (Contracts for the Rendition of Services). *See also id.* comment d ("There will also be occasions when the local law of some state other than that where the services are to be performed should be applied in any event, because of the intensity of the interest of that state in having its local law applied to determine the particular issue."). This determination would be fact dependent and would turn on the intricacies of the particular relationship between the U.S. employer, the Mexico-based recruiter, and the recruited Mexican workers. A full discussion of these issues is beyond the scope of this article.

32. 871 F.2d 1412, 1414 (9th Cir. 1989).

valid cause borrowed from Saudi Law.”³³ Similarly, the theories that foreign law influences AWPAs (“AWPA foreign law influence theories”) call for the incorporation of a particular foreign labor law protection into an otherwise fully domestic claim.

It is important to acknowledge at the outset that these AWPAs foreign law influence theories will only apply to a limited number of recruited Mexican workers because (1) they apply to limited factual scenarios; (2) AWPAs only applies to migrant and seasonal³⁴ agricultural³⁵ workers not participating in the H2-A³⁶ visa program;³⁷ and, (3) this is a novel question for courts. Moreover, because AWPAs cases involving recruited Mexican workers often raise questions about whether a Mexico-based recruiter is an “agent” of the U.S. employer such that the U.S. employer can also be held responsible,³⁸ it is important to note that the theories presented here apply to U.S.-based

33. *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1417 (9th Cir. 1989). *See also Adams v. Arabian Am. Oil Co.*, 1993 U.S. App. LEXIS 25448, at *4 (9th Cir. 1993) (“The parties agree that Saudi Arabian law governs Adams’ claim for wrongful discharge.”).

34. AWPAs states that a “migrant” agricultural worker is “an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence” 29 U.S.C. § 1802(8)(A), and that a “seasonal” agricultural worker shares the same definition except that a seasonal worker is not required to be absent overnight from his permanent place of residence, *id.* § 1802(10)(A).

35. 29 U.S.C. § 1802(3) (“The term ‘agricultural employment’ means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of the Internal Revenue Code of 1954 [1986] (26 U.S.C. 3121(g)) and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.”).

36. 29 U.S.C. 1802(8)(B)(ii), (10)(B)(iii); 29 C.F.R. 500.20(p)(1)(ii), (r)(2)(i)(C).

37. The two groups of recruited Mexican workers that this analysis covers are (1) H2-B guest workers performing agricultural work and (2) migrant and seasonal unauthorized workers performing agricultural work. *See, e.g., Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200, 1205 (11th Cir. 2003) (involving H2B tree planters that were covered by AWPAs). *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (stating that AWPAs applies regardless of “whether the alien is documented or undocumented”). *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 605 (D. Fla. 2002) (concluding that unauthorized employees are covered by AWPAs); *Escobar v. Baker*, 814 F. Supp. 1491, 1498 (D. Wash. 1993) (“The Court concludes that the AWPAs offers protections to both documented and undocumented workers.”).

38. *See, e.g., Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 589 (D. Tex. 1999) (“In a very real sense, the history of statutory protections for migrant workers in America is a history of Congress’s evolving attempts to prevent agricultural owners and operators from shielding themselves from liability for mistreating employees. By hiring (and thereby shifting liability to) intermediary ‘independent contractors’ to recruit and/or oversee workers, agricultural owners have, at times, sought to create a buffer between themselves and their workers [citing cases]. In the interests of justice, however, courts have frequently ‘pierced’ this independent contractor ‘veil’ with the invocation of the ‘joint employer doctrine.’”). *See also Cardenas v. Benter Farms*, 2000 U.S. Dist. LEXIS 13670, at **26–30 (S.D. Ind. 2000); *Avila v. A. Sam & Sons*, 856 F. Supp. 763, 771–73 (W.D.N.Y. 1994); *Maldonado v. Lucca*, 629 F. Supp. 483, 487–88 (D.N.J. 1986).

employers only when it can be established that the recruiter is an agent of the U.S.-based employer.³⁹

Despite these limitations, the existence of colorable arguments that Mexico's foreign employer provision may be an enforceable term of an AWPA working arrangement speaks to the scope of foreign workers' rights and demonstrates that a U.S. employment statute may be flexible enough to incorporate a foreign labor law requirement in some circumstances.

A. Relevant AWPA Provision: The Working Arrangement

The AWPA foreign law influence theories of incorporation rest on a firm grasp of the nature of AWPA and its working arrangement provision. AWPA, enacted in 1983, is similar to its predecessor, the Farm Labor Contractor Registration Act (FLCRA) of 1963 in that it is both a preventative and remedial measure⁴⁰ that was meant to "deter and correct the exploitive practices that have historically plagued the migrant farm labor market."⁴¹ AWPA's working arrangement provision states that "[n]o farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association" with any covered worker.⁴²

While AWPA provides significant protections for the "working arrangement" between the parties, it does not contain a definition of "working arrangement." Consequently, courts have developed varied interpretations of what constitutes an AWPA working arrangement. One federal district court, for instance, has described AWPA's working arrangement as "the understandings of the parties, given their mutual knowledge and conduct, as to the expected terms and conditions of employment."⁴³ Other courts have described the working arrangement as a type of "statutory contract" for migrant and

39. Regardless of the agency analysis to determine whether the U.S. employer can be held liable, the recruiter (farm labor contractor) may still be liable under AWPA.

40. 29 U.S.C. § 1801 (stating that AWPA's purpose is to "assure necessary protections for migrant and seasonal agricultural workers. . ."). See *Martinez v. Shinn*, 992 F.2d 997, 999, 1001 (9th Cir. 1993) (concluding that AWPA's statutory damages "serve a deterrent function as well as a compensatory function"); *Colon v. Casco, Inc.*, 716 F. Supp. 688, 693 (D. Mass. 1989) (stating that "[o]ne of the main stated purposes of the AWPA is to 'assure necessary protections for migrant and seasonal agricultural workers. . .'" (citation omitted).

41. *Beliz v. W.H. Mcleod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985) (FLCRA); *Maldonado v. Lucca*, 636 F. Supp. 621, 625-26 (D.N.J. 1986) (AWPA).

42. 29 U.S.C. §§ 1822(c) and 1832(c).

43. *Aviles v. Kunkle*, 765 F. Supp. 358, 366 (S.D. Tex. 1991), *vacated* for lack of personal jurisdiction, 978 F.2d 201 (5th Cir. 1992).

seasonal agricultural workers.⁴⁴ The U.S. Court of Appeals for the Seventh Circuit recently described AWPA's working arrangement as an "obligation to keep . . . promises."⁴⁵ As discussed below, courts have found that AWPA working arrangements can have explicit, and at times, implicit terms.

In accordance with legal mandates to interpret AWPA broadly,⁴⁶ AWPA's protection of the terms of a working arrangement is expansive. An AWPA farm labor contractor, agricultural employer, or agricultural association (collectively referred to here, for brevity's sake, as "AWPA employer") must comply with the terms of the working agreement they make with a covered worker unless the AWPA employer's failure was directly due to "acts of God" or "conditions beyond the control of the person" or "conditions which he could not reasonably foresee."⁴⁷ Mexico's foreign employer provision may be particularly relevant to AWPA's working arrangement provision in situations involving recruited Mexican workers because the terms of the AWPA working arrangement will most commonly be formed while the parties are still in Mexico.⁴⁸

B. *Theories of Incorporation*

According to the AWPA foreign law influence theories developed here, Mexico's foreign employer provision may be incorporated into an AWPA working arrangement as (1) an explicit term or (2) an implicit term of the working arrangement formed in Mexico. While it is well-established that AWPA's working arrangement incorporates explicit promises made to workers as terms, it is less established whether and when AWPA's working arrangement incorporates implied terms. Furthermore, no court has considered whether foreign law can be incorporated into an AWPA working arrangement pursuant to either of these avenues. Nonetheless, based on current

44. *Villalobos v. Vasquez-Campbell*, 1991 U.S. Dist. LEXIS 18841 (D. Tex. 1991) ("In essence, the AWPA establishes a "statutory contract" for farm workers."). *See also* *Barajas v. Bermudez*, 43 F.3d 1251 (9th Cir. 1994) (stating that the working arrangement is "contractual in nature").

45. *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 410 (7th Cir. 2007).

46. The Eleventh Circuit Court of Appeals, for instance, has stated that "AWPA is a remedial statute and should be construed broadly to effect its humanitarian purpose." *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993).

47. 29 C.F.R. § 500.72(a).

48. Courts have interpreted the working arrangement to take place early in the relationship between the worker and employer. *See, e.g., Donaldson v. US DOL*, 930 F.2d 339, 350 (4th Cir. 1991) (holding that H2 clearance orders, completed before arrival in the U.S., often constitute working arrangements); *Hernandez v. Ruiz*, 1992 WL 510258, *2-3 (S.D. Tex. 1992) (holding Texas grower liable for recruiter's promises to workers under the working arrangement).

case law, it appears that both the explicit and implicit term avenues for incorporation of Mexico's foreign employer provision may be viable.

Given the current case law, incorporating Mexico's foreign employer provision as an explicit term of an AWPA working arrangement is a more straightforward proposition. In *Maldonado v. Rusty Lucca*, a U.S. employer verbally promised to provide transportation and housing for a worker.⁴⁹ When the employer failed to follow through with this promise, a New Jersey federal district court held that the failure was a violation of the AWPA working arrangement between the worker and the employer.⁵⁰ In other words, the court interpreted the explicit promises for transportation and housing as enforceable terms of the AWPA working arrangement. Similarly, in *Martinez v. Shinn*, a U.S. employer explicitly promised workers that he would provide a certain amount of employment planting asparagus and failed to follow through with that promise.⁵¹ Because the employer's failure was not directly due to an "act of God" or beyond the control of the defendants, the *Martinez* court held that the employer's failure to comply with his explicit promise was a violation of a term of the AWPA working arrangement.⁵² Applying these cases to Mexico's foreign employer provision, if a recruited Mexican worker manages to put forth persuasive proof that the recruiter explicitly promised to comply with Mexico's foreign employer provision, it may be enforceable as an explicit term of the AWPA working arrangement. While these kinds of factual scenarios are possible, they are unlikely to be common.

The more difficult and salient question about AWPA's foreign law influence theory, is when, if ever, Mexico's foreign employer provision could be considered an implied term of an AWPA working arrangement. As the analysis below demonstrates, Mexico's foreign employer provision may be an implied term of an AWPA working arrangement in some circumstances. This article examines three theories for implied incorporation of Mexico's foreign employer provision as a term of the AWPA working arrangement formed in Mexico. Below, I review cases where courts have implied terms into AWPA's working arrangement in other contexts and explore the extent to which the same rationale could be applied to imply Mexico's

49. See *Maldonado v. Rusty Lucca*, 636 F. Supp. 621, 626-27 (D.N.J. 1986).

50. *Id.*

51. *Martinez v. Shinn*, 1991 U.S. Dist. LEXIS 6985, at **45-46 (E.D. Wash. 1991).

52. *Id.*

foreign employer provision as a term of an AWPAs working arrangement.

1. First Theory: Incorporation as Applicable Federal, State, or Local Law in H2-B Cases

Mexico's foreign employer provision may be an implied term of an AWPAs working arrangement because (1) it is a relevant federal, state, or local law at the time the working arrangement was initiated in Mexico and (2) the employer promised to abide by relevant federal, state, or local employment-related laws when he or she signed the required H2 documentation. This first theory of implied incorporation of foreign law thus applies solely to H2-B recruited Mexican workers covered by AWPAs.⁵³

While no court has considered whether foreign laws may be implied terms of AWPAs working arrangement, a few courts have considered whether domestic laws may be implied terms of the working arrangement when the employer promised to comply with "applicable Federal, State, and local employment-related laws" as part of the required H2 documentation. H2 regulations have various requirements intended to ensure that U.S. employers have not passed up qualified U.S. applicants before turning to foreign workers and to ensure that U.S. employers do not mislead foreign workers. As part of the U.S. Department of Labor's procedures, H2-B employers of agricultural workers often submit H2 program required written assurances that they will comply "with applicable Federal, State and local employment-related laws."⁵⁴ Taking this written assurance into account, some courts have found that relevant federal, state, and local

53. H2-B workers covered by AWPAs include the following: *Morante-Navarro v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1165 (11th Cir. 2003) (stating that pine straw workers were H2-B workers and engaged in agriculture as defined by AWPAs); *DeLeon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214, 1216 (11th Cir. 2007) (indicating that forestry workers come on H2-B visas).

54. See 20 C.F.R. § 655.203(b), § 633.103(b), § 655.3(b) (incorporating the following language by reference) ("As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that: (b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws."). See also 29 C.F.R. 655.201(b)(2) (also incorporating by reference (§ 655.202 and 653.108)). Despite differences in the regulations, in practice these formal distinctions between visa types are not uniformly followed. See generally *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 488 F. Supp. 2d 565, 568 n.3 (D. La. 2007) ("It has been suggested that the bright-line associations between various visas and types of employment are often blurred in practice.") (citing Jacob Wedemeyer, Note, *Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa*, 10 J. GENDER RACE & JUST. 143, 159 (2006)).

employment-related laws of the United States are incorporated into the AWPA working arrangement as implied terms.

Because relevant local, state, and federal employment-related laws are not specifically included in the provisions of AWPA and are otherwise separate from AWPA's enforcement regime, by incorporating these laws as terms of the AWPA working arrangement, these courts have imported implied terms into the AWPA working arrangement. The Fourth Circuit U.S. Court of Appeals decision in *Donaldson v. Department of Labor* exemplifies the small set of cases that demonstrate this type of implied incorporation. The *Donaldson* court concluded that for H2 workers performing work in agriculture, the AWPA working arrangement may include aspects of "the 'job offer' made in the [H2] clearance process by which, per 20 C.F.R. 655.203(b), each grower defendant promised to comply with all federal employment related laws."⁵⁵ The relevant federal employment law in *Donaldson* was a U.S. Department of Labor (U.S.D.O.L.) regulation regarding piece-rate wages for H2 workers.⁵⁶ Even though the employer in *Donaldson* was not required to specifically include the piece rate term in its U.S.D.O.L.-required documentation and even though the employer never communicated the piece-rate wage to the workers, the court found as a matter of law that the piece-work wage may be an implied promise arising from the H2 regulation itself.⁵⁷ The *Donaldson* court rejected the employer's argument that implying an APWA term improperly bootstrapped a private right of action/access to the courts where it did not otherwise exist.⁵⁸

Following a similar view of implied incorporation of applicable federal, state, and local employment-related laws, a federal district court in Puerto Rico incorporated federal requirements pursuant to the Occupational Safety and Health Act (OSHA) as implied terms of an AWPA working arrangement.⁵⁹ In *Villalobos v. North Carolina Growers' Association* H2-B employers of tobacco workers⁶⁰ made

55. *Donaldson v. Department of Labor*, 930 F.2d 339, 349-50 (4th Cir. 1991). *See also* *Alfred v. Okeelanta Corp.*, 1990 U.S. Dist. LEXIS 21021, at **17-22 (S.D. Fla. 1990).

56. *Id.* at 347.

57. *Id.* at 350 n.13.

58. *Id.* at 350.

59. *Villalobos v. N.C. Growers' Ass'n*, 2001 U.S. Dist. LEXIS 25266, at **13-14 (D.P.R. 2001); *Villalobos v. N.C. Growers Ass'n*, 2002 U.S. Dist. LEXIS 26475, at **1-3, 252 F. Supp. 2d 1, 6 (D.P.R. 2002) (adopting magistrate's report and recommendation).

60. *Villalobos v. North Carolina Growers' Ass'n*, 42 F. Supp. 2d 131, 133 (D.P.R. 1999). *See generally* Laura Lockard, *Toward Safer Fields: Using AWPA's Working Arrangement Provision to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L. &

assurances as part of the U.S.D.O.L. certification process that they would comply with local, state, and federal employment-related laws. Plaintiffs argued that OSHA's field sanitation requirements, which cannot be enforced through a private right of action under OSHA, could be incorporated into the AWPAs working arrangement based on these H2 assurances.⁶¹ The *Villalobos* court reasoned that while AWPAs does not contain a "precise definition" of the working arrangement it is "undisputed" that H2 regulations require the employer to make assurances that it "will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws."⁶² The *Villalobos* court agreed with cases that found the employer's assurance that it would comply with applicable federal, state, and local law to be a "promise," or implied term, of the AWPAs working arrangement.⁶³ The *Villalobos* court made a broad conclusion, stating that therefore, "any violation of a safety and health law or regulation, such as OSHA, becomes an infringement of the working agreement, and therefore actionable under the AWPAs."⁶⁴ As a result of this conclusion, the *Villalobos* plaintiffs' claim survived Defendants' summary judgment motion to dismiss.

Applying this implied incorporation rationale to the inquiry at hand indicates that Mexico's foreign employer provision may be incorporated as an implied term of the working arrangement to the extent that it can be considered an applicable federal, state, or local employment-related law. The regulation is silent as to whether it is only referring to United States federal, state, and local employment-related laws. Since the plain language is ambiguous, it is therefore possible that a court may determine that Mexico's foreign employer provision is a relevant federal, state, or local employment law at the

SOC. CHANGE 507 (2004) (developing theories for implied incorporation of terms into AWPAs working arrangement provision).

61. *Villalobos v. N.C. Growers' Ass'n*, 2001 U.S. Dist. LEXIS 25266, at **10-13 (D.P.R. 2001) ("Plaintiffs base their contention on the presumption that OSHA's field sanitation standards are incorporated to the working arrangements since at the time when a temporary labor certification was requested, the employers specifically stated to the Employment and Training Administration (ETA) that they would comply with all applicable federal and state laws."); *Villalobos v. N.C. Growers' Ass'n*, 2002 U.S. Dist. LEXIS 26475, *1-3, 252 F. Supp. 2d 1, 6 (D.P.R. 2002) (adopting magistrate's report and recommendation); *Villalobos v. N.C. Growers Ass'n*, 252 F. Supp. 2d 1, 6 (D.P.R. 2002) (adopting magistrate's report and recommendation).

62. *Villalobos v. N.C. Growers Ass'n*, 2001 U.S. Dist. LEXIS 25266, at **10-13 (D.P.R. 2001) (citing *Donaldson and Elizondo*); *Villalobos v. N.C. Growers' Ass'n*, 2002 U.S. Dist. LEXIS 26475, at **1-3, 252 F. Supp. 2d 1, 6 (D.P.R. 2002) (adopting magistrate's report and recommendation).

63. *Id.* at *13.

64. *Id.* at **10-13 (citing *Donaldson v. United States Dep't of Labor*, 930 F.2d 339, 350 (4th Cir. 1991)).

time of recruiting in Mexico. There are several dynamics favoring an incorporation of Mexico's foreign employer provision pursuant to this theory.

First, AWPAs contemplate the pre-employment relationship through several of its provisions, which indicates that Mexico's foreign employer provision may be applicable law for AWPAs purposes as it applies to the pre-employment period while the recruited Mexican workers are still in Mexico.⁶⁵ With AWPAs, Congress consciously created protections for covered workers during this pre-employment period.⁶⁶ As mentioned in Section III.A. above, AWPAs's working arrangement is often formed at the time of recruiting. AWPAs also "requires written disclosures of working conditions at the time of the workers' recruitment" and "prohibits false and misleading representations regarding the terms and conditions of employment" during the recruitment stage.⁶⁷ AWPAs's legislative history regarding AWPAs's disclosure requirements illustrates this acknowledgment of the pre-employment period:

In the case of most migrant agricultural workers this recruitment and the accompanying disclosure will occur before the worker leaves his permanent place of residence The Committee wishes to ensure that workers to the greatest possible extent have full information about where they are going and what the conditions will be when they arrive, before they begin the journey.⁶⁸

65. Mexican law applies to foreign employers while they are within its territory. Article 12 of the Civil Code of the Federal District states that Mexican laws apply to "all persons within the Republic, as well as to acts and events which take place within its territory or jurisdiction. . . ." Article 12, Civil Code of the Federal District on Ordinary Matters and for the Entire Republic on Federal Matters. Article 1 of the Mexican Constitution states that "Every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided."

66. While these theories acknowledge AWPAs's application to pre-employment actions they do not call for an extraterritorial application of AWPAs. In other words they do not argue that AWPAs applies to services rendered abroad. Instead, the theories apply only to situations involving recruited Mexican workers who provide services for U.S. employers in the U.S. and claim an AWPAs Working Arrangement violation. See generally *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (U.S. 1949) ("[U]nless a contrary intent appears. . . Congress is primarily concerned with domestic conditions"). AWPAs concerns itself with pre-employment conditions but applies only to cases where services are ultimately rendered in the U.S.

67. *Cardenas v. Benter Farms*, 2000 U.S. Dist. LEXIS 13670, at *12 (D. Ind. 2000). See, e.g., 29 U.S.C. § 1831(a) ("Each farm labor contractor, agricultural employer, and agricultural association which recruits any seasonal agricultural worker. . . shall ascertain and, upon request, disclose in writing the following information when an offer of employment is made to such worker"); 29 U.S.C. § 1831(e) ("No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any seasonal agricultural worker concerning the terms, conditions, or existence of agricultural employment required to be disclosed . . ."). For similar requirements for migrant workers, see 29 U.S.C. § 1821(a)-(e).

68. *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d 334, 346 (D. Mass. 1999) (citing H.R. Rep. No. 885, 97th Cong., 2d Sess., 14, reprinted in 1982 U.S.C.C.A.N. 4547, 4560). See also *Cornejo*

As these pre-employment AWPAs requirements indicate, Congress intended AWPAs to provide legal obligations for AWPAs-covered employers at times and in places before the traditional employment relationship, or actual work, begins. Taking that reasoning one step further, a court may determine that Mexico's foreign employer provision, which is in effect in the time and place where recruited Mexican workers are recruited, may be an implied term of the working arrangement in limited circumstances.

Second, unlike the cases mentioned above that incorporated domestic requirements that did not have a private right of action independent of the AWPAs, Mexican law contains a private right of action. Therefore courts would not have to grapple the same way with a potential concern that a plaintiff is bootstrapping a private action where one does not otherwise exist.⁶⁹ Mexican workers can bring claims under Mexico's foreign employer provision in Mexican courts and there is nothing in Mexican law hindering a worker from bringing Mexico's foreign employer provision claim or raising Mexican foreign employer provision in conjunction with a U.S. cause of action in a U.S. domestic court.⁷⁰

While this implied incorporation theory would require a court to reach further than it has reached in its interpretation of AWPAs working arrangements, there is a colorable argument that courts may consider foreign law in the atypical employment relationships at issue here—employment relationships that are initiated in one country but involve the performance of services in another. To the extent that courts (1) follow courts cited in this example by incorporating federal, state, and local employment-related laws as implied terms when an

Ramirez v. James G. Garcia, Inc., 2000 U.S. Dist. LEXIS 20064, at 24–26 (D. Ariz. 2000) (referencing AWPAs's transportation requirement and concluding that a plaintiff can sue for activity before the employment relationship is established). For comprehensive coverage of AWPAs, see Bill Beardall, Equal Justice Center, *Migrant and Seasonal Agricultural Worker Protection Act, Outline and Annotations* (Updated and annotated by Greg Schell, Migrant Farmworker Justice Project, Apr. 2008).

69. See Section IV for discussion of Mexico's support for the enforcement of its foreign employer provision.

70. E-mail communication from Mexican Labor Lawyer and Professor at the Universidad Autónoma Metropolitana, Jorge Fernandez Souza (Oct. 21, 2007) (on file with author). Of course, a Mexican worker bringing an independent foreign law claim in a U.S. court would need to establish jurisdiction. In federal court, for instance, Title 28 of the United States Code, section 1367, allows common law claims to join claims that are properly in federal court when they "form part of the same case or controversy" as the federal claims. It should be noted, however, that a federal court has discretionary power, under 28 U.S.C. § 1367(c), to decline to exercise supplemental jurisdiction where (1) the claim raises a novel or complex issue of law; (2) the claim substantially predominates over the claim that has federal jurisdiction; (3) the district court has dismissed all claims over which it has federal jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

employer promises to abide by those laws in its H2 documentation and (2) interpret Mexico's foreign employer provision to be applicable federal, state, or local employment-related law in these cases, Mexico's foreign employer provision may be incorporated as a term of the AWPAs working arrangement in some circumstances.

2. Second Theory: Incorporation as Applicable Law at the Time of Contracting in Mexico

Mexico's foreign employer provision may be an implied term of an AWPAs working arrangement because it is a relevant labor law that relates to the unique employment relationship between a U.S. employer and a recruited Mexican worker. This second theory applies not just to AWPAs covered H2-B workers but to all recruited Mexican workers covered by AWPAs. A few federal courts have implied terms from domestic law into AWPAs working arrangements under this theory even though those domestic law requirements (1) were never put in writing; (2) were never communicated about between the employer and employee; and, (3) unlike the first theory, there was no written promise by the employer that he or she would comply with relevant federal, state, and local employment-related laws. The theory is based on a handful of cases that range from implied incorporation of U.S.D.O.L. requirements, which specifically target migrant workers, to Title VII of the Civil Rights Act protections, which apply more broadly.

On the relatively narrower side of the implied incorporation spectrum, *Salazar-Calderon v. Presidio Valley Farmers Association*, a U.S. Court of Appeals for the Fifth Circuit decision, allowed for the incorporation of a U.S.D.O.L.-required term into the AWPAs working arrangement.⁷¹ *Salazar-Calderon* involved a U.S.D.O.L. regulation requiring that the employer promise in H2 documentation to provide the worker with work for at least 75% of the period of employment that he or she was promised initially. The *Salazar-Calderon* court held that the H2-required 75% term was an implied term of the AWPAs working arrangement regardless of whether it was actually included in the employer's U.S.D.O.L. documentation. The court stated that terms required by the U.S.D.O.L.'s H2 regulations "were the terms the defendants were required to offer" and the employer's

71. *Salazar-Calderon v. Presidio Valley Farmers Asso.*, 765 F.2d 1334 (5th Cir. 1985) (interpreting working arrangement under FLCRA, AWPAs predecessor statute).

failure to do so does not inhibit the importation of those terms into the AWPA working arrangement.⁷²

Other courts have allowed incorporation of AWPA disclosure requirements as implied terms of AWPA working arrangement. AWPA regulations require AWPA employers to disclose certain things to workers before they leave to start their employment. In *Colon v. Casco, Inc.*, a district court in Massachusetts, for instance, found that an AWPA-required disclosure—disclosure of the worker's time period of employment—could be an implied term of the AWPA working arrangement under this theory.⁷³ The workers had been fired arguably in violation of the employer policy indicating that weekend work was optional or voluntary. The workers in *Colon* contended that their termination violated an implied term of the AWPA working arrangement—the period of employment that they received assurances about pursuant to AWPA's disclosure requirement. The district court found a violation of the AWPA working arrangement, reasoning that the period of employment was a term of the AWPA working arrangement because “the ‘period of employment’ is a required term in every working arrangement.”⁷⁴

Several district courts have implied terms from legal obligations beyond H2 and AWPA requirements. Two district courts, for instance, have interpreted AWPA's working arrangement to allow for the implied incorporation of relevant OSHA standards according to this theory⁷⁵: *Elizondo v. Podgorniak*, a Michigan federal district court case, and *Sedano v. Mercado*, a New Mexico federal district court case.⁷⁶ In *Elizondo*, the farmworkers who brought the case had increasingly worried about health problems at their labor camps. In their complaint, the farmworkers claimed that some of them and their children “developed Shigellosis, a disease that is spread through human waste” as a result of their employer's failure to follow safety

72. *Id.* at 1342. See also Lockard, *supra* note 60, at 531 (“Thus, the holding in [Salazar-Calderon] cannot be justified on a narrower theory that the provision of the working arrangement in question was actually offered to workers and subsequently reneged upon. The term at issue was brought into play solely through the H-2 regulatory scheme.”).

73. *Colon v. Casco, Inc.*, 716 F. Supp. 688, 694 (D.Mass. 1989) (citing 29 U.S.C. § 1831(a)(1)(D); 29 C.F.R. § 500.76(b)(4)).

74. *Id.*

75. The *Elizondo* court referred to court decisions that interpreted H2 documentation requirements as implied terms of an AWPA working arrangement. See *De Leon-Granados v. Eller & Sons Trees, Inc.*, 452 F. Supp. 2d 1282, 1284 (D. Ga. 2006); *Frederick County Fruit Growers Ass'n v. McLaughlin*, 703 F. Supp. 1021, 1031 (D.D.C. 1989) (citing *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1342 (5th Cir. 1985)).

76. Similar to *Elizondo*, a New Mexico district court agreed with plaintiffs' theory that an OSHA field sanitation requirement was an implied term of an AWPA working arrangement. *Sedano v. Mercado*, 124 Lab.Cas. (CCH) p 35756, 1992 WL 454007 (D.N.M.1992).

and health standards.⁷⁷ The farmworkers in *Elizondo* argued that a relevant OSHA regulation, which set standards for handwashing and drinking water in the fields, was an implied term of the AWPA working arrangement even though it was never explicitly put in writing or mentioned by either party.⁷⁸ The farmworkers sought to enforce this requirement through AWPA's working arrangement provision because OSHA does not provide workers with a private right of action. The *Elizondo* court reasoned that, because "the term 'working arrangement' includes those aspects of the working relationship that are required by law" the OSHA requirement was a "mandatory term" of the AWPA working arrangement.⁷⁹

A Florida district court went even further than *Elizondo* and *Sedano* and concluded that AWPA's working arrangement may incorporate federal statutory requirements that are not specifically targeted to migrants and/or agricultural workers. In *Denis v. New Hope Sugar Co.*⁸⁰ this Florida district court held that plaintiffs' theory that Title VII rights are incorporated as terms of an AWPA working arrangement was strong enough to survive a motion to dismiss the claim. Citing the Fifth Circuit's *Salazar-Calderon* case, the *Denis* court stated broadly, without much discussion, that "the AWPA includes protection against violation by employers of rights secured by other federal statutes."⁸¹

While the courts cited thus far in this example have read AWPA's "working arrangement" broadly and have been willing to incorporate domestic laws into the working arrangement, not all courts may be amenable to implied incorporation of a domestic or a foreign law. A federal district court in Ohio, for instance, rejected Plaintiff's argument that the employer's failure to pay Federal Insurance Contributions Act (FICA) taxes was a violation of the AWPA working arrangement.⁸² While the *Sanchez v. Overmyer* court agreed that the legal requirement to pay FICA taxes could be an implied term of a separate AWPA provision (AWPA's payment of

77. 70 F. Supp. 2d 758, 764 (D. Mich. 1999); *Elizondo v. Podgorniak*, 100 F. Supp. 2d 459, 463 (D. Mich. 2000).

78. The relevant regulation is 29 C.F.R. § 1928.110(c).

79. *Elizondo v. Podgorniak*, 100 F. Supp. 2d 459, 463 (D. Mich. 2000); *De La Cruz v. Gill Corn Farms, Inc.*, 2005 U.S. Dist. LEXIS 44676, at **22-23 (N.D.N.Y. 2005) (citing *Elizondo* and stating that "[f]or purposes of the pending motion for summary judgment, the Court will assume that federal and state employment related laws as part of the [AWPA] working arrangement").

80. *Denis v. New Hope Sugar Co.*, 1987 U.S. Dist. LEXIS 15213, at 1-4 (D. Fla. 1987).

81. For further discussion of AWPA's working arrangement and the Title VII claim in this case, see Lockard, *supra* note 60, at 531-32.

82. *Sanchez v. Overmyer*, 845 F. Supp. 1183, 1187 (D. Ohio 1993).

wages when due provision)⁸³ it treated the AWPA working arrangement implied incorporation theory negatively. The court stated that it was “inclined to read” AWPA’s working arrangement provision “as relating to express terms of a working arrangement as opposed to those implied by law.”⁸⁴

Nonetheless, given that some courts have implied domestic laws that specifically target migrant and agricultural workers as well as applicable domestic laws that target a broader group of workers, courts may find that Mexico’s foreign employer provision, which targets migrant workers, is an implied term of an AWPA working arrangement. In the OSHA field sanitation standard example, the incorporated federal requirements were requirements that specifically relate to employer obligations vis-à-vis agricultural workers. In the Title VII of the Civil Rights Act example, the court interpreted AWPA’s working arrangement to potentially incorporate federal statutory requirements that were not specifically targeted to agricultural or migrant workers. Incorporating Mexico’s foreign employer provision as an implied term of an AWPA working arrangement implies an obligation targeted to migrant workers, a group specifically addressed by AWPA, rather than a legal obligation that is targeted more broadly. Unlike Title VII of the Civil Rights Act, Mexico’s foreign employer provision specifically targets the predicament of migrant workers who often must travel great distances at significant cost to themselves.⁸⁵ AWPA’s acknowledgment of the pre-employment relationship in several of its provisions further supports a determination that Mexico’s foreign employer provision is an applicable law to the employment situation at issue and therefore is

83. According to this provision, a “farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall pay the wages owed to such worker when due.” 29 U.S.C. §§ 1822(a), 1832(a). In the FLCRA and AWPA context, courts have incorporated domestic federal and state wage laws into AWPA payment of wages when due claims. *See* Medrano v. D’Arrigo Bros. Co., 125 F. Supp. 2d 1163, 1166–68 (D. Cal. 2000); Martinez v. Shinn, 1991 WL 84473 (E.D.Wash.), *17, *affirmed*, 992 F.2d 997, 1000 (9th Cir. 1993); De Leon v. Trevino, 163 F. Supp.2d 682, 684 (S.D.Tex. 2001); Wales v. Berry, 192 F. Supp.2d 1269, 1287 (M.D.Fla. 1999); Smith v. Bonds, 1993 WL 556781, *8 (E.D.N.C.) (“The court’s finding of liability on plaintiffs’ FLSA claims *ipso facto* leads to the conclusion that defendants also violated Section 1822(a)”; Certilus v. Peeples, 1984 WL 3175, *8–9 (M.D.Fla.). *See* Lockard, *supra* note 60, at 532–35 (discussing AWPA case law supporting the “importation of substantive terms from distinct statutory regimes”).

84. Sanchez v. Overmyer, 845 F. Supp. 1183, 1187 (D. Ohio 1993). A Judge from the federal district court in the Eastern District of California recently echoed Overmyer’s reluctance. *See* Robles v. Sunview Vineyards of California, Inc., 2008 WL 895945, at **3–7 (E.D. Cal. 2008) (stating that the working arrangement “does not automatically encompass any and all statutes and regulations governing agricultural employment”); Doe v. D.M. Camp & Sons, 2008 WL 895938 (E.D. Cal. 2008) (same); Valenzuela v. Giumarra Vineyards Corp., 2008 WL 895943 (E.D. Cal. 2008) (same).

85. *See* Section II, *supra*.

a required term of the AWPA working arrangement. Thus, in light of the above, to the extent that courts interpret AWPA's working arrangement to imply terms from other legal regimes, including relevant Mexican law, Mexico's foreign employer provision may be incorporated as a term of the AWPA working arrangement in some circumstances.

3. Third Theory: Incorporation as Expectations of the Parties

Mexico's foreign employer provision may be an implied term of an AWPA working arrangement because (1) the reasonable expectations of the parties are implied terms of an AWPA working arrangement and (2) the parties reasonably expect that Mexico's foreign employer provision may have some effect. This third theory of incorporation applies to all recruited Mexican workers covered by AWPA.

The theory is derived from court opinions that have implied terms into AWPA working arrangements based on the reasonable expectations of the parties.⁸⁶ In *Wales v. Jack M. Berry, Inc.*, for instance, a Florida district court implied terms into the AWPA working arrangement based on the reasonable expectations of the parties that were created as a result of the employer's actions in the absence of verbal communication. Specifically, the court found that minimum wage information in a U.S. Department of Labor poster located at the workplace was an implied term of the AWPA working arrangement. The district court concluded that the employer "created a 'working arrangement' . . . by posting an official Department of Labor poster that notified workers of their right to receive [the minimum wage]." ⁸⁷ Therefore, the employer's Fair Labor Standards Act violation for failing to pay minimum wage in that case was also a violation of an implied term of the AWPA working arrangement. By incorporating reasonable expectations of the parties that may never be verbalized or explicitly communicated as terms of the AWPA

86. See, e.g., *Aviles v. Kunkle*, 765 F. Supp. 358, 366 (S.D. Tex. 1991), *vacated* for lack of personal jurisdiction, 978 F.2d 201 (5th Cir. 1992); *Rodriguez v. Berrybrook Farms, Inc.*, 1990 U.S. Dist. LEXIS 7678, at *35 (D. Mich. 1990) (stating that employer violated working arrangement because workers were hired with "the expectation that housing would be provided at no charge" and then "destroyed this expectation in instituting a \$ 5.00 per week per worker housing charge."); *Maldonado v. Lucca*, 636 F. Supp. 621, 631 (D.N.J. 1986) ("Plaintiffs are certainly entitled to a total award which will compensate them for the expectancy value of their promised seasonal wages.").

87. *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269, 1287 (M.D. Fla. 1999).

working arrangement, these courts illustrate a theory for importing implied terms into the AWPAs working arrangement.

In cases involving Mexico's foreign employer provision, the success of this type of AWPAs working arrangement implied incorporation theory depends on the courts' view of the "reasonable expectations" of the parties while they are in Mexico. A court, for instance, may view expectations objectively, subjectively, or as a combination of both.⁸⁸ On the one hand, a fully objective view of the reasonable expectations of the parties is outlined in the following statement by a plaintiffs' attorney: "(a) it's not unreasonable for a grower who recruits in Mexico to expect that Mexican law will apply to his activities there, and (b) . . . it's also not unreasonable for a Mexican worker recruited in Mexico to expect that Mexican law will apply to his recruitment at home."⁸⁹ According to this view, it would not need to be established that recruited Mexican workers and U.S. employers had actual knowledge of Mexico's foreign employer provision. A fully subjective view of the reasonable expectations of the parties may require a court to find that the Mexican worker and the U.S. employer actually knew that Mexico's foreign employer provision applied to their relationship. Furthermore, under a combined subjective and objective view, a court may find that the reasonable expectations standard is satisfied if the worker knows about his or her rights under Mexico's foreign employer provision and, under an objective view, it is not unreasonable to impute knowledge about Mexico's foreign employer provision onto the employer.

The success of this type of incorporation theory may also depend on whether the court requires that the worker relied on his or her reasonable expectations with respect to Mexico's foreign employer provision in making his or her decision to come to the United States. Therefore, for some courts, the success of this theory may be limited to factual scenarios where reliance on Mexico's foreign employer provision can be proven. The *Colon v. Casco* decision, which is mentioned in conjunction with the second implied incorporation theory, also demonstrates this third theory. It indicates that the mutual knowledge of the parties and reliance on that knowledge can

88. For a discussion of this in the contracts context, see 5-24 CORBIN ON CONTRACTS 24.26 (Matthew Bender & Co., Inc. 2008) (discussing "Interpretation of Contracts [as] Neither Wholly Objective Nor Wholly Subjective").

89. E-mail communication, Doug Stevick, Managing Attorney, Texas Rural Legal Aid (Dec. 10, 2007) (on file with author).

give rise to implied terms in an AWP working arrangement.⁹⁰ In *Colon*, the employer had a policy of allowing employees to take the weekend off if they desired without any negative consequences and the employees had general knowledge of the policy. The employer argued that it never explicitly made the policy a term of the AWP “working agreement.” The court disagreed with this argument and reasoned that the policy was a part of the AWP working arrangement because of the “mutual knowledge of and reliance upon” the policy.⁹¹ Also along these lines, even if there is mutual knowledge about Mexico’s foreign employer provision, courts may decline to imply this as a term if the worker does not rely on that knowledge.

To the extent that courts agree with the view that (1) the reasonable expectations of the parties reasonably includes Mexico’s foreign employer provision and (2) to the extent that reliance is a non-issue,⁹² Mexico’s foreign employer provision may be incorporated as a term of the AWP working arrangement in some circumstances.

IV. FOREIGN LAW INFLUENCE ON FLSA

Mexico’s foreign employer provision may influence another U.S. employment statute—the Fair Labor Standards Act (FLSA)—in some circumstances. The U.S. Congress enacted FLSA in 1938 to eliminate “substandard labor conditions throughout the nation”⁹³ by regulating minimum wages, maximum hours of work, and child labor in industries affecting interstate commerce.⁹⁴ FLSA, and therefore this foreign law influence theory, has significantly broader coverage than AWP as FLSA protects most agricultural and non-agricultural workers, including H2-A and H2-B workers.⁹⁵ As long as they are in workplaces that affect interstate commerce, many agricultural

90. *Colon v. Casco, Inc.*, 716 F. Supp. 688 (D. Mass. 1989).

91. *Id.* at 694.

92. Either because the court (1) concludes that a finding of reliance is not required or (2) makes a factual finding that the reliance requirement has been satisfied.

93. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 510 (1950).

94. 29 U.S.C. § 202(a) (finding “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”).

95. FLSA’s definition of “employee” is broad and covers “any individual employed by an employer.” See 29 U.S.C. § 203. For a full list of FLSA exemptions from its definition of employee, see 29 U.S.C. § 213. See also *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (U.S. 1945) (“[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.”); *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (U.S. 1993) (same); *Antenor v. D & S Farms*, 88 F.3d 925, 933 (11th Cir. 1996) (same); *Dole v. Petroleum Treathers, Inc.*, 876 F.2d 518, 523 (5th Cir. 1989) (same).

workers can bring FLSA minimum wage claims⁹⁶ and many non-agricultural workers can bring FLSA minimum wage and overtime claims against their employers.

Unlike the AWPAs foreign law influence example above, this section provides an example of foreign law influence on a U.S. employment statute that does not involve the direct incorporation of a foreign law requirement into a U.S. statute. Moreover, unlike the AWPAs theories, largely drawn from AWPAs case law, the FLSA theory of foreign law influence is primarily drawn from recent U.S. Supreme Court precedent and legal scholarship on the use of foreign law as guidance to interpret the U.S. Constitution and U.S. statutory terms.⁹⁷ According to this theory, Mexico's foreign employer provision may provide guidance that will inform the proper interpretation of a particular FLSA provision. Specifically, Mexico's foreign employer provision may help resolve an open question about the proper interpretation of Section 203(m) of FLSA and its interpreting regulations: namely, whether a U.S. employer's failure to pay for a recruited worker's required relocation travel costs constitutes an improper deduction under FLSA when the failure brings wages below FLSA's minimum standards.⁹⁸

A. *Relevant FLSA Provision: Improper Deductions from Wages*

To fully understand the FLSA theory of foreign law influence, it is important to understand the specific statutory question surrounding FLSA's improper deductions provision. FLSA requires U.S. employers to pay covered workers their weekly wages at a rate that is

96. Originally, FLSA exempted agricultural workers from its minimum wage and overtime protections. See 29 U.S.C. § 213(a)(6)(1938). In 1966, the U.S. Congress amended FLSA to provide minimum wage but not overtime protection for agricultural workers. 29 U.S.C. § 213(b)(12); S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.A.N. 3002.

97. For a constitutional law discussion see Vicki C. Jackson, *The Supreme Court, 2004 Term - Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 112-15 (2005). See also Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 4 (2005) ("Much less discussed, but no less important, is the relevance of foreign authorities to the interpretation or application of domestic statutes. While constitutional cases carry greater glamour, statutory cases raising this question can be expected to arise more frequently.").

98. FLSA does not apply to work performed outside the United States. 29 U.S.C. § 213(f) (stating that exempted from FLSA coverage is "any employee whose services during the workweek are performed in a workplace within a foreign country . . ."). Since these theories do not extend to work performed in Mexico and since recruited workers often incur these travel costs before the first week of work, these cases often consider whether the relocation travel costs are improper FLSA deductions from the first week of employment. See, e.g., *Martinez-Bautista v. D&S Produce*, 447 F. Supp. 2d 954, 964 (D. Ark. 2006) ("As these pre-employment expenses exceed the total amount paid to each Plaintiff for the first workweek, Plaintiffs did not receive the FLSA mandated minimum wage.").

no lower than the federal minimum wage for the first forty hours of work and no lower than one-and-one-half times the employee's regular rate for hours worked above forty (FLSA's minimum standards).⁹⁹ FLSA's improper deductions provision, Section 203(m), allows an employer to deduct below minimum standards for "furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."¹⁰⁰ Since a recruited Mexican worker's relocation travel costs clearly do not constitute "board" or "lodging," the statutory interpretation question becomes whether these costs constitute "other facilities" under Section 203(m) of FLSA. The plain language of FLSA does not answer this question but, since a statutory term "is known by the company it keeps,"¹⁰¹ the meaning of "other facilities" should be given a "related meaning"¹⁰² to the meaning of "board" or "lodging."

The U.S. Department of Labor's (U.S.D.O.L.) regulations do not directly answer this question either, but they do further flesh out Section 203(m)'s meaning.¹⁰³ According to the regulations, improper deductions can take the form of direct deductions or what some courts characterize as "*de facto* deductions."¹⁰⁴ A direct deduction occurs when an employer deducts an expense from an employee's paycheck. A *de facto* deduction occurs when an employer does not deduct from the employee's paycheck but instead fails to reimburse the employee for an employer expense.¹⁰⁵ According to the regulations, if deductions "are primarily for the benefit or convenience of the

99. See 29 U.S.C. §§ 206, 207.

100. 29 U.S.C. § 203(m).

101. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

102. See *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 378 (U.S. 2006) (internal citation and quotation marks omitted) ("The canon, *noscitur a sociis*, . . . is invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning").

103. *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) ("Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law."). The regulations, for instance, require that the employer must pay FLSA-required wages "free and clear" of improper deductions each workweek. 29 C.F.R. §§ 531.35, 776.4.

104. See 29 C.F.R. § 531.35 ("For example . . . there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act"); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F. 3d 1228, 1236 (11th Cir. 2002) ("[T]here is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear."); *Ayres v. 127 Rest. Corp.*, 12 F. Supp. 2d 305, 310 (S.D.N.Y. 1998) ("[F]ederal law require[s] employers to compensate employees for the purchase and maintenance of required uniforms if the employees' expenditures for these purposes would reduce their wages to below minimum wage.").

105. *Id.*

employer,” they are not “other facilities” and therefore represent an improper FLSA deduction under Section 203(m) if the deductions bring the worker below FLSA’s minimum standards.¹⁰⁶ Deductions listed in the regulations as primarily for the benefit of the employer include deductions for required uniforms, miners’ lamps, and “transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad).”¹⁰⁷ While the U.S.D.O.L. regulations do indicate that transportation costs that are incident of and necessary to the employment are primarily for the benefit of the employer, they do not explicitly state whether relocation travel costs of recruited workers are “other facilities” and therefore a legal deduction under Section 203(m).

U.S.D.O.L. Opinion Letters have directly confronted the question of whether deductions for relocation travel costs of recruited workers are improper FLSA deductions but the weight of their authority is questionable. Pre-1994 Opinion Letters concluded that relocation travel costs from point of hire to the workplace are primarily for the benefit of the employer because they viewed “such travel costs ‘as a cost incidental to the employer’s recruitment program.’”¹⁰⁸ As the U.S. Supreme Court stated in *Skidmore v. Swift*, while not “controlling upon the courts” these letters do offer some “guidance” to the courts that deductions for the relocation travel costs of recruited Mexican workers are improper FLSA deductions.¹⁰⁹ The U.S.D.O.L., however, does not actively enforce this position and has been reconsidering this interpretation since 1994.¹¹⁰

Furthermore, the U.S. Supreme Court and the majority of U.S. Circuit Courts of Appeals have not directly confronted the question of whether a U.S. employer’s failure to pay the relocation travel costs of recruited foreign workers constitutes an improper deduction from FLSA’s minimum standards. The U.S. Court of Appeals for the

106. 29 C.F.R. § 531.32.

107. *Id.*

108. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002) (commenting about and quoting U.S.D.O.L. Opinion Letters); *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, at **38–39 (D. Pa. 2008) (noting its agreement with *Arriaga* that the U.S.D.O.L. has exhibited “incoherence” on this issue and concluding that there is no “deference-worthy analysis from the Department of Labor”).

109. 323 U.S. 134, 140 (1944).

110. *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, at *35 (D. Pa. 2008) (“Though administrative enforcement actions have ceased, the Department of Labor has not officially revised its position that travel costs from remote locations are primarily for the benefit of the employer, and, indeed, has explained in subsequent communications that its official position is unchanged.”).

Eleventh Circuit's decision in *Arriaga v. Florida Pacific Farms, L.L.C.* represents the one federal court of appeals that has directly confronted this question.¹¹¹ The *Arriaga* court relied heavily on the plain language of the U.S.D.O.L. regulations and held that transportation and visa costs from Mexico to the United States for H2-A workers were "primarily for the benefit or convenience of the employer" and could not be counted as part of the employer's wage calculations for purposes of compliance with FLSA's minimum standards.¹¹² Referring to the dictionary definitions of "necessary" and "incident," the court concluded that in contrast to situations when growers seek employees locally that will not travel beyond "basic commuting," the relocation costs of recruited workers "are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States."¹¹³ The *Arriaga* court reasoned that "other facilities" must be "something like board or lodging" and then identified what it saw as a chief distinction in the regulations between "those costs arising from the employment itself and those that would arise in the course of ordinary life."¹¹⁴ It concluded that the transportation and visa costs at issue in *Arriaga* were incident to the unique bi-national work relationship and not the kind of costs that arise in the course of ordinary life.¹¹⁵

At least four federal district courts outside of the U.S. Court of Appeals for the Eleventh Circuit have followed *Arriaga* and have indicated that FLSA's improper deductions provision forbids an employer to deduct for relocation travel expenses from the point of hire if that deduction brings the worker's wages below minimum standards.¹¹⁶ In a recent decision from a federal district court in Arkansas, for instance, the court stated "that a one-time transportation cost and the visa fees are the inevitable consequence of

111. See *Brock v. Glassboro Serv. Ass'n*, No. 78-0377, 1987 WL 25334, at *5-*6 (D.N.J. 1987) (coming to the same conclusion as *Arriaga*), *aff'd sub. nom.* *McLaughlin v. Glassboro Serv. Ass'n*, 841 F.2d 1119 (3d Cir. 1988).

112. 305 F.3d 1228, 1242-44 (11th Cir. 2002).

113. *Id.* at 1242 (citing Merriam-Webster's Collegiate Dictionary 776 (10 ed. 1995)).

114. *Id.* at 1242-43.

115. *Id.*

116. See *Rosales v. Hispanic Empl. Leasing Program, LLC*, 2008 U.S. Dist. LEXIS 9756, at **2-3 (D. Mich. 2008) (H2-B workers); *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, at **22-23 (D. Pa. 2008) (H2-B); *Martinez-Bautista v. D&S Produce*, 447 F. Supp. 2d 954, 963-64 (D. Ark. 2006) (H2-A); *De Jesus De Luna-Guerrero v. North Carolina Grower's Ass'n*, 338 F. Supp. 2d 649, 661-63 (D.N.C. 2004) (H2-A). For federal district cases following *Arriaga* within the Eleventh Circuit, see *Moreno-Espinosa v. J & J Ag Prods.*, 2007 U.S. Dist. LEXIS 88246, at **7-8 (D. Fla. 2007) (H2-A); *Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 U.S. Dist. LEXIS 51950, at **41-43 (D. Ga. 2007) (H2-A); *Avila-Gonzalez v. Barajas*, 2006 U.S. Dist. LEXIS 9727, at ** 6-9, 13 (D. Fla. 2006) (H2-A); *Morante-Navarro v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1166 n.2 (11th Cir. 2003) (H2-B).

participating in the H-2A program to employ non-immigrant alien workers” and are not analogous to “other expenses arising from every day living.”¹¹⁷ In coming to this conclusion some of these courts have determined that the H-2A program’s requirement that an employer pay a recruited worker’s relocation travel costs halfway through a contract does not foreclose FLSA from separately requiring the employer to reimburse these costs at the beginning of the contract if the failure to reimburse brings the wages below FLSA’s minimum standards for any workweek.¹¹⁸

One recent federal district court decision, however, denied plaintiffs’ class certification motion, in part because it concluded that the *Arriaga* theory in the H-2-B context was a “yet-to-be established legal premise.”¹¹⁹ It is likely that U.S. Courts of Appeals and U.S. district courts will increasingly face the “*Arriaga* question.” As evidenced by the increasing number of cases recently, plaintiff attorneys in the wake of *Arriaga* are increasingly bringing FLSA illegal deductions claims for relocation travel costs on behalf of their recruited worker clients. In some circumstances, Mexico’s foreign employer provision, which unequivocally views relocation travel costs as an improper deduction from wages, may support a determination that these one-time relocation travel costs are extraordinary expenses that must be borne by the employer to the extent that they bring a recruited Mexican worker’s wages below FLSA’s minimum standards.

B. Theory of Foreign Law Influence

Under the FLSA theory of foreign law influence, courts may consider Mexico’s foreign employer provision as guidance and further confirmation that a U.S. employer’s failure to pay a recruited Mexican worker’s relocation travel costs is an improper FLSA deduction when that failure brings the worker’s wages below minimum standards. The FLSA theory of foreign law draws its foundation from current

117. *Martinez-Bautista v. D&S Produce*, 447 F. Supp. 2d 954, 963–64 (D. Ark. 2006).

118. *See e.g., De Jesus De Luna-Guerrero v. North Carolina Grower’s Ass’n*, 338 F. Supp. 2d 649, 663–64 (D.N.C. 2004) (“There is no indication that it is impossible to comply with both laws. The H2A regulations allow defendants to wait until the 50% mark in the contract period before being obligated to reimburse workers; however, there is no requirement that they must wait until that time to reimburse.”).

119. *Villanueva-Bazaldua v. Trugreen Ltd. Partners*, 479 F. Supp. 2d 411, 417–18 (D. Del. 2007). In contrast, a district court in Louisiana recently stated, in dicta, that “*Arriaga* and its progeny of H-2A cases become extremely persuasive precedent” in the H-2-B context. *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 488 F. Supp. 2d 565, 572 (D. La. 2007). *See also Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, at **22–23 (D. Pa. 2008) (adopting *Arriaga* in H-2-B case).

scholarship on the role of foreign law to interpret U.S. law. In the Constitutional interpretation context, Professor Vicki Jackson posited that, by engaging with transnational legal norms, “the constitution’s interpreters do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience.”¹²⁰ In the statutory interpretation context, some have stated that the “exclusively domestic view of statutory interpretation can no longer remain an unquestioned assumption” and have argued that, due to globalization, foreign law may be relevant to the proper interpretation of domestic statutes in limited circumstances.¹²¹ Thus, courts may similarly engage with Mexico’s foreign employer provision as they consider whether a direct or *de facto* deduction for relocation travel costs is an improper FLSA deduction from an employee’s wages. This is not to say that U.S. courts must defer to Mexican law in any way. Instead, the theory posits that Mexico’s foreign employer provision, similar to U.S.D.O.L. Opinion Letters, may serve as guidance for courts. Since the case law on what FLSA’s improper deductions provision means and what “‘primarily for the benefit of the employer’ means is surprisingly thin,”¹²² courts confronting this question may be more amenable to additional forms of guidance.

Consideration of Mexico’s provision supports a determination that deduction for a recruited Mexican worker’s relocation travel costs are improper FLSA deductions. Specifically, Mexico’s foreign employer provision aids the determination of whether relocation travel costs have a meaning “related to”¹²³ board and lodging such that they are “other facilities” and employer deductions for those costs are proper deductions. Mexico’s foreign employer provision indicates that relocation travel costs are unlike board and lodging because, unlike board and lodging, they are not expenses typical to ordinary life. Instead, relocation travel costs arise from the unique employment relationship acknowledged by Mexico’s foreign employer provision. For instance, Mexico’s foreign employer provision acknowledges an employment relationship that is initiated in one country and takes place in another. Moreover, the employer’s

120. Jackson, *supra* note 97, at 112–15.

121. See, e.g., Lee, *supra* note 98, at 6 (describing why “foreign law is becoming more relevant in deciding [Intellectual Property] claims arising under domestic statutes.”).

122. *Rivera v. Brickman Group, Ltd.*, 2008 U.S. Dist. LEXIS 1167, at *26 (D. Pa. 2008).

123. See *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (U.S. 2006) (internal citation and quotation marks omitted) (“The canon, *noscitur a sociis*, reminds us that, and is invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning”).

payment of relocation travel expenses is not provided as a matter of custom but rather is required by Mexico's foreign employer provision. Mexican labor law not only requires this of foreign employers but also obligates Mexican employers to pay the travel costs of relocated employees.¹²⁴

Mexico's foreign employer provision speaks even more directly to FLSA's regulatory language. Mexico's provision indicates that relocation travel costs are primarily for the benefit or convenience of the employer because it unambiguously requires that U.S. employers comply with its protections when they contract recruited Mexican workers within Mexican territory. The plain language of Mexico's foreign employer provision¹²⁵ indicates that it is the employer's, rather than the employee's, obligation to pay relocation travel costs. A U.S. domestic court may reasonably determine that, because a U.S. employer chose to affirmatively cross the border into Mexico to recruit Mexican workers through work authorization programs or outside of them, Mexican law is relevant guidance to consider.

While the Mexican example is just one country's determination, Mexico may be a persuasive example because it is the country of origin of the majority of foreign-born workers in the United States.¹²⁶ Some courts, however, may conclude that foreign law is persuasive guidance only to the extent that other countries share Mexico's view of the issue.¹²⁷ In a 2005 U.S. Supreme Court death penalty decision, for instance, the Supreme Court held that executing an individual who had committed the act while a juvenile was "cruel and unusual punishment" and noted that "the overwhelming weight of international opinion" was against the practice.¹²⁸ Similarly, in a 2003

124. 29 U.S.C. § 203(m) (stating that deductions are proper for the "reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are *customarily* furnished by such employer to his employees") (emphasis added). See Ley Federal de Trabajo: Mexico, Article 30, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

125. As mentioned above, it states that relocation travel costs are "the exclusive responsibility of the employer."

126. Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, (Nov. 2005), tbl. 1. Jackson, *supra* note 98, at 126 (indicating in the constitutional interpretation context that, in certain circumstances, the opinion of one country may be particularly relevant and noting that there is a difference "between trying to identify world practice in deciding whether a punishment is 'cruel and unusual,' which may call for a comprehensive survey, and trying to determine whether a government act is 'rational' or 'reasonable,' when the practices of a small number of roughly comparable countries may be helpful").

127. See Mark Tushnet, *When is Knowing Less Better Than Knowing More?: Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1276 (2006) (noting this common criticism and quoting Justice Roberts' statement that "looking at foreign law for support is like looking out over a crowd and picking out your friends.").

128. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

U.S. Supreme Court case involving Texas' ability to restrict same-sex private consensual conduct the Court stated that this kind of conduct "has been accepted as an integral part of human freedom in many other countries."¹²⁹

It is beyond the scope of this article to consider all relevant labor laws cross-nationally to determine whether these countries overwhelmingly require employers to pay for relocation costs of its workers.¹³⁰ A brief survey of other labor laws in Central American countries, however, indicates that, at the very least, "many other countries"¹³¹ that send workers to the United States share Mexico's view that relocation travel costs are primarily for the benefit of the employer. All Central American countries require employers to pay for the relocation costs of employees to some extent. For instance, Article 34 of the Guatemalan Labor Code states:

The recruiting agent or the business on whose behalf he acts, must pay the costs of transportation abroad, from the place in which the worker usually lives to the place of work, including those that arise from crossing borders and in complying with regulations about migration or for any other similar concepts.¹³²

The Central American countries of Honduras,¹³³ Costa Rica,¹³⁴ and Panama¹³⁵ have similar provisions explicitly requiring foreign employers who find workers in these countries to pay these workers' relocation travel costs.

While El Salvador and Nicaragua do not have labor law provisions that specifically mention "foreign" employers, they have provisions that require specified employers to pay for relocation travel costs when a worker "has to move from his place of residence" to perform services.¹³⁶ Moreover, along with their foreign employer

129. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

130. For a U.S. Supreme Court case that considered whether other countries "overwhelmingly" agreed on a particular determination, see *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 ("Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

131. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (referring to the views of "many other countries").

132. El Código del Trabajo: Guatemala, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

133. See Código de Trabajo y sus reformas: Honduras, Article 43(c), available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

134. See Código de Trabajo: Costa Rica, Article 42(a), available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

135. See Código de Trabajo: Panama, Article 100(1),(2), available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

136. Legislación Laboral: El Salvador, Article 29(8)(a). See also El Código del Trabajo: Nicaragua, Article 202(g) (applying requirement solely to agricultural employers), available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

requirements, Mexico, Guatemala, Honduras, Costa Rica, and Panama specifically require their domestic employers to pay for travel costs of workers who are required to relocate to perform services.¹³⁷

In sum, a survey of the labor and employment laws of Central American countries indicates that many other countries share the view that relocation travel costs are primarily for the benefit of the employer. The labor laws of seven countries certainly do not indicate an international consensus on the issue. To fully develop this cross-national comparison, future research could explore all relevant labor laws from countries that send and/or receive significant numbers of migrant workers. While there are limitations to a U.S. court's consideration of foreign law to interpret U.S. employment statutes, there are colorable arguments that Mexico's foreign employer provision and its Central American counterparts may provide some guidance for and influence on a domestic court's interpretation of FLSA's improper deductions provision.

V. POTENTIAL RESISTANCE TO CONSIDERATION OF FOREIGN LAW

While these theories do not require the United States to acknowledge foreign law causes of action, there may be some resistance to consideration of foreign law in the context of domestic causes of action.¹³⁸ Sections A and B below address the potential view that these foreign law theories unnecessarily complicate a domestic legal claim by asking the court to interpret an unfamiliar area of law. Section C addresses the potential view that these theories raise comity issues.

A. *Mexico's Foreign Employer Provision as Part of the U.S.-Mexico Bracero Agreement*

The relocation travel costs content of Mexico's foreign employer provision is unlikely to be viewed as a complicated legal requirement as it is not entirely unfamiliar to U.S. law. Historically, Mexico's foreign employer provision was recognized by, and to some extent

137. See Ley Federal de Trabajo: Mexico, Article 30; El Código del Trabajo: Guatemala, Article 33(a); Código de Trabajo y sus reformas: Honduras, Article 42; Código de Trabajo: Costa Rica, Article 39; Código de Trabajo: Panama, Article 129, available at http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI.

138. See Federal Rule of Civil Procedure 44.1 for rules on raising foreign law in domestic federal courts. ("A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.").

incorporated into, U.S. law through the U.S.-Mexico Bracero Program. The Bracero Program, which represents the sole bilateral immigration agreement between the United States and Mexico,¹³⁹ allowed Mexican workers to temporarily enter the United States to perform agricultural work. The Bracero Program was in effect from 1942 until 1964. During that period, more than five million Mexican guest workers were recruited to work through the Bracero Program in twenty-four U.S. states.¹⁴⁰ Although the Bracero Program ended in 1964 amidst an onslaught of criticism,¹⁴¹ its legacy continues to influence the H2 agricultural guest worker program and ongoing policy debates about proposed legislation for new guest worker programs.¹⁴²

Mexico's foreign employer provision played a prominent role in the Bracero Program negotiations between Mexico and the United States from the beginning.¹⁴³ Mexico consistently insisted that the Bracero Agreement require U.S. employers to pay relocation travel costs in accordance with its foreign employer provision. In 1942, for instance, Mexico's Minister of Foreign Affairs contended that "Mexicans entering the United States under this agreement shall enjoy the guarantees of transportation, living expenses and repatriation established in [Mexico's foreign employer provision]."¹⁴⁴

139. Luis Herrera-Lasso, *The Impact of U.S. Immigration Policy on U.S.-Mexico Relations*, 3 UCLA J. INT'L LAW & FOREIGN AFF. 527, 535 (1998-1999).

140. Maria Elena Bickerton, *Note: Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 897 (2001).

141. See Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 506 (1998) (affirming that "heated criticism from worker advocates ultimately ended the Bracero Program"). See Michael J. Mayerle, *Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, if not Impossible, Question*, 6 J. SMALL & EMERGING BUS. L. 559, 565 (2002) (indicating wage provisions were scarcely enforced); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 633 (1981) (noting Mexican workers perceived by some as depressing U.S. wages).

142. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 551-53 (2007) ("Contrary to popular perception, the end of the bracero program in 1964 did not bring guest work to a close in the United States. The 'H' category of the Immigration and Nationality Act provided for the admission of other temporary workers beginning in 1952, during the bracero era. When the bracero program was abolished, use of those visas expanded."); Victoria Lehrfeld, *Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again*, 8 LA RAZA L.J. 209, 219-20 (1995).

143. President Truman's Commission on Migratory Labor stated: "The negotiation [was] a collective bargaining situation in which the Mexican Government [was] the representative of the workers and the Department of State [was] the representative of our farm employers." KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 19 (1992).

144. Agreement between the United States of America and Mexico revising the agreement of August 4, 1942 respecting the temporary migration of Mexican agricultural workers, Apr. 26, 1943, 57 Stat. 1152. Padilla quoted much of the text of Mexico's foreign employer provision and demanded its inclusion in the agreement. *Id.*

Throughout the initial negotiations, both governments specifically referred to Mexico's foreign employer provision and both stipulated during the negotiations that the Agreement would comply with provisions of Mexican law that required employer payment of relocation travel expenses.¹⁴⁵

In accordance with these prior bilateral negotiations, the text of the original Bracero Agreement, signed on August 4, 1942,¹⁴⁶ and subsequent updates to the Agreement, explicitly referred to and incorporated Mexico's relocation travel costs requirement.¹⁴⁷ Moreover, in 1943, the governments added a statement clarifying that that the relocation travel costs provision of the bilateral Agreement should be interpreted "in accord with the intent of [Mexico's foreign employer provision]."¹⁴⁸ In the 1950s, other aspects of Mexico's foreign employer provision continued to be central to the negotiations and substance of the Bracero Program.¹⁴⁹ In his seminal work on the Bracero Program, Richard Craig states that the principle of the 1942 Bracero Agreement—"that braceros would be guaranteed transportation, living expenses, and repatriation along the lines established by Mexico's foreign employer provision"—was to serve as one of the four general guidelines to the Bracero Program throughout its twenty-two-year history.¹⁵⁰

Not only was Mexico's foreign employer provision included in the text of the bilateral Agreement but there are indications that the substance of Mexico's foreign employer provision may have been

145. See ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 48 (1964).

146. The U.S. admitted braceros between 1942 and July 1951 pursuant to various governmental authorities. Some of the early agreements were more informal. Public Law 45 contained appropriations that financed the 1943 agreement. Galarza, at 48. U.S. Congress approved Public Law 78 in 1951, which added Title V to the Agriculture Act of 1949 and which provided the statutory basis for the Bracero program until its expiration in December 1964. Agricultural Act of 1949, ch. 223, §§ 501-09, 65 Stat. 119 (1951) (repealed 1964).

147. See AGREEMENT ON THE TEMPORARY MIGRATION OF MEXICAN AGRICULTURAL WORKERS, AUG. 4, 1942, 56 STAT. 1759; AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND MEXICO RESPECTING THE RECRUITING OF MEXICAN NON-AGRICULTURAL WORKERS, APRIL 29, 1943, 57 STAT. 1353.

148. See AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND MEXICO REVISING THE AGREEMENT OF AUGUST 4, 1942 RESPECTING THE TEMPORARY MIGRATION OF MEXICAN AGRICULTURAL WORKERS, APRIL 26, 1943, 57 STAT. 1353.

149. In 1948, the Bracero Agreement was modified to include another aspect of Mexico's foreign employer provision—the requirement that U.S. employers post a bond for the worker in Mexico. The bond, which was posted before the contract, guaranteed that the bracero's did not have to pay for his return to Mexico. This was a highly-debated provision and its substance fluctuated throughout the Bracero Program. RICHARD B. CRAIG, *THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY* 54 (1971). In 1950, the Mexican Supreme Court created precedent that all Mexicans working in foreign lands, whether they were legal or illegal entrants, could not be deprived of their rights under its foreign employer provision. *See id.* at 59.

150. *Id.* at 43.

enforced in the United States under the Bracero Program. In the 1942 Bracero Agreement, the two governments jointly guaranteed compliance with the terms of the labor contract through administrative and diplomatic channels. The methods and mechanisms of enforcement fluctuated over time.¹⁵¹ Generally speaking, however, the U.S. Department of Labor, the U.S. Department of Agriculture, and Mexican consuls supervised contracts and enforced the Bracero Agreement's requirements. In the early 1950s, a formal grievance procedure was agreed upon, which relied on "joint decisions" by the Mexican and United States governments.¹⁵²

As the above demonstrates, Mexico's foreign employer provision¹⁵³ is not a particularly complicated area of law as it is not entirely "foreign" to the U.S. legal regime. Moreover, the inclusion of Mexico's foreign employer provision in the Bracero Program did not provide Mexican guest workers with an extraordinary right or remedy. Despite the requirement that U.S. employers pay for relocation travel costs, many criticized the Program for failing to provide Mexican guest workers with even the most basic of rights. In fact, a United States Department of Labor official in charge of administering the Program notoriously characterized the Bracero Program as "legalized slavery."¹⁵⁴

B. U.S. Domestic Courts have Some Experience with Foreign Labor Law Claims

Because U.S. domestic courts have interpreted foreign labor law claims in other contexts, the content of Mexico's foreign employer provision is less likely to be viewed as an unfamiliar and complicated legal requirement. Although this article focuses on legal theories for including foreign law in domestic causes of action, rather than theories for bringing independent foreign law claims, the fact that U.S. domestic courts have acknowledged independent foreign law claims

151. GALARZA, *supra* note 145, at 47; LUNA, *supra* note 141, at 506 (stating that originally "the (now defunct) Farm Security Administration, which was part of the Department of Agriculture, conducted recruitment and contracting.").

152. AGREEMENT AMENDING AND EXTENDING THE AGREEMENT OF AUGUST 11, 1951, AS AMENDED AND EXTENDED, OCT. 23, 1959, 10 U.S.T. 2036. BRACEROS, OR MEXICAN CONSULS ON THEIR BEHALF, OFTEN MADE COMPLAINTS DIRECTLY TO THE U.S. DEPARTMENT OF LABOR. GALARZA, *supra* note 145, at 183.

153. As defined above, in this article I am using the phrase "Mexico's Foreign Employer Provision" to refer only to the relocation travel costs portion of the law.

154. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 161 (2003) (citing LINDA C. MAJKA & THEO J. MAJKA, FARMWORKERS, AGRIBUSINESS, AND THE STATE 136 (1982)).

demonstrates that U.S. domestic courts have some experience with the application of and interpretation of foreign law in employment cases.¹⁵⁵ In these cases the individuals performed services in a country other than the United States and the U.S. domestic court was faced with the question of whether it was appropriate to litigate the foreign labor law issue within the United States. In *Curtis v. Harry Winston, Inc.*, for instance, a Venezuelan citizen who had worked for a New York corporation operating in Venezuela sued that corporation in a U.S. federal district court for his right to vacation benefits pursuant to Venezuelan labor law.¹⁵⁶ The Curtis court determined that, even though “federal courts are not often called on to apply Venezuelan labor law” it had jurisdiction to hear the claim, in part, based on “principles of international comity and fairness.”¹⁵⁷

Some U.S. domestic courts have even found jurisdiction over foreign labor law claims despite specific foreign labor law provisions that grant foreign courts exclusive jurisdiction to hear the matter. In *Randall v. ARAMCO* the U.S. Court of Appeals for the Seventh Circuit held that the exclusive jurisdiction provision of Saudi Arabian labor law could not deprive the U.S. courts of diversity jurisdiction over a wrongful discharge claim arising under Saudi Arabian labor law.¹⁵⁸ The court stated, “[w]e reject outright the notion that the law of a foreign country can unilaterally curtail the power of our federal courts to hear a dispute even though the dispute involves rights fixed by the laws of another nation.”¹⁵⁹ In the *Randall* court’s view, the cause of action for wrongful discharge was a transitory cause of action that could be enforced in any court with jurisdiction and foreign laws could not remove a U.S. court’s jurisdiction.¹⁶⁰ Similarly, in *Chinnery v. Frank E. Basil*, despite an express choice of law provision in the employment agreement to use Saudi Arabian law, the court held that Saudi Arabia’s exclusive jurisdiction provision could not divest U.S. domestic courts of jurisdiction over the claim but that the court would honor the clause by applying Saudi Arabian labor law to the dispute.¹⁶¹

155. In each of the cases where foreign labor law was brought as an independent claim, the court found that it had jurisdiction to hear the claims based on the diversity of citizenship of the parties.

156. 653 F. Supp. 1504 (S.D.N.Y. 1987) (finding diversity jurisdiction).

157. *Id.* at 1508–09.

158. 778 F.2d 1146 (7th Cir. 1985).

159. *Id.* at 1150.

160. *Id.* at 1151.

161. 1988 U.S. Dist. LEXIS 19438, at *11–12 (D.D.C. Jan. 13, 1988) (stating that “we will evidence our regard for Saudi law by applying it to the present lawsuit ‘in all respects,’ as

C. *Mexico's Foreign Employer Provision and Comity Between the United States and Mexico*

The consideration of Mexico's foreign employer provision accords with potential comity considerations. When the application of foreign laws in U.S. domestic courts is at issue, U.S. domestic courts often consider whether there are any "comity" concerns related to that application.¹⁶² "Comity" is a concept in U.S. jurisprudence that encourages respect for the executive, legislative, and judicial acts of another nation when they are not contrary to public policy.¹⁶³ If the application of a foreign law would unnecessarily strain U.S. public policy goals or would unnecessarily create a conflict with U.S. law, U.S. domestic courts will often disregard that foreign law. The Supreme Court has clarified that comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."¹⁶⁴

First, a court's acknowledgement of Mexico's foreign employer provision according to the theories presented here does not appear to conflict with U.S. employment statutes. As Sections III and IV of this article demonstrated, Mexico's foreign employer provision does not substitute AWPAs or FLSA. Instead, Mexico's requirement is folded into the statutory scheme of AWPAs and used in FLSA's statutory scheme to help interpret a particular provision. Even if Mexico's foreign employer provision provides rights beyond those embodied in FLSA and AWPAs, there does not appear to be a conflict because both FLSA and AWPAs provide requirements that are meant to serve as floors rather than ceilings on the rights of covered workers.¹⁶⁵ In other words, both FLSA and AWPAs set out "minimum standards"¹⁶⁶

required by the express and undisputed terms of the parties' Agreement"). *Accord Veitz v. Unisys Corp.*, 676 F. Supp. 99, 102 (E.D. Va. 1987).

162. Given the "domestic" nature of these foreign law theories it is unclear to what extent courts would view comity issues as relevant.

163. See e.g., *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482 U.S. 522, 544 n.27 (1987).

164. *Id.* (citation omitted).

165. FLSA contains an express non-preemption clause. See 29 U.S.C. § 218(a); ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter. . . ."); *Frank Bros., Inc. v. Wis. DOT*, 409 F.3d 880, 887-88 (7th Cir. 2005). See also *Heder v. City of Two Rivers*, 295 F.3d 777, 779 (7th Cir. 2002) (describing FLSA as "statutory floor"); *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000) (stating that FLSA's "savings clause," allows "states and municipalities to enact stricter wage and hour laws."); *Salazar-Calderon v. Presidio Valley Farmers Asso.*, 765 F.2d 1334, 1340 (5th Cir. 1985) (stating that FLCRA, AWPAs's predecessor "required certain minimum standards for the employment of such workers").

166. *Donovan v. Weber*, 723 F.2d 1388, 1391 (8th Cir. 1984) (stating that FLSA "establishes uniform national minimum standards for various working conditions, including wages and hours,

for U.S. wage and hour laws and therefore do not conflict with laws that provide additional protections. Similarly, consideration of Mexico's foreign employer provision does not appear to conflict with the rights provided by the H2-A and H2-B guest worker programs, which are also meant to serve as minimum standards.¹⁶⁷

Second, acknowledging Mexico's foreign employer provision in U.S. domestic courts would accord with U.S. foreign policy interests to promote mutually beneficial relations with Mexico. The U.S. Congress has often acknowledged the "special relationship" between Mexico and the United States.¹⁶⁸ Mexico and the United States, for instance, are increasingly becoming commercially interconnected through the North American Trade Agreement (NAFTA),¹⁶⁹ and strategically interconnected through the U.S. War Against Drugs, and the War Against Terror.¹⁷⁰ One scholar recently noted, for instance, the "entrenched migrant networks that bind the two countries to each other" and "the complex web of economic interdependence that characterizes our thoroughly integrated labor markets."¹⁷¹ Mexico is also an important oil provider¹⁷² to the United States and the most significant sending country for immigrants admitted to the United States each year.¹⁷³

in businesses covered by its provisions."). In re Reyes, 814 F.2d 168, 171-72 (5th Cir. 1987) (describing AWPAs as a "minimum standard").

167. See, e.g., *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 488 F. Supp. 2d 565 (D. La. 2007) (indicating that H2-B regulations are supplemented by FLSA); *Arriaga*, 305 F.3d at 1235-36 (indicating that H2-A regulations are supplemented by FLSA).

168. See, e.g., 147 Cong. Rec. 10380-01 (2001) (statement of Sen. Dodd) (highlighting the "special relationship" between the U.S. and Mexico and the importance of Mexican allegiance in the fight against terror); 147 Cong. Rec. 5413-06 (2002) (statement of Rep. Pence) (noting the "special relationship" between the U.S. and Mexico). U.S. immigration law, for instance, recognizes a special relationship between the U.S. and Mexico. See *Alvarez v. INS*, 539 F.2d 1220, 1224 (9th Cir. 1976) (finding nationals of contiguous countries, who are daily commuters, receive special status); Lopez, *supra* note 141, at 695-707.

169. Guy Poitras, *The Potential for U.S. Economic Dominance*, 6 NAFTA: LAW & BUS. REV. AM. 389, 392 (2002). Irasema Coronado, *Legal Solutions vs. Environmental Realities: The Case of the United States-Mexico Border Region*, 10 CONN. J. INT'L L. 281, 285 (1995) (stating that mutually dependent relationship between the U.S. and Mexico aids the United States' position as a global industrial leader).

170. See 147 Cong. Rec. 9151-03 (2001) (statement of Sen. Feinstein) (commending Mexico for its assistance in the Drug War); Tim Weiner, *Suspect in Vast Drug Ring Held in Mexico; May Be Sent to U.S.*, N.Y. TIMES, Dec. 22, 2001, at A1 (noting the United States and Mexico have increased cooperation on drug enforcement issues); Steven Erlanger, *Risking Dissent, U.S. Is Expected to Waive Drug Sanctions Against Colombia*, N.Y. TIMES, Feb. 26, 1998, at A6 (suggesting Mexico's special status as NAFTA member helped U.S.-Mexico Drug War coordination).

171. Gordon, *supra* note 142, at 549-50.

172. See, e.g., Clifford Krauss, *Oil-rich nations use more energy, cutting exports*, N.Y. TIMES, Dec. 9, 2007, at O1 (referring to Mexico as "the No. 2 source of foreign oil for the United States.>").

173. See, e.g., U.S. DEP'T OF JUSTICE, 2003 STATISTICAL YEARBOOK OF THE INS 27, tbl. 8, (2004) (indicating that the U.S. admitted 115,864 Mexican-born immigrants in 2003 and admitted

Explicitly requiring U.S. employers to pay for the relocation travel costs of recruited Mexican workers would be a low-cost way for the United States to foster this special relationship with Mexico. The enforcement of Mexico's foreign employer provision encourages beneficial relations with Mexico because Mexico would like the protections of this provision to be enforced on behalf of its recruited workers. In fact, as part of its substantial foreign policy interest in the welfare of Mexicans laboring in the United States,¹⁷⁴ Mexico has specifically expressed its interest in the enforcement of Mexico's foreign employer provision in U.S. courts. For instance, a Mexican Consulate submitted an affidavit in support of a lawsuit involving domestic causes of action in a U.S. district court in Oregon. The affidavit stated:

Abuse of Mexican citizens who are recruited for work in the United States by farm labor contractors is all too common. There are Mexican laws designed to ensure that Mexican workers . . . are not charged for travel expenses. . . . These contractors recruit thousands of Mexican nationals to work in the United S[t]ates in violation of Mexican laws designed to protect our citizens. Once Mexican workers enter the United States, employer intimidation, language barriers and lack of financial resources prevent them from individually asserting their rights under either United States or Mexican laws.¹⁷⁵

After describing Mexico's foreign employer provision in detail, the affidavit indicates the Mexican government's support of the enforcement of Mexico's requirements in lawsuits in the United States. It states: "The thousands of Mexican workers who are recruited to work . . . must be able to assert their legal rights to fair pay and decent working conditions through class action litigation such as this lawsuit. . . ."¹⁷⁶

In sum, the consideration of Mexico's foreign employer provision in U.S. courts may be a way to acknowledge the unique relationship between the United States and Mexico and enhance U.S. foreign policy interests to promote mutually beneficial relations.

48,738 immigrants from the entire continent of Africa); U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE INS 27, tbl. 3, 240, tbl.1 (2002).

174. See generally Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terror, and the Movements of People*, 36 INT'L LAWYER 91, 99 (2002).

175. Affidavit of Alma P. Soria Ayuso, Consul General for the Consulate of the United Mexican States located in Portland, Oregon, submitted in *Perez-Perez v. Progressive Forestry Servs.*, 2000 U.S. Dist. LEXIS 414 (D. Or. 2000) (Civ. No. 98-1474).

176. *Id.*

VI. CONCLUSION

This article demonstrates that Mexico's foreign employer provision (1) may be incorporated as a term of an AWP working arrangement claim in certain circumstances and (2) may help interpret what constitutes proper deductions from wages under FLSA. By doing so, it contributes to our understanding of the ability of the domestic labor and employment law regime to remain relevant and cope with challenges linked to increasing global economic integration. While it is not a comprehensive assessment of the system as a whole, this article illustrates that two domestic employment law provisions may not be too "ossified"¹⁷⁷ and inflexible to respond to foreign labor law influence and to have relevance for the realities¹⁷⁸ of a globalizing workforce.

By presenting domestic employment law causes of action with a foreign law twist, this article also brings an unexplored area of inquiry to the growing literature on the scope of foreign workers' rights in the United States. This is a burgeoning area of inquiry as attorneys increasingly raise foreign law in U.S. courts. As a scholar recently noted, U.S. courts "can and should consider . . . foreign law when adjudicating the rights of unauthorized immigrant workers" and courts will have that opportunity in "the near future, as advocates for unauthorized immigrant workers begin to 'import' . . . foreign law arguments into their litigated cases."¹⁷⁹ Moreover, because it demonstrates a potential additional workplace protection for foreign workers, this article may be of interest to labor unions¹⁸⁰ and foreign

177. See generally Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 108 (2004) (noting that academics and some federal judges may be worried that employment law is becoming "ossified").

178. See *id.* at 127 ("There is always a danger, of course, that laws can become ossified and no longer reflect the realities of the individuals they ostensibly protect.").

179. Lyon, *supra* note 6, at 172-73.

180. As part of their efforts to revitalize the ailing U.S. labor movement, some unions have come to view the mistreatment of low-wage immigrant workers as a threat to the workplace rights of all workers. See Ruth Milkman, *Introduction*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 1, 1-2, 10-11 (Ruth Milkman ed. 2000). Some have targeted immigrants in union organizing campaigns. See, e.g., Harold Meyerson, *Taking On the Hotels*, WASH. POST, Jan. 18, 2006, at A17 (stating that UNITE HERE "excelled at organizing immigrant workers, who constitute a disproportionate share of hotel employees"). For instance, the Service Employees International Union (SEIU) successfully organized 4,700 janitors in Houston, Texas by focusing "on two groups [the union] says are pivotal if labor is to grow again: low-wage workers and immigrants." Steven Greenhouse, *Union Claims Texas Victory With Janitors*, N.Y. TIMES, Nov. 28, 2005, at A4; See, e.g., Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 59 (2002) ("In a world in which organizing is difficult and ninety percent of private-sector employees are unorganized, some unions have embraced the enforcement of employment law in nonunion workplaces both as an organizing strategy and as a matter of philosophical commitment.").

worker plaintiffs' attorneys as well as those engaged in the ongoing immigration debate in the United States.¹⁸¹

While the article focuses on the scope of rights of recruited Mexican workers, the arguments may extend beyond recruited Mexican workers.¹⁸² In the AWPAs context, recruited workers from countries such as Guatemala, Honduras, Costa Rica, and Panama as well as workers from other countries with labor law provisions similar to Mexico's foreign employer provision may be able to incorporate those provisions into their AWPAs working arrangement claims. The FLSA foreign law influence theory, in particular, may be broadly applied to benefit all workers covered by FLSA who incur relocation travel costs. Unlike AWPAs foreign law influence theory, the FLSA theory does not provide an enforceable right within a domestic cause of action. Instead, the FLSA theory uses foreign law to determine the proper interpretation of statutory terms. If courts determine that Congress intended to prohibit employer deductions for relocation travel costs pursuant to FLSA's improper deduction provision, the interpretation would apply to all FLSA-covered workers. While there is some indication that these foreign law influence theories may extend beyond cases involving recruited Mexican workers, a full exploration of the applicability of these theories to other contexts is beyond the scope of this article. Given that it is increasingly common that citizens of one nation will work in another, future research should continue to explore theories of foreign law influence on U.S. labor and employment law.

181. See, e.g., Bauer et al, *supra* note 20.

182. While this article presents specific theories of foreign law influence on AWPAs and FLSA that may apply beyond the recruited Mexican workers context, it does not argue that all foreign labor and employment laws should be incorporated into and acknowledged by U.S. domestic courts. To the extent that an applicable foreign labor and employment law conflicts with some aspect of U.S. law, foreign law would not be considered. In other words, the incorporation of or use of foreign law in the labor and employment law context is contingent on the absence of a conflict of law between the foreign law at issue and U.S. law.

